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BY

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"THE YEARLY DIGEST"

OF

INDIAN AND SELECT ENGLISH CASES.

I—INDIAN DECISIONS.

AGRA TENANCY ACT (III OF 1926), S. 8 (3)—*Lease of* nautor *land—Construction—If constitutes reclamation contract—Accrual of statutory rights—If barred.*

Where it is stated in the body of a lease of *nautor* land that it is given to the tenant for cultivation, and there are no special conditions of any kind in the kabuliyat executed by the tenant, the lease cannot be said to be a reclamation contract, by virtue of which the accrual of statutory rights is barred. (*Darling, S.M.*) TUFAIL HASAN *v.* BHAGWANT SINGH 1937 R.D. 485.

——S. 14—*Ex proprietary rights accruing in* Sir *while in possession of trespasser*—Sir *holder recovering possession of his* Sir *from trespasser within* 12 *years—Right to claim ex proprietary rights.*

A *Sir* holder who recovers possession of his *Sir* from a trespasser within 12 years from the date of his adverse possession can as against the transferee claim ex-proprietary rights which had accrued in the *Sir* while it was in the possession of the trespasser. (*Darling, S.M. and Bomford, J.M.*) BHAIRO PRASAD SINGH *v.* BHIRGUNATH SINGH. 1937 R.D 451.

——S. 19—*Fallow land—Accrual of statutory rights.*

A person who has taken a lease of old fallow land but has never cultivated it cannot become a statutory tenant, and a mere misdescription of such a person as '*haqdar*' tenant in a receipt for rent does not constitute a grant of statutory rights. (*Bomford, J.M.*) RAM ADHIN *v.* NARAIN RAO PATNIS 1937 R.D. 456.

——S. 19—*Re-admission of ejected tenant—Burden of proof.*

When a tenant has been ejected, it is for him to prove that he has been re-admitted. If he retains possession, the mere acceptance of rent from him does not constitute admission of tenancy, nor can a mistake committed by the zamindar in misdescribing him as an occupancy tenant in a suit for arrears of rent be construed as an act of re-admission. (*Darling, S.M. and Bomford, J.M.*) MOHAMMAD ASGHAR *v.* [illegible]A. 1937 R D. 378.

——S 24—*Co-sharing.*

[illegible] tion, that there [illegible] and the imple- [illegible] *and Bomford,* [illegible] A.W.R. 1028.

——S 24—"*Co-sharing*"—*Meaning of—Proof.*

Co-sharing involves a pooling of cattle and the implements of husbandry; and in the absence of evidence that the claimant had pooled his cattle and implements of husbandry along with those of the person with whom he claims to have co-shared the mere fact that he may have helped the latter over the holding would not amount to co sharing. (*Darling, S.M. and Bomford, J.M.*) PEAREY LAL *v.* KUNJAL. 1937 A.W R. 869=1937 R.D. 397.

——S. 24—*Sharing in cultivation—Proof—Holding sub let at the time of death of tenant and for a long time before—Effect.*

A perso[illegible] tion wher[illegible] sub-let wl[illegible] a long tin[illegible] *J.M.*) [illegible]

——S. 24—*Succession—Daughter's son not sharing in cultivation—Right of.*

[illegible] succeed to the [illegible] unless he has [illegible] his grandfather [illegible] him the right [illegible] *omford, J.M.*) REOTI PRASAD *v.* MANGALI. 1937 R.D. 443= 1937 A.W.R. 1028.

[illegible] CHANDRIKA DUBE *v.* BANSDEO MISRA. 1937 R.D. 454.

——S. 37—*Applicability and scope—Partition of rent free tenure—Jurisdiction of Civil Court—If excluded.*

There is no warrant for holding that S. 37 of the Agra Tenancy Act extends to all lands held under one tenure, lease, engagement or grant. The section is confined to land held by tenants. It is only in the cases of suits in which rent paying tenancy lands are sought to be partitioned that the jurisdiction of Courts other than Revenue Courts acting under S. 37 is excluded. The object of the section is to confer exclusive jurisdiction on Revenue Courts where rent payable by a tenant is to be split. In the case of rent-free tenures the jurisdiction of the Civil Court is not excluded and the Civil Court is competent to divide specific plots constituting a proprietary tenure. A rent free tenure can therefore be [illegible]

AGRA TENANCY ACT (1926), 40.

——Ss. 40 and 41—*Application under—Summary dismissal on applicant's failure to appear in person—Propriety.*

Where an application under Ss. 40 and 41 of the Agra Tenancy Act for the acquisition of ce tain occupancy and statutory holding is summarily d smissed by the Collector on the ground that the applicant has failed to appear in person, though he is represented by his own general attorney and by a Court Mukhtar, the summary dismissal is for no adequate reasons and the order of the Collector is, therefore, liable to be set aside. (*Darling, S.M. and Bomford, J.M.*) HARGUR DASS RAO *v.* MULAIM SINGH. 1937 R.D. 457.

——S. 44—*Applicability—Co-widows —Remarriage of one—Death of other co-widow—Suit by zamindar against remarried widow for ejectment—Maintainability.*

Where one of two co-widows left by a deceased tenant re-marries, the occupancy tenancy continues to subsist so long as the other co-widow who has not remarried is alive, notwithstanding the remarriage of one of them. On the death of the co-widow who has not remarried, the zamindar is entitled to assert his rights by treating the re married widow as a trespasser on the ground of her re-marriage which comes to his notice. (*Darling, S.M.*) BUNDI BEGAM *v.* MUSTAFA HUSAIN KHAN. 1937 A.W.R. 871=1937 R.D. 413.

——Ss. 44 and 82—*Applicability—Land validly let to tenant and transferred by him to another—Remedy of landlord—Suit by landlord to eject transferee as trespasser—Maintainability.*

S. 44 of the Agra Tenancy Act only applies to a case where a person has taken possession of the landholder's land without his consent and in contravention of the provisions of the Act. It is only then that the landholder can treat the occupier as a mere trespasser and sue him in a Revenue Court for ejectment. Where, however, the land had been validly let to a tenant who was in lawful possession thereof, and the latter has transferred it to another person, S. 44 cannot apply. To such a case S. 82 is the special section applicable. The proper course for the landlord in such a case is to bring his suit under S. 82, because the cause of action for his suit is the illegal act of his tenant and not the occupation of the land by the transferee. (*Sulaiman, C.J. and Harries, J.*) RAM CHANDRA SINGH *v.* MISRILAL. 1937 A.W.R. 888=1937 R.D. 532=1937 A.L.J. 1204=A.I.R. 1937 All. 790.

——Ss. 44 and 45—*Applicability—Tenants holding on in possession in spite of ejectment for over 12 years—Effect—Suit by landlord under S. 44 if lies—Proper remedy.*

The defendants who were formally ejected in 1923 managed to hold on to the plots and to retain possession for more than 12 years; there was no evidence of any regular re-admission to the tenancy. The names of the defendants continued in the *khatauni* even after the ejectment, and there was a settlement the very next year. In a suit by the zamindar for ejectment under S. 44 of the Agra Tenancy Act,

Held, that it was impossible to believe that the plaintiff-zamindar had no knowledge of the entry in the settlement, that the defendants had acquired statutory rights and that they were therefore protected from ejectment.

Held, further, that it was open to the zamindar to bring a suit under S. 45 of the Act for the assessment of rent on the holding. (*Darling S.M. and Bomford, J.M.*) PULANDER SINGH *v.* DAULI SINGH. 1937 R.D. 442=1937 A.W.R. 1027.

AGRA TENANCY ACT (1926), 80.

——S. 44—*Mortgage —Purchaser of equity of redemption taking possession of mortgaged land from mortgagor's sub-tenants—If liable to be ejected as trespasser.*

While a mortgagor may retain proprietary rights as against his co-sharers in an undivided *mahal*, he cannot retain any proprietary right in the share which he has transferred by mortgage. Until the mortgage is redeemed, the mortgagor is not a proprietor, though he may be recorded in the *khewat*, and he has no right to take into his cultivation any portion of the mortgaged land. A purchaser of the equity of redemption cannot have more right than his vendor, and if therefore, the sub-tenant in *Sir* of the mortgagor surrender and hand over the fields to the purchaser, the mortgagee can sue to eject him as a trespasser on the ground that he has no right to take land in the *patti* mortgaged to the plaintiff without his consent. (*Darling, S.M. and Bomford, J.M.*) CHINTAMANI SINGH *v.* BASAWAN SINGH. 1937 R.D. 339.

——S. 44—*Tenant ousted by some of landholders—Rights to sue them as trespassers.*

Where some of a body of landholders have ousted the tenant, in pursuance of some supposed right, the tenant has the right to sue them for ejectment under S. 44 as trespassers. (*Darling, S.M.*) DULAR SINGH *v.* GAJRAJ SINGH. 1937 R.D. 449.

——S. 44—*Usufructuary mortgage of* khudkasht *plot under old Act—Mortgagor simultaneously executing deed of relinquishment of exproprietary right—Effect—Mortgagor losing cultivating possession of plot—Right of his sons to revive exproprietary rights—Liability to ejectment.*

Where while the old Tenancy Act of 1901 was in force a person executed a usufructuary mortgage of his *khudkasht* plot and simultaneously on the same day executed a deed of relinquishment of all exproprietary rights, the surrender of exproprietary rights was null and void having been made before their accrual. If the mortgagor, in whose favour exproprietary rights might have accrued, lost cultivating possession of the plot, his sons who subsequently come to be recorded as holding *bila tasfia* cannot revive these exproprietary rights and are liable to be ejected as trespassers. (*Darling, S.M. and and Bomford, J.M.*) BILASI SINGH *v.* RAM CHANDER SINGH. 1937 R.D. 462.

——S. 78 (1)—*Claim for compensation made after close of evidence—Entertainability.*

A claim for compensation for trees which is not put forward in the reply to the plaint but is advanced at a very late stage when the evidence has been closed will be entertained, as such a claim is not "duly" made within the meaning of S. 78 (1) of the Agra Tenancy Act. (*Darling, S. M.*) GAJRAJ SINGH *v.* PHUL KUNWAR. 1937 R.D. 380 (2).

——S. 80—*Decree for arrears of rent—Judgment-debtor paying small portion of amount within the period of grace and asking for further grace—Discretion of Court—Interference.*

Where a judgment-debtor pays only a small portion of the amount due under a decree for arrears of rent within the period of grace given to him and asks for further grace, it is within the discretion of the Court to refuse to grant a further extension, and if it rejects the application of the judgment-debtor for a further extension and orders his ejectment, the Board will not interfere in revision. (*Darling, S. M.*) SUKJA *v.* PANNA LAL. 1937 R.D. 374

——S. 80—*Judgment-debtor failing to appear on last day allowed for payment—Order of ejectment—Duty of Court to pass.*

AGRA TENANCY ACT (1926), 80.

If judgment-debtors fail to appear on the last day allowed by the law for payment of the decretal amount, the order of ejectment should necessarily follow and Courts should be chary of accepting the many and varied excuses made for failure to meet their obligations by defaulting tenants. (*Darling, S. M and Bomford, J. M.*) RAM DHARI SINGH *v.* TAHSILDAR AHIR.

1937 R.D. 472.

——**S. 80**—*Order of ejectment passed on judgment-debtor failing to appear on day fixed for payment—Judgment-debtor applying to set aside order on next day alleging illness—Order setting aside ejectment order—Revision.*

Where a judgment-debtor against whom a decree for arrears of rent was passed failed to appear on the last day fixed for payment and an order of ejectment was passed, and on the very next day he applied for that order to be set aside on the ground that he had been taken ill the day before and so had arrived later and the ejectment order was thereupon set aside, there is no illegalit[illegible] interfere [illegible] *J.M.*)

——**S. 80**—*Order of ejectment passed on judgment-debtor failing to appear on last day—Order subsequently set aside on judgment debtor's application—Court, if can order damages to decree holder.*

Where an order of ejectment passed on the failure of the judgment-debtor to appear on the last day fixed for payment of the decretal amount, is subsequently set aside on the application of the judgment-debtor giving a satisfactory reason for his failure to appear, the Court cannot order compensation in the form of damages to the decree holder. (*Darling, S. M. and Bomford, J. M.*) RAM DHARI SINGH *v.* TAHSILDAR AHIR.

1937 R.D. 472

——**S. 82**—Applicability—Lands let to tenant validly and transferred by him to another—Remedy of landlord—Suit to eject under S. 44—Maintainability. *See* AGRA TENANCY ACT, SS. 44 AND 82.

1937 A.W.R 888

——**Ss. 82 and 83**—*Mortgage of occupancy holding before Act—Zamindar not taking action to eject mortgagee—Subse*[illegible] *mortgagor a*[illegible] *ejectment.*

Where an [illegible] the Act of [illegible] not take acti[illegible]

[illegible] the Act. (*Darling, S. M. and Bomford, J. M.*) PHEKU CHAMAR *v.* ABDUL WAHAB. **1937 R.D. 445.**

——**Ss. 86 and 92**—[illegible] *moved from* khatauni [illegible] *cedure under S.* 107 *not* [illegible] *to sue for ejectment of his* [illegible]

From 1336 F onwards the plaintiff who was an occupancy tenant was shown as *ghair qabiz* in the *khatauni* with the Zamindar cultivating the plots as his *khudkosht*. The names of the defendants [illegible] the *khatauni* for the first time in 1341 F [illegible] *vice* the Zamindar. In 1342 F there wa[illegible] note in *khatauni* to the effect that under the supervisor *qanungo* the name of th[illegible] tenant had been expunged. The procedure [illegible] of the Tenancy Act was not followed in the present

AGRA TENANCY ACT (1926), 99.

case. The occupancy tenant brought a suit for ejectment of the defendants as sub-tenants under Ss. 86 and 92 of the Act and established their contract of sub-tenancy with them.

[illegible]

——**S. 86**—*One of co-sharers in* Sir *executing mortgage in favour of sub-tenant—Suit to eject latter—Joinder of all co sharers in suit—If necessary.*

All the co-sharers in *Sir* should join in a suit under S. 86 of the Agra Tenancy Act to eject a sub tenant in *Sir* in whose favour one of the co sharers has executed a mortgage. (*Darling, S. M. and Bomford, J. M.*) RAGHUNANDAN *v.* RAM BACHAN SINGH.

1937 R.D. 345.

——**Ss. 86 and 92**—*Suit for ejectment brought while Act II of* 1901 *was in force—Suit compromised—Defendant admitted to fresh tenancy and given land under* [illegible] *suit to eject him from* Singhara [illegible] *can revive his claim to occupancy*

[illegible] ectment brought by the Zamindar [illegible] was in force was compromised, and the defendant was admitted to a fresh tenancy of the holding and was given land under *Singhara*, in a subsequent suit for his ejectment the defendant cannot revive his claim to occupancy rights which was not recognised in the agreement which led to the decision of the earlier ejectment suit, and as under the new Tenancy Act of 1926 he is not entitled to statutory rights in the *Singhara* plot, he is liable to ejectment as a non-occupancy tenant from this plot. (*Darling, S. M.*) CHATURI *v.* RAM CHANDER. **1937 R.D. 377.**

——**S. 86**—*Suit to eject tenant from grove land—Question if grove was planted by Zamindar or tenant—Burden of proof.*

Where in a suit under Ss. 86 and 92, Agra Tenancy Act, for the ejectment of the defendants as non-occupancy tenants from certain plots which are claimed by the plaintiff Zamindar to be his grove land, it is established that the grove in one of the plots had already been planted by the Zamindar when the defendants [illegible]

——**Ss. 86 and 92**—*Zamindar seeking to eject occupancy tenants under S. 79—Decretal sum paid by one of them raising money on mortgage—Death of mortgagor tenant—Surviving tenants—If can eject mortgagees as sub-tenants.*

The Revenue Courts will not help an occupancy [illegible]

ings under S. 79 of the Tenancy Act, the decretal sum was paid by one of them raising the requisite money on an usufructuary mortgage, on the death of the mort[illegible] [illegible]ants cannot [illegible] 86 and 92 [illegible] *Bomford,* [illegible] **7 R D. 342.**

[illegible] *Hindu joint family having fixed rate tenancy—Suit by one member to set aside alienation of fixed rate tenancy by another*

AGRA TENANCY ACT (1926), 99.

member and for declaration that it is not binding on family—Jurisdiction of Civil Court—If excluded.

A suit by a member of a joint Hindu family seeking to set aside an alienation of family property made by another member thereof and to have it declared that the same does not affect the family property, which, in spite of it, continues to belong to the family, and praying that in case the property has passed out of the family, it be restored to it, is a suit which is usually and generally instituted in the Civil Court. Such a suit is of a very rare occurrence in a Revenue Court. The fact that the property alienated which is the subject-matter of the suit is a fixed-rate tenancy, which is both heritable and transferable does not exclude the jurisdiction of the Civil Court which is otherwise the proper Court to decide the question arising in such a case. The fixed rate tenancy belongs to the entire joint family of which the plaintiff is a member, and it is the family and not the plaintiff that is the tenant thereof. Ss. 99 and 121 of the Agra Tenancy Act are wholly inapplicable to such a suit, as the plaintiff and the alienating members are not co-tenants in the strict sense of the term but they are members of a coparcenary body to whom the fixed-rate tenancy belongs. There is consequently nothing in those sections read with S. 230 and Sch. IV of the Act to exclude the jurisdiction of the Civil Court. (*Niamatullah and Harries, JJ.*) DEOKINANDAN PANDEY *v.* RAM CHANDRA TEWARI. 1937 A.L.J. 905= 1937 A.W.R. 919=1937 R.D. 551= A.I.R. 1938 All. 17.

——S. 99—*Scope—Retrospective operation—Cause of action arising before Act.*

S. 99 of the Agra Tenancy Act has no retrospective effect and does not oust the jurisdiction of the Civil Court in respect of a suit the cause of action for which arose prior to the coming into force of the Act. (*Ganga Nath, J.*) JAGDEI *v.* SAMPAT DUBE. 1937 A.W.R. 916=1937 R.D. 548= 1937 A.L.J. 1111=A.I.R. 1937 All. 796.

——S. 99—*Suit for wrongful dispossession alleging that plaintiff was member of joint family with deceased statutory tenant—Assistant Collector finding in plaintiff's favour on ground that he was heir to deceased as his nearest collateral—Decision, if* res judicata *on question of plaintiff's status.*

Where the plaintiff sued the Zamindar for wrongful dispossession under S. 99 of the Agra Tenancy Act claiming in his plaint that he was a member of a joint family with the deceased statutory tenant, but the Assistant Collector found in his favour on the ground that he was heir to the deceased tenant as being his nearest collateral who had co-shared in cultivation with him at his death, the decision operates as *res judicata* on the question of the plaintiff's status, and he cannot in a subsequent suit for ejectment shift his ground and claim that he was really admitted to the co-tenancy with the deceased tenant. (*Darling, S.M. and Bomford, J. M.*) TULSI *v.* JAMUNA. 1937 R.D. 373 (2).

——S. 121—Applicability—Suit by Hindu coparcener challenging alienation by another coparcener—Property alienated consisting of fixed-rate tenancy—Jurisdiction of Civil Court. *See* AGRA TENANCY ACT, Ss. 99 AND 121. 1937 A.W.R. 919= A.I.R. 1938 All. 17.

——S. 123 (c)—*Suit for declaration of rent payable by statutory tenant—Zamindar claiming higher figure than that entered in* khatauni—*Burden of proof.*

In a suit by a Zamindar under S. 123 (c) of the Tenancy Act for a declaration of the rent payable by his statutory tenant, the burden of proving, in the absence of a lease, a higher figure than that entered in the

AGRA TENANCY ACT (1926), S. 237.

khatauni lies heavily on the plaintiff Zamindar, (*Darling, S.M. and Bomford, J.M.*) CHOTEY *v.* MOHOBBE ALI KHAN. 1937 R.D. 376.

——S. 203—*Applicability—Perpetual lease giving heritable rights and powers of transfer—Provision against ejectment under any circumstances—Effect of—Status and rights of lessee—Rights—If saleable in execution*—Thekadar.

A deed of perpetual lease, the terms of which give the lessee the right to receive rents and profits and also full power to transfer his rights and which provides that the lessee's rights should be heritable and that in no circumstances should the lessee be ejected, confers on the lessee the status and rights of a *thekadar* and not merely of an agricultural tenant. His rights are transferable and saleable in execution of a decree. (*Thom, Ag.C.J. and Niamatullah, J.*) NAZIM HUSAIN *v.* RAM NATH DUBEY. 1937 A.W.R. 1043= 1937 A.L.J. 1166.

——S. 221—*Profits collected by Lambardar exceeding revenue paid—His right to sue for arrears of revenue.*

If the profits collected by a Lambardar exceed the land revenue and cesses actually paid, he is not entitled to maintain a suit for arrears of revenue under S. 221, Agra Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) BABU SINGH *v.* MUNSHI SINGH. 1937 R.D. 370.

——S. 227—Gonwandhar—*Right to sue for share of profits of* mahal.

A *gonwandhar* has no share in a *mahal* as defined in S. 4 (4) of the Land Revenue Act. Therefore, he cannot sue for a share of the profits of a *mahal* under S. 227 of the Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) RAM LAKHAN SINGH *v.* RAM NARESH SINGH. 1937 R.D. 337.

——S. 230—*Applicability—Suit for return of sum advanced for* zaripeshgi *on repudiation by heir of grantor—Jurisdiction of Civil Court.*

A suit by a person for return of the money advanced by him in consideration of a *zaripeshgi* lease, the validity of which is denied by the persons succeeding the grantor of the lease, on the ground that the consideration for the contract of lease has failed is a suit which the Civil Court is competent to try, and is not one for the Revenue Court. S. 230 of the Agra Tenancy Act does not apply to such a case. (*Niamatullah and Allsop, JJ.*) MAHOMED ANIS *v.* IQBAL HUSAIN. 1937 A.W.R. 990=1937 A.L.J. 1202= A.I.R. 1938 All. 29.

——S. 237—Theka *granted by mortgagor pending foreclosure proceedings—Mortgagee agreeing to* Thekadar *being recorded as such on his undertaking to surrender possession after Civil Court's decree—Mortgagee applying for mutation after decree by Civil Court—Application opposed by* Thekadar—*Mortgagee's remedy.*

In the course of foreclosure proceedings the mortgagor gave a *theka* of the mortgaged village to one *X* who applied for mutation. The mortgagee opposed the application but eventually agreed that *X* should be recorded as *thekadar* on the understanding that if and when the mortgagee should get *"dakhal"* he would surrender possession. The proceedings in the Civil Court ended in favour of the mortgagee and he was granted possession as against the mortgagor. When the mortgagee applied for mutation and removal of *X*'s name, *X* opposed the application.

Held, that the possession of a proprietor was distinct from that of a *thekadar* and all that the mortgagee had been given by the Civil Court was proprietary possession

and that if he thought that *X's theka* was really void *ab initio* or had come to an end in accordance with his promise, it was open to him to file a suit to get rid of him, and that a mutation case between proprietors was not the proper forum to decide whether *X's theka* had come to an end or not. (*Darling, S.M. and Bomford, J.M.*) BHAWANI SHANKAR *v.* DULAREY LAL.
1937 R.D. 391.

——S. 242 (3) (a)—*Scope—Question of proprietary right—Whether lands are* sir *lands or tenancies—Appeal to District Judge—If lies.*

A question whether certain [illegible] person or whether they are t[illegible] a question of proprietary ri[illegible] S. 242 (3), Agra Tenancy Ac[illegible] lies to the District Judge [illegible] would lie only to the Cou[illegible] (*Sulaiman, C.J. and Har*[illegible] SINGH *v.* MISRILAL.
1937 R.D. [illegible]

——Ss. 248 (3) and 226[illegible] *firming sale in execution of decree for profits—Appeal—Forum.*

[illegible]

Bomford, J.M.) AMIR HASAN *v.* BADRI PRASAD.
1937 R.D. 373 (1).

——S. 249—*Appeal—Order of remand by District Judge—Appealability—Remedy.*

The Agra Tenancy Act does not provide for an appeal from an order of remand, but the order can be questioned by a superior Court when the final decree is appealed from, under S. 105 (1), C. P. Code, which applies to suits and appeals under the Tenancy Act, though S. 105 (2) does not apply, as the Tenancy Act does not allow an appeal from an order of remand. (*Niamatullah and Allsop, JJ.*) SRI RAM *v.* JAI KISHAN LAL. 1937 A.W.R. 1075 = 1937 A.L.J. 1237.

——S 252—*Failure to award costs—Revision.*

Failure to award costs has no doubt been held to be [illegible]

[illegible] ULLAH *v.* RAHMAT ULLAH. 1937 R.D. 379.

——S. 252 (c)—*Material irregularity—Assistant Collector giving plaintiff only* $3\frac{1}{2}$ *weeks to deposit fees for fresh summons—Dismissal of suit on default by plaintiff—Interference in revision—C. P. Code, O. 9, R. 5.*

Under R. 5 of O. 9, C. P. Code, a period of three months is allowed to a plaintiff when a summons is returned unserved. Where, therefore, in a suit for profits under S. 226 of the Agra Tenancy Act the Assis[illegible]

[illegible] the needful, the Assistant Collector in a very summary fashion dismisses the suit, he acts with material irregularity [illegible] [illegible]he Act, and (*Darling,* [illegible] [P]ERSHAD *v.* [193]7 R.D. 381

——S. 266 (2)—*Applicability and scope—Sale of proprietary rights along with* mahal—*Undertaking to*

pay rent of exproprietary holding to vendor—Latter given right to collect whole rent—Undertaking acted upon for 50 years—Usage in mahal *for exproprietary tenant to pay whole rent to vendee who accounted to co-sharers—Effect of—Right of vendee to realise entire rent.*

C. S., the proprietor of a fractional share in a *mahal*, who also held some *sir* land, sold his entire proprietary rights in the *mahal* along with his *sir* land to the plaintiff in 1880. *C. S.* thus became entitled to ex proprietary rights in that *sir*. There was a covenant in the sale [illegible]

[illegible] co-sharers.

Held, that the case fell within S. 266 (2), Agra Tenancy Act and that though the ex-proprietary tenant in the *mahal* was a tenant not only of the purchaser of his [shar]e but of the entire coparcenary body in view of the [cust]om or usage obtaining in the *mahal* and of the [spec]ial contract contained in the sale-deed which was acted upon for about 50 years, the plaintiff-purchaser was entitled to realize not only his share of the rent but the whole of rent due from the ex-proprietary tenant. (*Iqbal Ahmad, J.*) DURBIJAI SINGH *v.* ZOHRA SULTAN BEGAM. 1937 A.L.J. 1130 = 1937 A.W.R. 838 = 1937 R.D. 480 = A.I.R. 1937 All. 760.

——S. 271—*Suit for ejectment—Defendant claiming proprietary title and possession—Procedure.*

Where in a suit for ejectment of the defendant as a trespasser under S. 44 of the Tenancy Act, the defendant sets up a definite claim for proprietary title and possession, the Court should frame an issue on the question of proprietary title and then submit the record to the competent Civil Court for the decision of this [illegible] [Bomfo]rd, J.M.*) ABDUL [illegible]
1937 R.D. 506.

[illegible] *Scope—Suit under* [illegible] *[sh]are of revenue paid* [illegible] *same out of funds due to defendant in his hands out of collections—Plaintiff's father as lambardar and not accounted for—If open—Duty of plaintiff to account and prove that payment was out of his own pocket.*

In a suit under S. 222, Agra Tenancy Act, for recovery of the defendant's share of the revenue paid by the plaintiff, the defendant pleaded that the plaintiff's father who was the lambardar at the time of the alleged payment did not make the collections diligently on [illegible] [o]ught to, and in con[illegible] [illegible]s were not collected, [illegible]s father was liable to [illegible] of the profits at the [illegible] [th]e plaintiff was never the lambardar, and after the death of his father, which occurred in the year in which he paid the revenue, and before a new lambardar was appointed every co-sharer collected for himself.

Held, that the defendant's plea was in substance a plea of set-off which could not be entertained in view of serial No. 10 of schedule to the Agra Tenancy and that the defendant should, if he wanted to raise

question, should do so by a separate suit; (2) that the plaintiff, having paid revenue to Government was entitled to call upon the defendant to contribute his share of the revenue; and (3) that the plaintiff was not to establish that the payment had been made out of his pocket and not out of the funds of the defendants in his hands before he could get a decree. (*Niamatullah and Allsop, JJ.*) SRI RAM v. JAI KISHAN LAL.

1937 A.W.R. 1075 = 1937 A.L.J. 1237.

——**Sch. IV, Grp. F, Serial Nos. 3 and 5**—*Suit for abatement of rent remanded by Board to Assistant Collector—Suit compromised before him and rent abated—Application for realisation of costs awarded to Zamindar in Court of Commissioner and Board—Limitation.*

Where a suit for abatement of rent was remanded by the Board back to the Court of the Assistant Collector before whom the suit was compromised and rent was abated, an application by the defendant Zamindar for the realisation of costs awarded to him in the Court of the Commissioner and the Board falls under Serial No. 5 and not Serial No. 3 of Grp. F of Sch. IV of the Tenancy Act. The limitation is only one year. (*Darling, S.M.*) KHALIL AHMAD v. DALTUA.

1937 R.D. 448.

APPROPRIATION. *See* CONTRACT ACT, SS. 59 TO 61.

BENGAL AGRICULTURAL DEBTORS ACT (VII OF 1936), S. 34—*Court receiving notice under—If can go into question whether one is a debtor under the Act—Anomaly in construction.*

It is not open to a Court to which notice under S. 34 of the Bengal Agricultural Debtors Act is sent to decide or even consider whether the debtor comes within the Act or whether he does not; that question rests solely with the Board. Thus a Debt Settlement Board can hold up a suit started in the Court of the Subordinate Judge, in which a sum of over Rs. 26,000 is in dispute, and if that Debt Settlement Board comes to the conclusion that the debtors are in fact 'debtors' within the meaning of the Act, the Board can completely oust the Court and adjudicate in effect upon a claim for Rs. 26,000 and the only appeal against their decision will be to a Munsif whose ordinary powers are limited to cases involving not more than one thousand rupees. Thus it seems to be that the Act in its present form is likely to entail consequences of a fantastic description which obviously could not have been realised or foreseen when the Act was drafted or passed. (*Costello, Ag. C. J. and Edgley, J.*) BHAGWAN DAYAL v. CHANDULAL.

A.I.R. 1938 Cal 23.

——**S. 34**—*Stay order—Condition precedent—Act to be in force in both the places of issue and receipt of notice.*

In order to obtain a stay order of the nature contemplated by S. 34, Bengal Agricultural Debtors Act, the Act must be in operation both in the district in which the Board is situated to which an application is made for the settlement of a debt and also in the district in which the Court is situated to which the notice under S. 34 of the Act is actually sent. But no Court situated in a district in which the Act has not been brought into force can be compelled to issue the stay order contemplated in the latter portion of S. 34. (*Costello, Ag C. J. and Edgley, J.*) BHAGWAN DAYAL v. CHANDULAL.

A.I.R. 1938 Cal. 23.

BENGAL TENANCY ACT (VIII OF 1885), S 26 F—*Pre-emption order—Minor party—Compromise entered into by guardian—Sanction of Court—If necessary—Order of Court—If can be challenged by suit—C. P. Code, O. 32, R. 7.*

By virtue of S. 141, C.P. Code, O. 32, R. 7 of the Code applies to proceedings under S. 26 F of the Bengal Tenancy Act and express sanction must be given by the Court to a compromise where a minor is concerned. An order passed on an application made under S. 26 F of the Bengal Tenancy Act can be challenged by a suit on the ground of fraud and can also be challenged by a suit by a minor on attaining majority if it was the result of a compromise entered into by his guardian without the leave of the Court expressly recorded. (*Guha and Mitter, JJ.*) SYED MAHOMMED ALI v. AJIT KUMAR DAS.

42 C.W.N. 1154

——**Ss. 29, 33 and 80**—*Raiyat contracting to pay enhanced rent in consideration of improvement—Improvement not registered—Landlord's right to enhanced rent.*

Where a raiyat binds himself by a contract to pay an enhanced rent in consideration of an improvement made by the landlord, the landlord is entitled to the enhanced rent although the improvement in respect of which the enhancement is claimed has not been registered under the provisions of the Bengal Tenancy Act. (*Macnair, J.*) MADAN MOHAN v. KALI CHARAN. 42 C.W.N. 126.

——**S. 111-B and Limitation Act, Art. 120**—*Suit for correction of record of rights—Limitation—Computation—Deduction of four months—If permissible.*

A suit for a declaration and correction of the record of rights falls under Art. 126 of the Limitation Act and in computing the period of limitation, the period of four months mentioned in S. 111-B (4) of the Bengal Tenancy Act, shall be excluded from the time allowed. (*M. C. Ghose, J.*) BHABADAS MUKHERJEE v. KARPUR KAMINI DEBI. 42 C.W.N. 96.

——**S. 174 (5)**—*Order dismissing for default application for setting aside sale—Appeal.*

An order dismissing for default an application for setting aside a sale is appealable under S. 174 (5) of the Bengal Tenancy Act. (*S. K. Ghose, J.*) DEBENDRA NATH v. GOPAL CHANDRA. 42 C.W.N. 128.

BIRAR REVENUE BOOK CIRCULAR Vols. II-III-8—Adjournment of sale—Failure to specify hour of adjourned sale—Omission to inform all persons present of adjournment—Effect—Material irregularity. *See* C. P. CODE O. 21, R. 90. 20 N. L. J. 283.

BIHAR AND ORISSA MUNICIPAL ACT (VII OF 1922), S. 99 (b)—*Scope and applicability—Procedure under, if condition precedent to an assessment—Prescribing of tests—When necessary.*

S. 99 of the Act does not prescribe the procedure which as a matter of course and on all occasions must be followed by municipalities before assessment is made. It comes into operation only when the question arises of how the words in cl. (9) of S. 3 "held under one title or agreement" are to be interpreted. Then the commissioners are to decide at a meeting what tests shall be applied. (*James and Dhavle, JJ.*) CHAIRMAN, ARRAH MUNICIPALITY v. RAMKUMAR CHOUDHURY.

16 Pat. 662.

——**Ss. 116 and 119**—*Objection as to liability to assessment—Non-observance of procedure under S. 116—Bar under S. 119—Scope of.*

Where an assessee disputed his occupation of any holding or his liability to be assessed, it is necessary under S. 116 of the Act that he should apply to the commissioners for review of the assessment or exemption; and S. 119 of the Act provides that no objection shall be taken to any assessment in any other manner than that provided by the Act. (*James and Dhavle, JJ.*) CHAIRMAN, ARRAH MUNICIPALITY v. RAMKUMAR CHOUDHURY. 16 Pat. 662.

BIHAR AND ORISSA MUN. ACT 1922), S. 119.

——**S. 119**—Bar under—Scope of. *See* BIHAR AND ORISSA MUNICIPAL ACT, SS. 116 AND 119.

16 Pat. 662.

BURDEN OF PROOF — *Encroachment—Suit by owner of land against adjoining owner—Proof of disturbance of boundary marks—If essential—Measurements and area—If conclusive.*

In the case of persons owning or occupying adjoining plots of land, in order to determine whether there has been an encroachment by one of them upon the land of his neighbour, what has to be shown is that there has been a disturbance of the actual boundary marks on the site. In the absence of such disturbance of the actual boundary marks, an argument based on measurements is of little value; an argument based on area is of even less value, because there may have been an encroachment in any direction or in any part of the plot. The measurements of area in a record cannot be expected to be meticulously accurate; as the area is given only by way of description. (*Allsop, J.*) RAM KISAN *v.* PAHLAD. **1937 A.L.J. 1216=1937 A. W. R. 1078.**

CALCUTTA IMPROVEMENT ACT (V OF 1911), S 31 (b)

Rules contained in the Calcutta Improvements Trust Accounts Manual (1933) are only directions and would not be operative if they are in conflict with the fundamental rules made under S. 31 (*b*) of the Calcutta Improvement Act. (*Mc Nair, J.*) NONI GOPAL GANGULY *v.* CALCUTTA IMPROVEMENT TRUST.

A.I.R. 1938 Cal 43.

[illegible]

transaction which was in substance a mortgage, a charge or a sale of immovable property. A Court should therefore be very slow to give retrospective effect to S. 9 of the Act as amended in the case of a transaction of loan which was not a loan within the meaning of the Act at the time when the suit was brought. The Amending Act of 1937 is not retrospective in operation and does not affect transactions prior to it. (*Stone, C.J. and Digby, J.*) BHAGWANTRAO *v.* DAMODAR.

20 N.L J. 285.

CENTRAL PROVINCES REDUCTION OF INTEREST ACT (XXXII OF 1936)—*Scope—If retrospective.*

The C. P. Reduction of Interest Act is clearly retrospective in its operation. (*Stone, C.J. and Digby, J.*)

[illegible]

not void on the ground that there is an error in describing a khasra number and in stating its area. There must be a substantial error such as has in fact misled or was likely to mislead the tenant, otherwise the defect or error is not fatal. (*Greenfield, F.C.*) LACHHMAN *v.* SETH PARTAPCHAND. **20 N.L.J. 274.**

——**S 30**—*Scope—Duty of Revenue Officer to ascertain improvements and determine value—Tenant—If bound to put forward claim.*

C. P. CODE (1908), S. 11.

It is the duty of the Revenue Officer to determine the amount of compensation due to a tenant for improvements before he ejects him. The Act does not cast a duty on the tenant to make a claim. The officer even at the commencement of the proceedings should take steps to ascertain whether improvements have been effected in the holding, and not leave it to the tenants to claim compensation. The tenants are entitled as of right not to be ejected until the issue of compensation is decided and the amount determined as compensation is paid into Court. (*Greenfield, F. C.*) LALSING *v.* BISHNOOPRASAD. **20 N.L.J. 268.**

CHARITABLE AND RELIGIOUS TRUSTS ACT (XIV OF 1920), S. 3—*Construction—"Trust...for a public purpose of a charitable or religious nature"—Meaning of—Deed or will creating trust—Part of property or income set apart for private purposes—Specified part definitely set apart of public purposes—If falls under Act.*

Act XIV of 1920 is not inapplicable to a trust merely because a small sum is reserved for purposes which may not be strictly public purposes. Where under the same deed or will either a specified part of the property, for example, a defined share in the property, or a specified part of the income has been definitely set apart for public purposes, then the mere fact that any other part of the property or any other specified part of the income is for private purposes would not take the case out of the provisions of the Act. (*Sulaiman, C.J and Harries, J.*) PRATAP SINGH *v.* BRIJNATH DAS.

1937 A.L.J. 1183=1937 A W R. 873=7 All.786.

OF 1908) ... eaning of. ... r in S. 139 (4 A), was the class of case in which the person whom it ... land with no ... So the section ... sons who were ... e. (*Wort and* ... HTO.

16 Pat. 682.

CIVIL PROCEDURE CODE (V OF 1908), S. 11—Miscellaneous proceedings—Suit under S. 99 of Agra Tenancy Act—Finding as to status of plaintiff—If *res judicata*. *See* AGRA TENANCY ACT, S. 99.

1937 R.D. 373 (2).

——**S. 11**—*Parties and representatives — Hindu father or manager—Adverse decision against — If* res judicata *against sons or other coparceners.*

A Hindu father or manager sufficiently represents his sons or the other members of the joint family in a suit instituted against the father or manager on a mortgage executed by him. The latter must be considered to be fighting the battles of the entire family, especially where there is no suggestion and nothing to show that the ... was not for legal necessity, and the ... nds to lose or gain by the decision in ... therefore, a mistake is made at the ... ee, and more property than is mort... included in the final decree, and objections thereto by the father or manager taken in execution are dismissed, not only the father or manager but the sons and other members are bound by such decision. The suit in a mortgage action continues right up to the time that the final decree is prepared. Consequently a subsequent suit by the sons or other members to recover possession of the excess property included in the final decree and sold in execution is barred by *res judicata*, because the sons or other members must be deemed to have been represented in the former litigation by their

father or manager. (*Collister and Bajpai, JJ.*) KAZIM ALI KHAN *v.* OM PRAKASH.
1937 A. L.J. 1095=1937 A.W.R. 841= A.I.R. 1937 All. 731.

——**S. 11, Expl. IV**—*'Might and ought'—Suit for possession based on title—Claim for compensation for improvements not set up in defence—Subsequent suit for such compensation—If barred.*

In a suit for possession of land based on title, a claim for compensation for the improvements made by the defendant *ought* to be set up by him in defence. If it is not so set up, a decree for possession passed in the suit would operate as a bar to the further agitation of the question of compensation in a subsequent suit. (*M. G. Ghose and Mitter, JJ.*) MAJUDDIN *v.* LANGLA SYLHET TEA CO. **42 C.W.N. 110.**

——**S. 41**—*Scope—Certificate under—What amounts to—Arrangement in transferee Court between decree-holder and judgment-debtor—Time given to latter to pay up certain amount in full satisfaction—Attachment kept alive and decree-holder having liberty to proceed to execute for whole amount on default—Report sent by Court to transferor Court relaing true facts—Jurisdiction of transferee Court to execute—If terminates.*

Where the Court to which a decree has been transferred for execution has neither executed the decree nor finally failed to execute the decree, it does not cease to have jurisdiction to execute the decree merely because it sends a report, to the transferring Court of the true facts about an arrangement between the parties under which the judgment-debtor is given time to pay up an amount to the decree-holder in full satisfaction, the attachment being at the same time being kept alive and the decree-holder being at liberty to recover the full amount by execution on default of such payment. Such a report is not properly a certificate under S. 41, C. P. Code, which would operate to re-transfer the jurisdiction for execution of the decree from the transferee Court to the transferor Court. There is no necessity for a report of this kind at all; it is only if such circumstances as are referred to in S. 41, C. P. Code, exist and a certificate is sent relating those circumstances that the transferee Court does cease to have jurisdiction. (*Niamatullah and Allsop, JJ.*) SIVA DAYAL MAL *v.* RAJESHWAR PRASAD. **1937 A.W.R. 910= 1937 A.L.J. 1168=A.I.R. 1937 All. 766.**

——**Ss. 47 and 115**—*Amendment on application under Ss.* 151 *and* 152—*Appeal if lies—Revision, competency.*

Where the order amending a decree for a certain sum is not passed in execution proceedings but on a separate application under Ss. 151 and 152, the application does not fall under S. 47 and no appeal from the order is competent. But the mere fact that the order amending the decree is not itself appealable and the mere fact that an appeal could be presented from the amended decree is no bar to the entertainment of a revision petition of the order in question, if it is passed without jurisdiction. (*Bhide, J.*) MITTER SEN-GANESHI LAL *v.* KALYAN RAI. **A.I.R. 1938 Lah. 4.**

——**S. 47**—*Bar of suit—Declaration that property is not liable to be sold—Party against whom no relief is asked or given, if can sue for.*

A party against whom no relief is either asked for or given cannot sue for a declaration that certain property is not liable to be sold in execution of the decree as it is not the property of the judgment-debtor. S. 47 is a bar to such a suit. He can only make an application under that section. (*Nasim Ali and Mukherjea, JJ.*) NIRODE KALI ROY CHOUDHURY *v.* RAI HARENDRA NATH. **42 C.W.N. 87.**

——**S. 47**—*Execution, discharge or satisfaction—Parties and representatives—Mortgage suit—Decree-holder purchaser—Application for possession—Question as to what passed under the sale—If one under S. 47.*

A question between the auction-purchaser who is also the decree-holder in a mortgage suit and the judgment-debtor in that suit as to what passed under the auction sale and arising in an application by the auction-purchaser for possession of the property sold should be held to be not a question between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge and satisfaction of the decree or to the stay of execution thereof. (*Sulaiman, C. J., Thom and Allsop, JJ.*) KEDAR NATH *v.* ARUN CHANDRA SINHA.
1937 A.W.R. 937=A.I.R. 1937 All. 742 (F.B.).

——**S. 47**—*Parties to suit—Person against whom no relief was either prayed for or granted.*

Section 47 speaks of parties to suit and so applies to persons who are made parties though as against them relief is neither asked for nor granted by the decree. (*Nasim Ali and Mukherjea, JJ.*) NIRODE KALI ROY CHOUDHURY *v.* RAI HARENDRA NATH.
42 C.W.N. 87.

——**S. 47**—*Question relating to execution—Attachability of the property.*

The question as to whether a particular property is liable to be attached and sold for satisfaction of the decree, is a question relating to the satisfaction of the decree. It cannot be said that the section contemplates that the question must relate to the execution of the decree as between the attaching decree-holder on the one hand and the objecting defendants on the other. (*Nasim Ali and Mukherjea, JJ.*) NIRODE KALI ROY CHOUDHURY *v.* RAI HARENDRA NATH.
42 C.W.N. 87.

——**S. 51 (d)**—Scope—Wakf property—Receiver in execution—Power of Court to appoint. *See* C. P. CODE, O. 40, R. 1. **1937 A.W.R. 903.**

——**S. 73**—*Assets held by the 'Court'—Moneys received by Collector executing decrees sent to him for execution.*

Even though the Collector to whom the decree is transferred for further execution, by a Civil Court, is not a Court, still in view of the duties of the Collector in this matter, though he is not an agent of such Court, the moneys received by him in execution of such decree are moneys received by him for and on behalf of such Court. The moneys so received, while they are in his hands, are "assets" held by such Civil Court. (*Stone. C.J.*) JAYANARAYAN *v.* DHANRAJ.
A.I.R. 1938 Nag. 14.

——**S. 100**—*Finding of fact—Evidence—Failure to refer to—Interference.*

Where the High Court is not satisfied with the finding of the fact on the point of possession because the appellate Court had not categorically made reference to the statements of the defendant's witnesses whom it purported to disbelieve nor had it made any reference to the witnesses of the plaintiff on the question of possession, the High Court can look into the evidence of the case and if satisfied that the finding was correct, should not interfere. (*Manohar Lall, J.*) PALAKDHARI MAHTON *v.* PURANDRA PRASAD. **A.I.R. 1938 Pat. 10.**

——**S. 105 (1) and (2)**—Applicability to suits and appeals under Agra Tenancy Act. *See* AGRA TENANCY ACT, S. 249. **1937 A.W.R. 1075= 1937 A.L.J. 1237.**

——**S 115**—Amendment on application under Ss. 151 and 152—Amended decree appealable—Revision

C. P. CODE (1908), S. 115.

Competency. *See* C.P. CODE (1908), SS. 47 AND 115. **A.I R. 1938 Lah. 4.**

——**S. 115**—*"Case decided"—Application for stay under S. 7* (1) (a), *U. P. Encumbered Estates Act—Dismissal—Revision.*

The proceeding started by the filing of an application under S. 7 (1) (*a*) of the U. P. Encumbered Estates Act is a fresh proceeding and, therefore, a case which terminates as soon as the application is dismissed. There is, therefore, a "case decided" within the meaning of S. 115, C. P. Code ...
Court ir ...
BABU R ...

——S ...
Courts ...
—Revision—Competency.

Where the Court of a n... presentation to the Revenue ... jurisdiction to try the suit, ar... Judge also holds the same view and dismisses an appeal, the aggrieved party is entitled to come up to the High Court in revision. The question involved, namely whether the Munsif's Court had jurisdiction to entertain and try the suit filed in his Court, is directly one relating to the jurisdiction of his Court, and the High Court in such a case has power to interfere in revision under S. 115, C. P. Code. (*Niamatullah and Harries, JJ.*) DEOKINANDAN PANDEY *v.* RAM CHANDRA TEWARI. **1937 A.L.J. 905 = 1937 R.D. 511 = 1937 A.W.R. 919 = A.I.R. 1938 All. 17.**

——**S. 115**- ...
District Court ...
Jurisdiction of ...

The High Court has jurisdiction to entertain a revision application under S. 115, C.P. Code, if no appeal lies to it; and it can interfere with the order of the first ... rt, although an ... t to the District ...) BABU RAM ... **A.W.R. 986 = A.I R. 1938 All. 6.**

——**S. 144**—*Order under—Appeal—Co*...

An appeal against an order made on ... under S. 144, C.P. Code, ought to bear ... court fee. (*Henderson, J.*) BIRENDR... SURENDRA NATH. **42 C.W.N. 152**

——**S. 144**—*Scope and object of—Decree entitling party to take charge of institution—Execution—Possession of building in which institution is located also taken under colour of decree—Reversal of decree—Duty to restore possession of building—Plea that building was taken possession of by force or otherwise—If open.*

A party taking possession of any thing under colour of his decree is bound to make restitution of everything that he takes possession under colour of the decree on reversal of that decree. Where a party entitled under his decree to hold charge of an institution, also takes possession of the building in which the institution is located under colour of the decree, such possession naturally ...

only of the institution under the decree, and that he took possession of the building by force or otherwise and thus resist restitution. The object and purpose of S. 144, C.P. Code is that the parties shall be restored to the position which they originally occupied. (*Collister, J.*)

C. P. CODE (1908), O 9, R. 5.

ARYA PRATNIDHI SABHA *v.* CHHOTEY LAL. **171 I.C. 709 = 1937 A W R. 912 = 1937 A.L J. 1107 = 1937 A L R. 878 = A I.R. 1937 All. 728**

——**Ss. 151 and 152**—*Inherent jurisdiction—Exercise of—Another remedy open—Amendment of decree—Powers of—Decree of Subordinate Court merged in appellate decree.*

A resort to inherent jurisdiction is not permissible where another remedy is open to the person preferring an application under S. 151. Thus where a remedy by ...

to be exercised after duly considering all the circumstances. (*Bhide, J.*) MITTER SEN GANESHI LAL *v.* KALYAN RAI. **A.I.R. 1938 Lah. 4.**

——**S. 151**—*Inherent powers—Recalling of invalid orders.*

A Court has inherent jurisdiction to recall and cancel its invalid orders. (*Iqbal Ahmad and Allsop, JJ.*) CHAMPA DEVI *v.* ASA DEVI. **1937 A.W.R. 933 = 1937 A.L J. 945 = A I.R 1938 All. 8.**

——**S. 152**—Amendment of decree — Subordinate Court's decree merged in appellate decree. *See* C. P. ... 52. **A.I.R. 1938 Lah. 4.**

... *Scope—Suit for* rabi *rent under* ... *Act*—Kharif *rent due but not included in claim—Distraint proceedings for* Kharif *proving infructuous—Subsequent suit for* Kharif *rent—If barred.*

A landholder sued his tenant under S. 132 of the Agra Tenancy Act for the recovery of *rabi* rent of a certain *fasli*, but did not sue for the *Kharif* rent of that *fasli*, though that was also due; as the landholder wanted to recover the particular instalment by distraint, ... he plaint. The ... and the plain... the *Kharif* rent ...

Held, that the suit was barred by O. 2, R. 2, C.P. Code. (*Darling, S.M. and Bomford, J.M.*) KISHAN LAL *v.* SHRI RAM. **1937 A.W R. 867 = 1937 R.D. 394.**

——**O. 2, R. 2 (3)**—*Splitting of claim—Right of plaintiff.*

Per *Baguley, J.*—There is no provision of law by which a plaintiff can reserve the right to split his claim arising out of the same cause of action. He may ask the Court to allow him to do so under O 2, R. 2 (3) C. P. Code, but the Code gives no unilateral right to reserve a claim of this sort. (*Baguley and Sharpe, JJ.*) MA MA NYUN *v.* MAUNG MYA. **1937 Rang. L.R. 44...**

——**O 9, R. 5**—*Order for issue of fresh notice to* ...ma *defendant—Plaintiff not complying with* ... *Dismissal of suit even as against contesting de*...*—Propriety.*

...action of an Assistant Collector in dismissing a suit for profits under S. 227 of Agra Tenancy Act against both defendants merely because the plaintiff failed to comply with the Court's order for the issue of a fresh notice for the appearance of the *pro forma* defendant is high-handed in character. Under Cl. (1)

R. 5 of O, 9, C. P. Code, the Court is at liberty to "make an order that the suit be dismissed as against such defendant", namely the *pro forma* defendant. The Assistant Collector is not justified in dismissing the suit against the contesting defendant who is duly represented from the very beginning, and his order is, therefore, liable to be set aside in revision. (*Darling, S.M. and Bomford, J.M.*) BANWARI LAL *v.* MADAN GOPAL.
1937 R.D. 384.

——O. 20, R. 11—*Power of Court under—If affected by U. P. Agriculturists' Relief Act.*

Under the Agriculturists' Relief Act it is imperative on the Court to pass an instalment decree in certain circumstances. The Act however, does not derogate from the provisions of O. 20, R. 11, C.P. Code under which the Court is entitled to pass an instalment decree. (*Allsop, J.*) GIRWAR SINGH *v.* HAR PRASAD.
1937 A.W.R. 1074 = 1937 A.L.J. 1247.

——O. 21, R. 50 (2)—*Jurisdiction—Application for leave under—Decree transferred for execution to another Court—Subsequent application to original Court for leave under O. 21, R. 50 (2)—Competency—Order granting leave—If* ultra vires.

The Court which passed the decree is competent and has jurisdiction to grant leave to the decree-holder under O. 21, R. 50 (2), C. P. Code, even after the decree has been transferred for execution to another Court. Merely because the decree is transferred for execution by it to another Court, it does not cease to have jurisdiction to grant such leave. (*Sulaiman, C.J. and Yorke, J.*) KRISHNA CHANDRA AGARWAL *v.* MOHAN LAL BIKRAM DAS & CO. **1937 A.W.R. 850 = 1937 A.L.J. 1165 = A.I.R. 1937 All. 758.**

——O. 21, R. 54 and O. 38, R. 5—*Conditional order of attachment before judgment—No order absolute—Requirements of O. 21, R. 54 complied with—No process issued—Validity of attachment.*

Where there was a conditional order of attachment before judgment and no order absolute was later on made and where though no process was issued under O. 21. R. 54, all other requirements were observed.

Held, that the attachment was validly made and that the mere omission to record an order absolute does not make the attachment ineffectual. (*M. C. Ghose, J.*) AMODINI DASI *v.* RAGHUNATH MALLICK.
66 C.L.J. 222.

——O. 21, R. 57—*Execution application 'consigned to the record room'—Effect.*

Where by an order execution proceedings are 'consigned to the record room,' the order is tantamount to 'a dismissal' of the application concerned and a subsisting attachment may come to an end. (*Bhide, J.*) DURGA DAS BHAGWAN DAS *v.* PEOPLE'S BANK OF NORTHERN INDIA. **39 P.L.R. 967.**

——O. 21, R. 57—*Scope and applicability of—'Default'—Compromise—Execution proceedings 'consigned to record room'—Attachment, if ceases.*

For an attachment to come to an end under O. 21, R. 57 the three things necessary are, an attachment 'in execution,' a 'default' of the decree-holder and 'dismissal' of the execution application owing to such 'default.' Where, after an order of attachment but during the proceedings in connection therewith, the parties enter into compromise and as a result of which the execution application was consigned to the record room (which is equivalent to a dismissal) there is no 'default' on the part of the decree-holder and as such O. 21, R. 57 has no application. (*Bhide, J.*) DURGA DAS BHAGWAN DAS *v.* PEOPLE'S BANK OF NORTHERN INDIA.
39 P.L.R. 967.

——O. 21, R. 63—*Right of suit—Property in possession of auction-purchaser of a Hindu widow's limited interest—Attachment by creditor of estate, after widow's death—Release on objection by auction-purchaser—Attaching creditor, if can sue under O. 21, R. 63.*

A sale in execution of a decree in a suit based on the personal debt of a Hindu widow, can only convey her life-interest in the property. On her death, the interest of an auction-purchaser of such property, will terminate. If he remains in possession, he does so without any right or title, and his sale need not be set aside. A creditor of the estate whose attachment of such property has been released on objection by the auction-purchaser, can sue for a declaration under O. 21, R. 63. (*Smith and Madeley, JJ.*) RAMESHAR BUX SINGH *v.* PATRAJ KUER. **1937 O.W.N. 1181.**

——O. 21, R. 63 and T. P. Act, S. 53—*Right of suit—Defeated attaching creditor, claimant—Avoidance of transfer necessary—Suit, if to be of representative character.*

It is very doubtful as to whether the fact that a plaintiff has instituted his suit under O. 21, R. 63, C. P. Code, to declare his right to attach and sell certain property after setting aside a transfer as having been done with a view to defeat creditors, is sufficient in itself to exclude the operation of the provisions of S. 53 (1) of the T. P. Act. (*Smith and Madeley, JJ*) GIRRAJ *v.* SANKTA PRASAD, **171 I.C. 927 = 1937 O.L.R. 582 = 1937 O.W.N. 1169.**

——O. 21, R. 66 (2)—*Scope Non-compliance with—Effect—Material irregularity—Failure of judgment-debtor to appear on previous occasions—If ground for non issue of notice.*

The fact that the judgment-debtor has not appeared at any previous stage of the proceedings does not absolve the Court from complying with the O. 21, R. 66 (2) which requires a notice to be sent to the judgment-debtor. Omission to give such notice is a material irregularity. (*Greenfield, F.C.*) KHAJA ABDUL GAFUR KHAN *v.* CHOTEKHAN. **20 N.L.J. 283.**

——O. 21, R. 89—*Deposit under—Sufficiency—Test—Amount mentioned in proclamation of sale.*

Where in execution of a mortgage decree, the properties were sold and an application was made by the mortgagee decree-holder to set aside the sale, with a deposit of 5 per cent. of the purchase price together with an amount enough to satisfy one of three creditors, who had attached the mortgage decree, but which was less than the amount mentioned in the proclamation of sale

Held, that assuming that he had a *locus standi* to maintain such an application, it was bad in law as the amount mentioned in the proclamation of sale, had not been deposited as required by O. 21, R. 89. (*Leach, C. J. and Burn, J.*) SUBRAMANIA IYER *v.* VISWANATHA PILLAI. **46 L.W. 922.**

——O. 21, R. 90—*Material irregularity—Adjournment of sale—Adjournment announced only to decree-holder—Failure to specify hour of adjourned sale.*

Where the Naib Tahsildar holding a sale adjourns it to another date, but informs no one but the decree-holder about the adjournment and does not specify the hour to which the sale is adjourned, that amounts to a material irregularity. The order of adjournment must be announced to all persons who have attended the sale and not merely to the decree-holder. (*Greenfield, F.C.*) KHAJA ABDUL GAFUR KHAN *v.* CHOTEKHAN.
20 N.L.J. 283.

——O. 21, R. 90—Material irregularity—Non-compliance with O. 21, R. 66 (2). *See* C. P. CODE, O. 21, R. 66 (2). **20 N.L.J. 283.**

C. P. CODE (1908), O. 23, R. 1.

——O. 23, R. 1—*Scope—If subject to Sch. II, para. 3—Reference to arbitration pending—Power to permit withdrawal of suit.*

Once a suit has been referred to arbitration, so long as that reference stands, the Court which has made the reference has no power to pass any order which in any way would affect the subject-matter of the suit. The Court has consequently no jurisdiction after the suit has been referred to arbitration and as long as the reference subsists, to intervene and give the plaintiff permission to withdraw his suit under O. 23, R. 1, C.P. Code. (*Thom, Ag. C.J.*) POORAN CHAND *v.* BABU RAM.
1937 A.W.R. 1083 = 1937 A.L.J. 1163.

——O. 23, R. 1 (2) (b)—*"Other sufficient grounds"—Interpretation.*

The "other sufficient grounds" in Cl ... of O. 23, C. P. Code, must be *ejusdem* ... ground mentioned in Cl. (2) (*a*). (*T*...
MT. FATIMA *v.* NURA.

——O. 32, R. 7—Applicability—Proceeding under S. 26-F of Bengal Tenancy Act. *See* BENGAL TENANCY ACT, S. 26-F. 42 C.W.N. 154.

——O. 34, R. 4 (3)—*Anomalous mortgage—Suit for foreclosuae—Power to pass decree for sale—T. P. Act* ...

... sale in a foreclo- ... Code, in the case ... 67 of the T. P. ... Act of 1929, two remedies can alternatively be given in the case of an anomalous mortgage which by its terms confers the right to foreclosure, namely, sale or foreclosure. (*Stone, C.J. and Digby, J.*) BHAGWANTRAO *v.* DAMODAR.
20 N.L.J. 285.

——O. 34, R. 6—*Personal decree—Right of second mortgagee to apply—Entire property sold under prior mortgagee's decree.*

Where there are two mortgage decrees in favour of different mortgagees, and the property had been sold and the entire equity of redemption in the mortgaged property had passed to the first mortgagee under the first sale, the second mortgagee would be at liberty to start a proceeding under O. 34, R. 6, and obtain a personal decree, even though the property was not sold in execution of his own decree. (*Mukherjea, J.*) JAYRAM DAS *v.* TOKENDRA NATH. 42 C.W.N. 47.

——O. 38, R. 5—Conditional order of attachment before judgment—No order absolute—Validity of attachment. *See* C. P. CODE, O. 21, R. 54 AND O. 38, R. 5. 66 C.L.J. 222.

——O. 40, R. 1—Appeal—App... ing to act—Appeal against appoin... C. P. CODE, O. 43, R. 1 CL. (S).

——O. 40, R. 1—*Construction—Just and convenient.*

The words 'just and convenient' in O. ... strued according to the ordinary rules do r... appointment of a receiver to property ove... plaintiff has a lien. Receiver can be appc... appointment is in fact just and convenient.
HARI RAM *v.* FIRM MADDU MAL.
A.I.R. 1938 Lah. 12.

——O. 40, R. 1—*"Just and convenient"—Wakf property—Receiver in execution—Power of Court to appoint—C. P. Code, S. 51.*

The Court under O. 40, R. 1, C. P. Code, has a discretion to appoint a receiver where it appears to it just and convenient The rule is not mandatory. Where the property in question is dedicated property, being *wakf* property, which under the terms of the *wakf* deed has to be managed by a trustee enjoined to perform certain religious duties as trustee, it would not be just and convenient to appoint a receiver of such property. No receiver of such property can therefore be appointed in execution of a simple money decree, as the property is not liable to attachment and sale and as the judgment-debtor has no proprietary interest in the same. S. 51, C. P. Code, must be read subject to O. 40, R. 1. (*Sulaiman, C. J. and Harries, J.*) ABDUL LATIF KHAN *v.* SIKHANDAR BEGUM 1937 A W.R. 903 =
1937 A.L.J. 1103 = A.I.R. 1938 All. 3.

——O. 40, R. 1—*Partition suit—Propriety of appointment of receiver.*

Where in a suit for partition of the movable and immovable property, it is likely that debts may be realized by the defendants without the plaintiff's know...

A I R. 1938 Lah. 10.

——O. 40, R. 1—*Receiver—Grounds for appointment—Courts of concurrent jurisdiction—Separate appointments by—Undesirability of.*

It is obviously undesirable that receiver should be appointed by two Courts of concurrent jurisdiction, so that orders may be given possibly by one Court which may conflict with the orders that are given in the other Court. Where there is a receiver already appointed, the proper procedure for protection of one's interest is not to apply to another Court of concurrent jurisdiction for the appointment of another receiver, but to apply to the Court which has already appointed a receiver for adequate protection. (*McNair, J.*) ANANDINATH MUKHERJEE *v.* SHIBCHARAN TRIGUNAIT
42 C.W.N. 33.

——O. 41, R. 4—*Powers of Court—Dismissal of suit by two plaintiffs—Appeal by one only—Other impleaded as party but no appeal by latter—Decree in favour of latter also—Power to pass.*

Where a suit filed by two plaintiffs as reversioners to an estate is dismissed on the ground that they are not the reversioners, and one of them prefers an appeal in respect of the whole claim impleading the other also as a party respondent, the appellate Court has power to pass a decree in appeal in favour of not only the appellant plaintiff, but also in favour of the other plaintiff, though he has not himself appealed against the dismissal, in virtue of the powers conferred on the appellate Court under O. 41, R. 4, C. P. Code. The appeal being from the whole decree, which proceeded on ... 41, R. 4 ... appellate ... of both ... considera- tions, firstly to give the appellate Court full power to do ...

——O. 41, R. 6 (1)—*Order directing execution to proceed on furnishing of security—Security to the 'satisfaction of the Registrar'—Report by Registrar— ... lies.*

... for stay of execu- ... the decree holder was permitted to execute the decree on condition of his furnishing security to the satisfaction of the Registrar of the appellate side', and where by a subsequent order the time fixed was extended and the whole was

directed to be disposed of by the Registrar in insolvency, and a 'report' is made by the Registrar accepting the security offered.

Held, that the party objecting to the acceptance of the security cannot come up to the Court again, as it would be in the nature of an appeal, which does not lie. But there is no doubt the Court can review its own order on proper grounds. (*S. K. Ghose and Patterson, JJ.*) BIBHABATI DEBI *v.* RAMENDRA NARAYAN ROY. **66 C.L.J. 169.**

——**O. 41, R. 20**—*Party 'interested in the result of the appeal'—Party not impleaded in appeal and against whom appeal had become barred—If can be added.*

Where an appeal is preferred against the dismissal of an application under S. 53 of the Provincial Insolvency Act and the transferee is not impleaded, and as against whom the appeal had become barred by time, cannot be added as a respondent under O. 41, R. 20, as he is not a person 'interested in the result of the appeal'. (*Srivastava, C. J. and Madeley, J.*) HARI SHANKAR *v* MENDI LAL. **171 I.C. 896=1937 O.L.R. 578=1937 O.W.N. 1179.**

——**O. 41, R. 27**—*Additional evidence—Opportunity to rebut.*

The Court admitting additional evidence in appeal should give an opportunity to the opposite party to meet the new situation arising out of the admission of such new evidence. (*Manohar Lall, J.*) MAUJI SHAH *v.* SAKALDIP SINGH. **A.I.R. 1938 Pat. 11.**

——**O. 43, R. 1 (s)**—*Refusal of appointed receiver to act—Appeal against appointment of receiver—If lies.*

Where a receiver is appointed but he refuses to act, an appeal on the point whether a receiver should or should not be appointed can be entertained. (*Skemp, J.*) MANOHAR LAL *v.* KISHAN LAL. **A.I.R. 1938 Lah. 10.**

——**O. 47, R. 3**—*Application for review—Copy of order sought to be reviewed—If should be filed—Affidavit—If necessary.*

Under O. 47, R. 3, C. P. Code, it is not necessary to require a petitioner for review to file a copy of the order sought to be reviewed, as the application is made in the same Court and the previous order is on its own records. Nor does the law require that an application for review should invariably be accompanied by an affidavit. (*Tek Chand, J.*) JOWAND SINGH *v.* ALA SINGH. **39 P.L.R. 1046.**

——**O. 47, R. 4 (2) (a)**—*'Opposite party'*—Pro forma *defendant—Proceedings* ex parte *against him throughout—Notice of review to him—If necessary.*

In a suit by some reversioners for setting aside an alienation, a certain reversioner was made a *pro forma* defendant in the suit. He however took no interest in the litigation and all the proceedings were *ex parte* against him from the very beginning. His interest was sufficiently guarded by one of the plaintiffs reversioners. The suit was decreed but on the application for review of the judgment, the suit was dismissed. On appeal by the plaintiff against the order granting review, in which the *pro forma* defendant joined as appellant, it was contended by the *pro forma* defendant that notice to him was necessary before the review was granted.

Held, that the *pro forma* defendant could not under such circumstances come within the meaning of 'opposite party' in O. 47, R. 4 (2) (*a*), and therefore notice to him before the granting of the review application was not necessary. (*Jai Lal, J.*) GANDU *v.* MT. NASIBO. **A.I.R. 1938 Lah. 22.**

——**Sch. II, Para. 3**—Scope—If controls O. 23, R. 1—Reference to arbitration pending—Permission to withdraw suit—Jurisdiction to grant. *See* C. P. CODE, O. 23, R. 1. **1937 A.W.R. 1083=1937 A.L.J. 1163.**

——**Sch. II, Para. 20**—*Construction and scope—Parties to suit pending in Revenue Court—Agreement of reference to arbitration without intervention of Court—Award—Application to Civil Court to file award—Jurisdiction of Civil Court to file award and pass decree.*

The right to agree to refer to an arbitration and to file an award under para. 20 of Sch. II, C. P. Code, is not confined to persons who are not parties to any litigation. Where persons who are parties to a suit pending in a Revenue Court go to arbitration without the intervention of any Court, one of the terms of the agreement of reference being that the award would be effective whatever might be the decision of the Revenue Court in the suit before it, the award may be filed in a Civil Court under para. 20 of Sch. II. Such Civil Court has jurisdiction to deal with the application and pass a decree in accordance with it. (*Niamatullah and Allsop, JJ.*) GANGA PRASAD SINGH *v.* BINDESHWAR SINGH. **1937 A.L.J. 1133=1937 A.W.R. 1080.**

CONTEMPT—*What amounts to—Intentional disobedience of Court's order.*

A Guzerati person applied for restoration of his minor boy from an Anglo-Indian lady who looked after him for a long time with the father's concurrence. In a previous proceeding, the father was appointed as the guardian of the boy and the father was ordered to have the custody of his boy and was to arrange to take the child for a change. The father made the arrangement but the lady refused to deliver the child to its father in spite of many requests. The lady had acted in such a manner as to indicate clearly that she wanted to have an absolute control over the child in derogation of the rights of the father. Any amicable settlement suggested by the father was refused by her.

Held, that the lady was guilty of contempt. (*McNair, J.*) RANJANI KANTA PADIA, *In re.* **A.I.R. 1938 Cal. 38.**

CONTRACT ACT (IX OF 1872)—*Champerty—Extortionate terms—Relief.*

Where the terms of an agreement to finance litigation were found by the Court to be extortionate and hence invalid and unenforceable the lender was given on equitable grounds, a decree for the amount found to represent the reasonable expenses of the litigation. (*Coldstream and Abdul Rashid, JJ.*) ALOPI PARSHAD *v.* COURT OF WARDS. **A.I.R. 1938 Lah. 23.**

——**S. 20**—*Applicability—Decree—Mistake of parties—If ground for setting aside by separate suit.*

S. 20 of the Contract Act only applies to contracts in which there has been a bilateral mistake of the parties which might be rectified. But the section cannot be applied to a decree and a decree cannot be avoided or set aside by means of a fresh suit on the ground that the decree has been obtained on account of the mistake of the parties. (*Collister and Bajpai, JJ.*) KAZIM ALI KHAN *v.* OM PRAKASH **1937 A.W.R. 841=1937 A.L.J. 1095=A.I.R. 1937 All. 731.**

——**S. 23**—*Act defeating statute—Opposed to public policy—Discharged insolvent's agreement with a former creditor—Fresh transaction—Scheduled creditors not affected—Validity.*

An insolvent was granted a discharge under S. 39 (1), Presidency Towns Insolvency Act conditional upon his consenting to a decree being passed against him in favour of official assignee for the full amount of his debts proved in the insolvency. Subsequently *A*, one of the scheduled creditors, agreed to advance certain amount of loan to the insolvent and to waive his claim

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to the sum due to him from the official assignee as a creditor in the insolvency. The insolvent and *B* as a surety for the insolvent executed promissory notes for the original amount of debt proved in the insolvency with interest thereon from the date of insolvency. The creditor subsequently brought a suit upon the promissory notes

Held, that as the creditor did not seek to prejudice the rights of any of the scheduled creditors by his new and independent contract, the consideration for the note was neither of such a nature as would defeat the provisions of the Presidency Towns Insolvency Act nor was opposed to public policy. The agreement was perfectly valid and enforceable and a decree could be passed in favour of the creditor. (*Roberts, C. J. and Sharpe, J.*) HASHIM ISMAIL *v.* CHOTALAL.

A.I.R. 1938 Rang. 11.

——S. 23—*Champerty—Agreement to finance litigation in consideration of share of property—Validity—Test.*

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy. But agreements of such a kind ought to be carefully watched and when extortionate, unconscionable or made for improper objects, ought to be held invalid. The question as to whether a contract is inequitable and unconscionable depen[illegible] stances of each particular case. B[illegible] tween *A* and *B*, *B* agreed to finance [illegible] respect of certain property in return for part worth about one lac and fifty thousand rupees of the recover ed property, knowing well that the litigat[illegible] only about Rs. 9,000. *A* was a man of [illegible] and was in the habit of drinking.

Held, that the agreement was uncon[illegible] therefore invalid. (*Coldstream and Abdul* [illegible]) ALOPI PARSHAD *v.* COURT OF WARDS.

A.I.R. 1938 Lah. [illegible]

——S. 23—If affects leases gover[illegible] Grants Act. *See* CROWN GRANTS ACT [illegible]

——S. 23—*Public policy—Government opening telegraph office at particular place at request of certain persons—Contract with them for meeting deficit in its working expenses—Validity.*

Where Government open a telegraph office at a particular place at the request of certain persons in that place, a contract with them for meeting the deficit in its working expenses is a contract relating to a matter of amenity, which a modern State generally provides for, for advancing the material welfare of its subjects, but which it is not bound to do as a part of its fundamental constitutional obligations. There can, therefore, be no objection to such a contract on the ground of public policy. (*M. C. Ghose and R. C. Mitter, JJ.*) KISHORI PRASAD *v.* SECRETARY OF STATE. 42 C.W.N. 116.

——Ss. 59 to 61—*Appropriation—Contrary to stipulation in mortgage deed—Validity.*

Where there is the definite stipulation in the mortgage-deed that the money paid is to be appropriated, in the first instance, towards payment of interest and the balance set-off against the principal due, the mortgagee must in such a case apply the money received in accordance with the provisions of the mortgage deed He cannot appropriate such payments towards principal For purposes of Income tax, the authorities are certainly entitled to assume that a creditor appropriates the payments only in accordance with the agreement with his debtor. (*Derbyshire, C. J. and Costello, J.*) GOPIRAM GOBINDRAM, *In the matter of.* A.I.R. 1938 Cal. 20.

COURT-FEES ACT (1870), Sch. II, Art. 11.

——Ss. 59 to 61—*Appropriation—Rule as to—If applies to agreement regulating order of payment of instalments of a debt.*

If a series of separate debts exist between a creditor and a debtor, the debtor may pay any one of them as he may deem fit and if he specifically appropriates the payment to a later debt, the creditor is not entitled to accept the payment otherwise than in respect of the debt to which it is so appropriated by the debtor. This doctrine, however, has no application when the parties enter into an agreement regulating the order of payment of instalments in respect of a debt. (*Courtney-Terrell, C. J. and Manohar Lall, J.*) DHARAM DEO PANDEY *v.* RAMANUJ PANDEY. A.I.R. 1938 Pat. 8.

——S. 70—*Suit for money—Alleged agreement found against—No alternative prayer—Relief under section—Court, if can grant.*

Where a plaintiff sues for recovery of money on the basis of an alleged agreement which is found against and there is no relief asked for under S. 70 of the Contract Act, it is not open to the Court to grant that relief. (*Bhide, J.*) TEJ RAJ *v.* RAM LAL. 39 P.L.R. 1007.

——S. 74—*Penalty—Stipulation for interest at 12 per cent,—Clause that on certain default interest to be paid at 18 per cent and that interest to be paid on interest—If penal—Power of Court to relieve against.*

A clause in a mortgage deed which provides for in[illegible], that in a certain [illegible] to increase to [illegible] should be paid on interest is a penal clause and can be relieved against. The fact that the mortgagee claims not the increased rate [illegible] Re. 1 per [illegible] rt giving [illegible] What the [illegible] the claim [illegible] loan was worth more than twice the amount advanced, the Court [illegible] uce the interest. [illegible] be allowed is [illegible]

[illegible] *damages.*

The basis of an action under S. 235 of the Contract Act is the implied warranty by the professing agent that he had the authority to act. The measure of damages must accordingly in substance be what benefit the other party would have had from the contract if the representation that he was the authorised agent had been true. (*M. C. Ghose and R. C. Mitter, JJ.*) KISHORI PRASAD *v.* SECRETARY OF STATE.

42 C.W.N. 116.

COURT FEES ACT (VII OF 1870), S. 7 (iv) (b) and (c)—Suit for partition—Plea by defendant that part of property does not belong to joint estate—Court-fee payable on plaint. *See* COURT FEES ACT, SCH. II, ART. 17 (*vi*). 1937 Rang. L.R. 447.

——Sch. I, Art 1—Order under S. 144, C. P. Code —Appeal—Court-fee. *See* C. P. CODE S. 144.

42 C.W.N. 152.

——Sch. I, Art. 1 and Sch. II, Art. 11—Applicability—Appeal under S. 23, U. P. Agriculturists' Relief Act—Court fee payable. *See* U. P. AGRICULTURISTS' RELIEF ACT, S. 23. 1937 A.W.R. 932=A.I.R. 1938 All. 14.

——Sch. II, Art. 11—Applicability—U. P. Agriculturists' Relief Act, S. 23—Appeal under—Court fee payable. *See* U. P. AGRICULTURIST'S RELIEF ACT, S. 23. 1937 A.W.R. 932=A.I.R. 1938 All. 14.

——Sch. II, Art. 17 (vi) and S. 7 (iv) (b) and (c) —*Suit for partition—Plea by defendant that part of property does not belong to joint estate—Court-fee payable on plaint.*

The proper Court-fee payable on a plaint in a suit for partition of property of which the plaintiff alleges to be in actual or constructive possession is Rs. 10 under Sch. II, Art. 17 (6) of the Court-fees Act. A plea by the defendant that part of the property mentioned in the plaint does not belong to the joint estate does not convert the suit into one to enforce a right to share in property or into one for declaration of title and recovery of possession, and consequently an *ad valorem* fee is not payable either under Cl. (*b*) or Cl. (*c*) of S. 7 (*iv*) of the Act. (*Baguley and Sharpe, JJ.*) MA MA NYUN *v.* MAUNG MYA. 1937 Rang. L. R. 447.

CRIMINAL PROCEDURE CODE (V OF 1898), S. 133—*Discretion of Magistrate—Right of private person to insist on order under section—Refusal by Magistrate—Remedy.*

Whether or not an order should be passed under S. 133, Cr. P. Code, is a matter of discretion for the Magistrate and no private person has a right to insist that a Magistrate shall pass such an order. If the Magistrate does not choose to pass an order under the section, the remedy of the aggrieved party is normally in the Civil Court. (*Allsop, J.*) AL AHMAD *v.* EMPEROR. 1937 A. W. R. 866= 1937 A Cr. C. 165.

——S. 139-A—*Object and scope of—Right of private party to ask for enquiry into rights of parties.*

The provisions in S. 139-A, as to the holding of an enquiry are intended to protect the rights of a person against whom it is proposed to pass an order under S. 133, Cr. P. Code, and are not intended to enable any private person complaining of a construction to compel a Magistrate to hold an enquiry into the rights of the parties concerned. (*Allsop, J.*) ALI AHMAD *v.* EMPEROR. 1937 A. W. R. 866=1937 A. Cr. C. 165.

——S. 162 (1)—*Applicability — "Statements"—Meaning of.*

S. 162, Cr. P. Code, does not apply to statements made in an investigation other than that which results in a trial in which those statements are sought to be used. (*Grille, J.*) SHIVLAL *v.* EMPEROR. 20 N. L. J. 280.

——S. 162 (1), Proviso—*Construction—Proof of statements formally—If condition precedent to use of statements.*

An admission made by a witness that he made a statement is sufficient proof of the statement to enable it to be brought on the record. Formal proof of the statement prior to the cross-examination of the witness is not necessary. Cross-examination may be allowed subject to subsequent proof of the statement by calling the police officer who recorded the statement. (*Grille, J.*) SHIVLAL *v.* EMPEROR. 20 N. L. J. 280.

——Ss. 190 (1) (c) and 191—*Charge at the instance of Magistrate—Taking cognizance on such report—Failure to comply with S. 191—Trial, if vitiated.*

When a charge sheet is filed against any person at the instance of the Magistrate and the latter takes cognizance on such charge sheet, though apparently the case is taken cognizance of on a police report, the action of the Magistrate practically amounts to his taking cognizance under Section 190 (1) (*c*), as he is the real originator of the proceedings. The principle of S. 191 applies to such a case. Failure to comply with the provisions of S. 191 vitiates the proceedings, which have therefore to be quashed. (*Coldstream, J.*) MAHOMED SADIQ *v.* EMPEROR. A. I. R. 1938 Lah. 19.

——S. 191—*Failure to comply with—Proceedings, if vitiated.* *See* CR. P. CODE, SS. 190 (1) (*c*) AND 191. A. I. R. 1938 Lah. 19.

——Ss. 222 (1) and (2)—*Charge under Ss. 109 and 302, Penal Code—Species of abetment not specified—Sufficiency of notice to accused.*

S. 222 (1) and (2), Cr. P. Code, require, that the charge should contain such particulars as are reasonably sufficient to give the accused notice of the matter with which he is charged and that if the offence charged is given any specific name, it may be described by that name only. So it is open to the prosecution to charge abetment generally, and then, if the evidence did not establish abetment other than in one particular form, to rely on this particular form for a conviction. On the facts of the case where the accused was charged with an offence punishable under Ss. 109 and 302, Penal Code,

Held, that it cannot be said that the nature of the case was such that the non-particularisation of the species of abetment charged resulted in withholding such reasonably sufficient notice as the accused were entitled. (*S. N. Guha and Biswas, JJ.*) HARENDRA KUMAR MANDAL *v.* EMPEROR. 66 C. L. J. 196.

——S. 237—Applicability of. *See* PENAL CODE, SS. 120-B, 302 AND 201. 66 C. L. J. 225= 42 C. W. N. 129.

——S. 418 (1)—*Construction—'Where trial was by jury'—Meaning.*

Per *Biswas, J.*—The words 'where trial was by jury' in S. 418 (1), Cr. P. Code, are not so clear as to admit of one meaning only that they must mean 'where the trial *in fact* was by jury'. These words are equally capable of another construction, meaning 'where the trial was *lawfully* by jury'. (*McNair and Biswas, JJ.*) GOLOKE BEHARY TAKAL *v.* EMPEROR. 66 C. L. J. 225=42 C. W. N. 129.

——S. 421—*Summary dismissal after sending for record—Legality—Calling for record—Points argued—Desirability of noting.*

Where a Sessions Judge hears the pleader presenting a criminal appeal and before admitting it and in order to satisfy himself as to the points raised by the appellants' lawyer, sends for the record of the case and after perusing the same dismisses the appeal summarily, the Judge does not commit any illegality. But in all cases where a busy Sessions Judge sends for the record in a criminal appeal which is presented to him for admission, it is desirable that he should note in the order-sheet the points for which he is sending for the record in order to satisfy himself as to the correctness of the submission made by the appellants before him. It will be difficult, in many cases, if not in all, for a busy Sessions Judge to remember the submissions which were advanced by the appellants' advocate which had satisfied him to this extent that he was forced to send for the record. (*Manohar Lall, J.*) BASDEO KOIRI *v.* EMPEROR. A. I. R. 1938 Pat. 12.

——S. 423 (1) (b)—*Retrial—Order for—Principles.*

Per *McNair, J.*—Where the evidence would not on any proper view of the case support a conviction it would be worse than useless to send back the case for a new trial. (*McNair and Biswas, JJ.*) GOLOKE BEHARY TAKAL *v.* EMPEROR. 66 C. L. J. 225= 42 C. W. N. 129.

——S. 423 (2)—*Trial by jury—Misdirection—What amounts to.*

Where a Judge sums up to the jury by stating the case for the prosecution and then giving a short summary of the evidence of each witness and also dealing with the evidence against each individual accused.

CR. P. CODE (1898), S. 436.

Held (Per *McNair, J.*), that the failure to marshall the evidence relating to each element of the charge, or to indicate to the jury how far in his opinion each element has been substantiated by the evidence before them, may not by itself amount to misdirection. But coupled with omissions and inaccuracies, it may amount to misdirection within the meaning of S. 423 (2), Cr. P. Code. (*McNair and Biswas, JJ.*) GOLOKE BEHARY TAKAL *v.* EMPEROR. **66 C L J 225= 42 C.W N. 129.**

———**S. 436**—*Revision against dismissal under S. 203—Issuing of summons without notice to accused—Propriety of.*

Where in revision, against an order under S. 203, Cr. P. Code, the Sessions Judge without issuing any notice on the accused persons, directed the issue of summons on the accused persons straightway and ordered the case to be heard by another Magistrate.

Held, that the form of the learned Judge's order was not correct. The Sessions Judge should have left it to the Magistrate to select the particular form of enquiry instead of directing him categorically to issue a summons against the accused. But if the Magistrate in the exercise of his own discretion [illegible] immediately instead of wastin[illegible] was quite at liberty to do so. [illegible] *son, JJ.*) ANNAKALI DEBI *v.* GYANENDRA CHAKRAVERTY. **A.I R. 1938 Cal 22.**

———**S. 439**—*Quashing proceedings—Charge—Practice.*

It is not the practice of the High Court, nor would it be proper for it ordinarily to alter or quash a charge unless it is clear that the complaint does not disclose the offence in the charge. (*Coldstream, J.*) GUL MOHAMMAD *v.* EMPEROR. **39 P.L.R. 957.**

———**S. 488 (5)**—*Cancellation under—If retrospective—Effect on arrears.*

An order under S. 488 (5), Cr. P Code, cancelling the maintenance of a wife takes effect from the date of the order and has no retrospective operation. It cannot, therefore, affect the arrears due up to the date of the order. (*Biswas, J.*) TARI BALA *v.* KABAL RAM. **42 C.W.N. 64.**

———**S. 526**—Magistrate issuing search warrant—If can try case. *See* PUBLIC GAMBLING ACT, S. 5. **171 I C. 1007.**

———**Ss. 536 and 418**—*Appeal—Case triable by assessors tried by jury—Appeal, if lies on facts.*

Where an offence triable with assessors is tried with a jury and results in a conviction of the accused and an appeal is preferred therefrom, on a question whether an appeal lies on facts.

Held, Per *McNair, J.* (*Biswas, J.*, contra).—So long as the trial has in fact been with the aid of a jury, no appeal lies on facts, even though the jury trial was erroneous and the trial should have been by assessors.

Per *Biswas, J.*—Where, through no fault of his, a trial by jury is imposed on an accused person in disregard of the express provisions of the statute which entitle him as of right to a trial with the aid of assessors, it would be a manifest injustice to deprive him of a right of appeal on facts, which he would otherwise have had under the law. In any case S. 536 does not and cannot affect the right of appeal which is governed by S. 418 (1) read with S. 410. (*McNair and Biswas, JJ.*) GOLOKE BEHARY TAKAL *v.* EMPEROR. **66 C.L J. 225=42 C.W N. 129.**

CRIMINAL TRIAL—*Duty of prosecution—Independent witnesses not called—Inference.*

If the independent witnesses who were named in the first information report are not called by the prosecution, the Court is justified in assuming that their evidence would not have supported the prosecution. (*Young, C.J. and Monroe, J.*) GHULAM RASUL *v.* EMPEROR. **171 I.C. 906.**

———*Presumption of innocence—Doctrine of.*

To deal with a case upon the ground that when the complainant brings his case he must be assumed to have a real grievance is not the manner in which criminal trials are conducted in this country. The presumption is just the other way. The accused must be presumed to be innocent unless the prosecution have satisfactorily and without any reasonable doubt shown that the guilt is brought home to the accused. (*Manohar Lall, J.*) BASDEO KOIRI *v.* EMPEROR **A.I.R. 1938 Pat. 12.**

CROWN—*Liability for torts or negligent acts of servants—Limits.*

When the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment. Hence the Secretary of State will not be liable for torts or acts of negligence committed by Government servants while performing acts done in the exercise of powers which are usually termed sovereign. [illegible] HIMBUX *v.* SECRETARY OF [illegible] **A.I R 1938 Sind 6.**

[illegible] (XV OF 1895)—*Applicability—Leases of Sunderbans lands.*

The grants or leases of Sunderbans lands, which are [illegible] Crown grants and to these grants the Crown Grants Act applies. (*Mitter, J.*) JNANENDRANATH NANDA *v.* JADUNATH BANERJI. **42 C.W N. 81.**

———**Ss 2 and 3**—*Scope of—Crown lease—Restrictive clause as to submission of boundary dispute only to revenue authorities—If affected by S. 28 of the Contract Act—Objection as to Civil Court's jurisdiction—Who can raise.*

It is not only the T. P. Act that is affected by the Crown Grants Act. S. 3 of the Act declares the unfettered discretion of the Crown to impose such conditions and limitations as it thinks fit, no matter what the general law of the land be. By reason of this section, a restrictive clause in a Crown lease which compels the lessee to refer any boundary dispute with the adjoining lessee, only to revenue authorities, is not affected by S. 28 of the Contract Act. But such a clause cannot be availed of by a lessee of an adjoining lot, to oust the Jurisdiction of Civil Court, for the reason, that his predecessors-in interest were not parties to the contract entered into between the Secretary of State in Council and the other lessees' predecessors in-interest. (*Mitter, J.*) JNANENDRANATH NANDA *v.* JADUNATH BANERJI **42 C W.N. 81.**

DECREE—*Setting aside—Fraud—Misrepresentation made by plaintiff on account of ignorance—If ground for setting aside decree.*

A decree is not liable to be set aside on the ground of fraud merely because there was some misrepresentation on the part of the plaintiff in the suit in which that decree was passed when such misrepresentation is on account of ignorance. (*Collister and Bajpai, JJ.*) KAZIM ALI KHAN *v.* OM PRAKASH. **1937 A.W.R. 841=1937 A L J. 1095= A.I.R. 1937 All. 731.**

———Setting aside—Mistake of parties—If ground for setting aside. *See* CONTRACT ACT, S. 20. **1937 A.W.R. 841=1937 A L J 1095= A.I.R. 1937 All. 731.**

DEED—*Construction—Principles — Repugnancy between earlier and later portion.*

A deed of sale purported to convey lands identical with those covered by a prior lease. The lease contained dimensions of the lands, but the sale did not. It only contained a schedule in which the boundaries were given, following the description given in the lease. There was also a rider appended to the schedule. Whatever may have been the actual intention of the parties, actual measurements disclosed a repugnancy between the rider and the rest of the document.

Held, that as the repugnancy turned to be one of misdescription in the rider, the misdescription should be rejected and that the rider would not prevail over the recital in the body of the sale deed. (*Biswas, J.*) NAGENDRA BALA DEVI *v.* BAIDYANATH CHAKRABARTY. **66 C.L.J. 202.**

EASEMENTS ACT (V OF 1882), Ss. 59 and 60—*Licensee building on land—Transferee of licensor—Power to revoke license.*

If a licensee, acting upon the license has built a structure on the land, it would not be open to the transferee of the licensor to revoke the license. (*Mahomed Ismail, J.*) MAHOMED HASAN *v.* BODDHU. **1937 A.W.R. 1085 = 1937 A.L.J. 1297 = A.I.R. 1938 All. 32.**

ELECTRICITY ACT (IX OF 1910), S. 2 (c)—Consumer—Meaning of. *See* ELECTRICITY ACT, S. 37 (4) —RULES UNDER R. 106. **A.I.R. 1938 Pat. 15.**

——**S. 37 (4)**—*Rules under, R.* 106—*'Consumer'—Who is—S.* 2 (c).

The definition of 'consumer' includes any person who is supplied with energy by a licensee, and any person whose premises are for the time being connected for the purposes of a supply of energy with the works of the licensee. Therefore in a prosecution for offences under S. 44 and R. 106 *prima facie* it should be enough to prove either that energy was supplied for the use of the persons or that the persons were owners or occupiers of premises connected up with the licensee's electric system. (*Rowland, J.*) BHAGALPUR ELECTRIC SUPPLY CO. *v.* HARI PRASAD SAHA **A.I.R. 1938 Pat. 15.**

——**S. 50**—*'Person aggrieved'—Person in charge of company property.*

A person who is directly in charge of the property of an electrical company such as its chief Residential Engineer is within the description of the 'person aggrieved' within S. 50, by any offence against the company or by any tampering with its meters, or wrongful appropriation of electric current. (*Rowland, J.*) BHAGALPUR ELECTRIC SUPPLY CO. *v.* HARI PRASAD SAHA. **A.I.R. 1938 Pat. 15.**

EVIDENCE ACT (I OF 1872), Ss. 8 and 32—*Complaint to police by deceased apprehending danger—Admissibility.*

Where the deceased had made a complaint to the police shortly before his death, stating that he apprehended danger to his life at the hands of certain persons, it is admissible under S. 8 of the Evidence Act, whether or not it is admissible under S. 32 (1). It is evidence of the conduct of a person, an offence against whom was the subject of the trial. (*McNair and Biswas, JJ.*) GOLOKE BEHARY TAKAL *v.* EMPEROR. **66 C.L.J. 225 = 42 C.W.N. 129.**

——**S. 25**—*'Police Officer'—Abkari Officer investigating offence against Bombay Abkari Act—If a Police Officer.*

The expression 'Police Officer' is not to be read in a technical sense but in its more comprehensive and popular meaning. Whatever reasons existed for inducing the Legislature to make a departure from the English law and exclude a confession made to a Police Officer apply with equal if not greater force to an officer who is clothed with powers of a Police Officer and is actually engaged in the investigation of a crime in respect of which the confession is made to him. Hence an Abkari Officer investigating an offence against the Bombay Abkari Act in exercise of the powers conferred upon him in Ch. 9 of the Act is a 'Police Officer' within the scope of S. 25. (*Rupchand Bilaram, Ag. J.C. Dadiba C. Mehta and Lobo. A. J.Cs.*) BACHOO KANDERO *v.* EMPEROR. **A.I.R. 1938 Sind 1.**

——**S. 32 (1)**—*Statements long prior to death—Admissibility.*

Where the statement in question was said to have been made months before the alleged murder,

Held, that it could hardly come within the terms of S. 32 (1) of the Evidence Act. (*S.N. Guha and Biswas, JJ.*) HARENDRA KUMAR MANDAL *v.* EMPEROR. **66 C.L.J. 196.**

——**S. 32 (6)**—*Horoscope— Admissibility—Conditions.*

A horoscope may be admissible in evidence under S. 32, but it must be shown that the person who prepared the horoscope had special means of knowledge. (*McNair, J.*) NONI GOPAL GANGULY *v.* CALCUTTA IMPROVEMENT TRUST. **A.I.R. 1938 Cal. 43.**

——**S. 157**—*Construction — 'Former statement'—Meaning of.*

The words 'former statement' in S. 157 of the Evidence Act mean a previous statement of the witness who is to be corroborated made on another occasion, (*i.e.*) an occasion other than that at which the subsequent statement requiring corroboration is made. (*S.N. Guha and Biswas, JJ.*) HARENDRA KUMAR MANDAL *v.* EMPEROR. **66 C.L.J. 196**

EXECUTION—Revival—'Consigned to record room' —If a 'dismissal'. *See* C. P. CODE, O. 21, R. 57. **39 P.L.R. 967.**

GOVERNMENT OF INDIA ACT (1935), S. 224—*Applicability.*

Although S. 224 of the Government of India Act (1935) contains in effect a reproduction of the terms of S. 107 of the previous Government of India Act, it also contains a proviso which makes it clear that S. 224 has no application of itself to legal proceedings at all. (*Costello Ag. C. J. and Edgley, J.*) BHAGWAN DAYAL *v.* CHANDULAL. **A.I.R. 1938 Cal. 28.**

HINDU LAW—*Debts—Father—Antecedent debt—Son's liability—Mortgage by father to fulfil obligation under prior usufructuary mortgage taken by him—If binding on son.*

There is no warrant for holding that the liability of a Hindu son to pay the antecedent debts of his father would not extend to any liability incurred otherwise than by the advancement of a sum in cash to the father. A Hindu is obviously bound to pay any sum which is lawfully due from his father, provided that the father's liability is not in any way tainted with immorality or illegality. Where the father takes a usufructuary mortgage of certain properties obtaining possession of the properties and undertakes by that mortgage to pay off the debt of the mortgagor, the obligation to pay off that debt is a lawful obligation which he is bound to fulfil and justified in fulfilling. If for fulfilling that obligation, he borrows money under a simple mortgage, the son is bound by that agreement of mortgage; and the obligation to pay being antecedent to the transaction of mortgage executed by the father, the mortgage is clearly binding on the son. (*Niamatullah and Allsop, JJ.*) CHATAR SEN *v.* RAJA RAM. **1937 A.W.R. 1065 = 1937 A.L.J. 160**

HINDU LAW.

——*Partition—Accounts*—Karta's *liability in regard to—Finality of his statements—Limits of rule.*

The position of a *karta* of a joint Hindu family is not that of a trustee or agent. He is only bound to account for which he had in fact received and not for what he might and ought to have received, by a more prudent management. He is under no obligation to save or economise. His power to spend money is only limited by family purposes. But he cannot misappropriate the family property or its income. He is only liable to account for the assets as they are or as they exist. But this does not mean that his statement is final and that the members are bound to accept his *ipse dixit*. They have a right to have it verified in the usual way. (*Guha and Mitter, JJ.*) NARENDRA NATH ROY *v.* ABANI KUMAR ROY. **42 C.W.N. 77.**

——*Partition—Property acquired by widow on partition among sons—Nature of.*

The property which a widow acquires under Mitakshara Law on a partition among sons cannot be treated as property given to her in lieu of her maintenance but should be treated as property in the same category as one inherited from the husband. (*Stone, C.J. and Bose, J.*) BHAGWANTRAO JAIRAM *v.* PUNJARAM SADASHIV. **A.I.R. 1938 Nag. 1.**

——*Succession—Illegitimate son—Position of—Right to share in property given to widow on partition.*

Among Sudras the illegitimate son is the father's heir and except in so far as his rights have been curtailed by express texts, he must be treated as such. After his father's death he becomes a member of the coparcenary —a member with curtailed rights but nevertheless a member. Where therefore a widow acquires property on a partition between legitimate and illegitimate sons and subsequently dies, the illegitimate sons can claim a share in the property allotted to her. (*Stone, C.J. and Bose, J.*) BHAGWANTRAO JAIRAM *v.* PUNJARAM SADASHIV. **A.I.R. 1938 Nag. 1.**

——*Succession—Obstructed heritage—Male issue of acquirer—If get an interest by birth.*

The male issue of the acquirer do not obtain an interest by birth in property which has descended as obstructed heritage. (*Vivian Bose, J.*) OFFICIAL RECEIVER, AMROATI *v.* SRIDHAR. **A.I.R. 1938 Nag. 7.**

——*Widow—Alienation by—If void—Suit by reversioner to avoid—Liability of alienee for mesne profits.*

An alienation made by a Hindu widow being merely voidable and not void, the alienee cannot be made liable for mesne profits to the reversioner until the alienation has been avoided. (*Pollock, J.*) PARASHURAM *v.* BALAKRISHNA. **20 N.L.J. 278.**

INCOME TAX ACT (XI OF 1922), S. 4—Appropriation by creditor, contrary to agreement with debtor —Incometax authorities—If can ignore. *See* CONTRACT ACT, Ss. 59 TO 61. **A.I.R. 1938 Cal. 20.**

——**S. 4 (2)**—*Foreign business—Debts due in respect of—Assignment of* [illegible]
of such debts—If [illegible]
India on that dat [illegible]

Where in disch [illegible]
a fore [illegible]
Britisl [illegible]
Hel [illegible]
Britisl [illegible]
though no money was actually realised in respect of the assigned decree. (*Beatley, C.J., King and Gentle, JJ.*) COMMISSIONER OF INCOME TAX, MADRAS *v.* MANICKAM CHETTIAR. **46 L.W. 908 (F.B.).**

INTERPRETATION OF STATUTES.

——**S. 66**—*Reference—Form of questions—Combining several questions in the form of one—Question in the abstract—Propriety of.*

When questions are asked by the Commissioner of Income-tax for the opinion of the High Court, one question should be asked at a time and an attempt should not be made to combine two or more questions in the form of one question. The questions should not be divorced from the facts of the particular case and should not be put in the abstract. (*Derbyshire, C.J. and Costello, J.*) GOPIRAM GOBINDRAM, *In the matter of.* **A.I.R. 1938 Cal. 20.**

INTERPRETATION OF STATUTES—*Duty of Court.*

The duty of Court is to interpret the Code (in this case Penal Code) and not to encroach on the prerogative of the Legislature. (*McNair and Biswas, JJ.*) GOLOKE BEHARY TAKAL *v.* EMPEROR. **66 C.L.J. 225 = 42 C.W.N. 129.**

——*Literal construction—If can prevail against clear intention of Legislature.*

It is a well-recognised canon of construction that the more literal construction ought not to prevail if it is opposed to the intentions of the Legislature as apparent from the statute, and if the words are sufficiently flexible to admit of some other construction by which the intention will be better appreciated. (*Rupchand Bilaram, Ag.J.C. Dadiba C. Mehta and Lobo, A.J.Cs.*) BACHOO KANDERO *v.* EMPEROR. **A.I.R. 1938 Sind 1.**

——*Literal construction—Rule as to—Limits of.*

It is a cardinal rule of construction that a section of a statute must be construed literally unless (1) the section itself is repugnant to the general purpose of the Act, and (2) there is some other section which cuts down its meaning. (*Ruphand Bilaram, Ag.J.C. and Lobo A.J.C.*) MINHO *v.* EMPEROR. **A.I.R. 1938 Sind 9.**

——*Marginal note—Value of.*

Marginal note is of no value in interpreting a section. (*Rupchand Bilaram, Ag.J.C. and Lobo, A J.C.*) MINHO *v.* EMPEROR. **A.I.R. 1938 Sind 9.**

——*Preamble—Reference to—Ambiguity.*

It is no doubt a principle of construction that the preamble of an Act can be invoked for removing an ambiguity in an Act, but it is equally a well-settled principle that the preamble cannot be invoked for creating an ambiguity in the Act. (*Mitter, J.*) JNANENDRANATH NANDA *v.* JADUNATH BANERJI. **42 C.W.N 81.**

——*Prior state of the law—Object of the legislature—Reference to.*

It is permissible to look into the state of the law at the time when an Amending Act is passed and the object which the Legislature had in view in introducing it, for the purpose of construing a statute provided it is done with a warning that the language of the statute should not be unduly strained by any attempt to bring it in with the supposed intention of the Legislature. (*Nasim Ali and Mukherjea, JJ.*) MAHAMMED HUSHEN *v.* JAMINI NATH. **42 C.W.N. 38.**

——*Retrospective effect* [illegible]

42 C.W.N. 38.

——*Retrospective operation—Acts impairing contracts and affecting vested rights—Duty and practice of Courts.*

Acts which have the effect of impairing contracts and affect vested rights must be strictly construed, and in the case of such laws the Court must lean against giving retrospective effect to their provisions. Unless there is something in the language, context or objects of the Act showing a contrary intention, the duty and practice of Courts of Justice is to presume that the Legislature enacts prospectively and not retrospectively. (*Stone, C.J. and Bose, J.*) BHAGWANTRAO v. DAMODAR.

20 N.L.J. 285.

JUDICIAL OFFICERS' PROTECTION ACT (XVIII OF 1850), S. 1—*Protection under—Limits—Jurisdiction—Meaning of—Order for search by Magistrate—Search carried out by police.*

By S. 1 of the Judicial Officers' Protection Act, a judicial officer is protected if he made the order in the discharge of his judicial duties whether or not within the limits of his jurisdiction, provided that he at the time, in good faith, believed himself to have jurisdiction to pass the order. "Jurisdiction" in the section is to be taken in the sense of authority or power to act in the matter and not in the sense of authority or power to act in a particular manner. Any person executing such an order within the "jurisdiction" of a judicial officer is equally protected. An order of a Magistrate for the search of a shop and seizure of certain tins of oil, therein, though not in the prescribed form, and the carrying out of such an order by a police officer were held to be alike protected, even though the prosecution with reference to which the order was made, ultimately failed. (*Nasim Ali and Mukherjea, JJ.*) SEWALRAM AGARWALLA v. ABDUL MAJID.

42 C.W.N. 50.

JURISDICTION—Civil and Revenue Court—Joint Hindu family—Fixed rate tenancy owned by—Alienation by one member—Suit to set aside and to declare that it is not binding on the family—If excluded from Civil Courts. *See* AGRA TENANCY ACT, Ss. 90 AND 121. **1937 A.W.R. 919=A.I.R. 1938 All. 17.**

LAND ACQUISITION ACT (I OF 1894), S. 9(3)—*Notice under—Failure to serve—Not wilful or perverse—Subsequent proceedings, if void.*

Collector's failure, when it is not wilful or perverse to serve notice of intended acquisition on the occupier or the owner as required by S. 9, Cl. (3), and in the manner laid down in S. 45, does not make the subsequent proceedings void. (*Hasnain, J.*) RAHIMBUX v. SECRETARY OF STATE. **A.I.R. 1938 Sind 6.**

———**S. 23 (1)**—*Market value—Evidence of accepted awards—Examination of owners—Necessity.*

Where in order to enable the determination of the market-value of the acquired property, an award accepted by an owner of an adjacent property is produced in evidence, it is not obligatory, on the part of the Government to examine such owner with reference to the circumstances under which the award came to be accepted. The Government using an accepted award, may or may not examine the owner or the person interested. (*Guha and Mitter, JJ.*) SECRETARY OF STATE v. NAGENDRA KUMAR BOSE. **42 C.W.N. 27.**

LANDLORD AND TENANT—*Admission to tenancy—Admission by zamindar after transfer of zamindari rights—If can be recognised.*

The admission of a person to the tenancy of a holding by a zamindar after he had transferred his zamindari rights to another cannot be recognised. (*Darling, S. M. and Bomford, J.M.*) KISHAN PRASAD v. KARTARA. **1937 R.D. 426.**

———*Admission to tenancy—Proof—Landlord suing person for rent—Such person's name wrongly entered in papers.*

The fact that the landlord sued a person once for arrears of rent because his name was in the papers is no evidence of admission to the tenancy, when the entry of such person's name was an error and he had no right to be entered at all in the papers. (*Bomford, J.M.*) LACHHMINIA v. NAGESHAR PRASAD.

1937 R.D. 400.

———*Admission to tenancy—Proof—Receipt for unspecified sum.*

A receipt for an unspecified sum can not be any proof of admission to any particular holding. (*Darling, S.M. and Bomford, J.M.*) SAT NARAIN MANI TEWARI v. BHUJHAVAN. **1937 R.D. 416=1937 A.W.R. 878.**

———*Building on landlord's land—Licence obtained by tenant to build—Right to build pucca house—Expression "permission for pucca house"—If necessary—Burden of proof.*

A tenant who has got a licence from his landlord to build a house on the landlord's land is entitled to build a *pucca* house, in the absence of proof by the zamindar or landlord that the licence was expressly confined to the erection of *kachcha* construction. It is not necessary for the tenant to establish affirmatively that there was a licence to build a *pucca* house. (*Harries, J.*) SHEO NARAIN v. INDER. **1937 A.W.R. 1038=1937 A.L.J. 1218.**

———*Cess—Drainage cess — Calculation—Amount given in record-of-rights—Value.*

In case of dispute as to the amount of drainage cess, it is futile for the Court to try to calculate either the amount of drainage cess or road cess payable by each tenant. The Court ought to rely upon the record-of-rights. (*M. C. Ghose, J.*) TULSI CHARAN BHATTACHARJEE v. HARENDRA NATH MUKERJEE.

66 C.L.J. 164.

———*Person holding* bila tasfia—*If can acquire grove rights.*

No grove rights can accrue to one who is holding *bila tasfia*. (*Darling, S.M. and Bomford, J. M.*) BILASI SINGH v. RAM CHANDER SINGH.

1937 R.D. 462.

———*Khasmahal tenant—If can grant permanent rights.*

A khasmahal tenant of land can create permanent rights of tenancy within his holding. (*Rowland, J.*) MADHUSUDHAN SWAIN v. DURGA PRASAD.

A.I.R. 1938 Pat. 7.

———*Permanent tenancy—Presumption—Lost grant—Origin of tenancy unknown.*

A landlord brought a suit to eject a tenant from homestead land. It was found that the origin of the tenancy was unknown and untraceable and there were repeated transfers of the tenancy to the knowledge of the landlord. The tenant had erected substantial structures to the knowledge of the landlord or his predecessor. The rent was paid uniformly until the commencement of the current settlement during which the rent was changed slightly.

Held, that a presumption of permanent tenancy created by a presumed lost grant could be drawn under the circumstances and the tenant was not liable to be ejected. (*Rowland, J.*) MADHUSUDHAN SWAIN v. DURGA PRASAD. **A.I.R. 1938 Pat. 7.**

LEASE—Construction— Mere agricultural lease or *theka*—Deed giving right to rents and profits and full rights of transfer—Rights made heritable—Immunity from ejectment under any circumstances—Nature of right conferred—Lessee—If *thekadar*—Rights—Saleability in execution. *See* AGRA TENANCY ACT, S. 203. **1937 A.W.R. 1043=1937 A.L.J. 1166.**

LEASE.

——*Lease for propagating lac—Subsequent lease in respect of same area to another for bringing jungle under cultivation—Leases, if consistent.*

It is open to a Zamindar to give a lease for propagating lac and subsequently to give a lease in respect of the same area to another for bringing jungle under cultivation. There is nothing inconsistent in the two leases and if the subsequent lessee in clearing his land damages the trees of the previous lessee, the latter will have a remedy in the Civil Court but not in the Revenue Court. (*Bomford, J. M.*) RAGHUBIR *v.* ASHRAF ALI. 1937 R.D. 470.

LIMITATION ACT (IX OF 1908), S. 6—*Alienation by limited owner—Major reversioners in existence not challenging in time—Minors, if entitled to extension—After-born reversioners—Rights.*

Where major reversioners existing at the time of alienation by a limited owner and competent to challenge the alienation fail to do so within period of limitation, a suit by other reversioners, minors at the time of alienation, to set aside the alienation, is not barred. The suit is also not barred against a reversioner born after alienation. For, as the existence of a reversioner clothes *an after-born reversioner with a right to sue, though an* after-born reversioner cannot claim the benefit of S. 6, Limitation Act, in his own right, he cannot be deprived of the benefit of the extended period claimable by the reversioner in existence at the time of the alienation. (*Addison and Din Mohammad, JJ.*) HARNAM SINGH *v.* AZIZ. A.I.R. 1938 Lah. 1.

——S. 19—*Acknowledgment under—If should be one falling under Stamp Act—Stamp—Necessity.*

An acknowledgment falling under S. 19, Limitation Act, need not necessarily be a stamped acknowledgment falling under Sch. I, Art. 1 of the Stamp Act. The latter must be written with the intention of supplying evidence of the debt; whereas a document containing an admission of liability, such as a letter reciting a settlement of accounts, would save limitation under S. 19, though not stamped. (*Pollock, J.*) TILAKCHAND *v.* RAMKISAM. 20 N.L.J. 276.

——S. 19—*Implied acknowledgment— Promissory note—Payment by debtor—Endorsement on subsequent date—If amounts to acknowledgment.*

[illegible]

is an acknowledgment within the meaning of the section. (*Ba U, J.*) M.K. KASIVISWANATHAN CHETTYAR *v.* R.M.S.L. LAKSHMANAN CHETTYAR. 1937 Rang L.R. 421.

[illegible]

The bond provided: "A [illegible] Rs. 9,091-0-3 is due from [illegible] agreement has taken place [illegible] we pay you Rs. 7,000 by [illegible] this amount by the date [illegible] balance, Rs. 2,091-0-3 and pass a receipt in full satisfaction of the bond, but if we do not pay you Rs. 7,000 by the date fixed, we shall be liable to pay the whole of the amount of Rs. 9,091-0-3, and we shall pay you compound interest at 10 annas per cent. per mensem on this amount from the date of the bond".

Held, that this was not a single bond and hence not governed by Art. 67 but that either Art. 68 or Art. 80 applied and the date when limitation began was 24th May, 1930. (*Stone, C.J. and Vivian Bose, J.*) YESHWANT RAO *v.* LAXMAN RAO. A.I.R. 1938 Nag. 13.

LIMITATION ACT (1908), Art. 113.

——Art. 68—Applicability—Suit on a bond not being a single bond. *See* LIMITATION ACT, ARTS. 67, 68 AND 80. A.I.R. 1938 Nag. 13.

——Art. 80—Applicability—Suit on bond not being a single bond. *See* LIMITATION ACT, ARTS. 67, 68, AND 80. A.I.R. 1938 Nag. 13.

——Arts. 89 and 90—*Applicability—Agent acting under salary chit and power-of-attorney—Fresh salary chit on different terms—No new power-of-attorney—Suit against agent—Allegations of acts in excess of authority—Article applicable—Separate agencies, if made out.*

The defendant was the agent of the plaintiff under a salary chit dated 28th April, 1919, which was for a period of three years. He was also given a power-of-attorney to facilitate the conduct of business. In August, 1922, another salary chit was executed wherein the salary and the percentage of commission were varied but the same power of attorney was continued. The business of the agency was terminated on 29th January, 1925 The principal instituted the suit for [illegible]

[illegible] ly that the two agencies under the two salary chits should be treated as distinct agencies and the suit in regard to the first period should be held to be barred.

Held, that though, as the principal was in possession of the accounts relating to the agent's conduct of the agency, the principal had not to pray for a general accounting and only took exception to particular matters appearing in the accounts and alleged that in certain transactions the agent had acted in excess of his authority, yet the suit was one for accounts governed by Art. 89 and not by Art. 90, and that as the object of the salary chit was only to fix the salary of the agent and as there was a continuous course of management by the agent and no new accounts were opened or no new power of attorney was executed in regard to the second period, the entire period from 1919 up to [illegible]

—APPLICABILITY. A.I.R. 1938 Mad. 39.

——Art. 113—*Applicability—Agreement to finance litigation—Date 'fixed'—What is—Date of decree—Meaning.*

[illegible] y construed and [illegible] would by law [illegible] ovisions of law, [illegible] e rights, can be [illegible] his case. [illegible] Art. 113 is [illegible] nt on the [illegible] between *A* [illegible] itigation in respect of certain property and in return should get certain share of the property after the passing of the decree. It was also provided that if an appeal was preferred from the decree to the Privy Council, *B* would be entitled to a greater share. *B* brought a suit for the specific performance of the contract more than three years after the date of the decree but within three years of the refusal to perform the contract.

LIMITATION ACT (1908), Art. 120.

Held, that the date of the decree could not be the time fixed within meaning of the first part of Art. 113 as *B* was entitled to get the share after the decree which meant when it became unassailable. As the decree, before appeal from it to the High Court and then to Privy Council, could not be said to be unassailable, it must be held that no date for specific performance of the contract was 'fixed.' The second part of Art. 113 therefore applied and the suit was within time. (*Coldstream and Abdul Rashid, JJ.*) ALOPI PARSHAD *v.* COURT OF WARDS. **A.I.R. 1938 Lah. 23.**

——**Art. 120**—Applicability—Suit for correction of record-of-rights. *See* B. T. ACT, S. 111-B AND LIMITATION ACT, ART. 120. **42 C.W.N. 96.**

——**Art. 141**—*Starting point—Successive female holders—Time—When begins to run—Death of last female holder—Suit within 12 years of—If in time.*

In a case where there has been more than one female heir in succession, the suit has to be brought within 12 years of the death of the last female holder. (*Pollock, J.*) PARASHRAM *v.* BALAKRISHNA. **20 N.L.J. 278.**

——**Arts. 166-181**—*Applicability—Application by a party under S. 47, C. P. Code, to declare a sale a nullity.*

Art. 166 must be confined to cases where the sale is voidable only and not void and where the execution sale is a nullity; if a party files an application under S. 47, C. P. Code, to have it pronounced a nullity or for setting it aside for safety's sake to avoid future difficulties, the proper article is Art. 181 and not Art. 166 of the Limitation Act. (*Nasim Ali and Mukherjea, JJ.*) NIRODE KALI ROY CHOUDHURY *v.* RAI HARENDRA NATH. **42 C.W.N. 87.**

——**Art. 181**—Applicability—Application by a party under S. 47, C. P. Code, to declare a sale a nullity. *See* LIMITATION ACT, ARTS. 166 AND 181. **42 C.W.N. 87.**

——**Art. 182 (5)**—*Step-in-aid—Application for payment of money realised in execution.*

Unless an application "advances or furthers" execution, it cannot be held to be a step in aid of execution. An application for payment of money realised in execution of a decree is not, therefore, a step-in-aid of execution. Payment after realisation is a purely ministerial act, when there is no dispute about it. (*Bhide, J.*) AMLOK CHAND *v.* HOSHIAR SINGH. **39 P.L.R. 1027.**

MAHOMEDAN LAW—*Gift—Delivery of possession—Gift to daughter.*

To constitute a valid gift under Mahomedan Law it is necessary that the gift should be accompanied by such delivery of possession as the gifted property is susceptible of. Where a father makes a gift of land to his daughter who is not a minor and who is living with him, attornment by the tenants to the donee would be a sufficient delivery of possession. If no such attornment takes place, the delivery of the deed of gift to the donee is not sufficient to validate the gift. (*Bhide, J.*) SHER DAD *v.* MT. ZAFAR JAN. **39 P.L.R. 1014.**

——*Marriage—Minor girl entering into contract of marriage with father's assent—Validity of marriage—Option of puberty—Availability.*

Where a Mahomedan girl who was past the age of discretion but had not attained the age of puberty, contracts a marriage herself, with the consent of the father, that is where the father had not expressed consent at the time of the marriage on behalf of the bride as her legal guardian, the marriage is not a nullity out and out. In such a case the girl can avail herself of the option of puberty. (*Mukherjea, J.*) SM. JOYGUNNESSA BIBI *v.* MAHAMMAD ALI BISWAS. **42 C.W.N. 69.**

MALICIOUS PROSECUTION.

——*Succession—Debts of deceased—Sale by heirs—Right of creditor to follow property.*

The creditor of a deceased Mahomedan cannot follow his property in the hands of a *bona fide* purchaser for value from his heirs. (*Bhide, J.*) MOHAMMAD AKBAR *v.* BAQA MOHAMMAD. **39 P.L.R. 974 (1).**

MALICIOUS PROSECUTION—*Damages—Measure of—Considerations—Duty to give best proof available.*

Law has not laid down what shall be the measure of damages in an action for malicious prosecution. The measure is vague and uncertain depending upon a variety of facts, conduct of the party and circumstances of the case. When a wrong has been committed, the person claiming damages must suffer from the impossibilities of actually ascertaining the amount of damages but that does not mean that he is exonerated from giving the best proof available for the extent of damages suffered by him. (*Haveliwala, J.*) KANYALAL *v.* MAHOMED IDRIS ABDULLAH. **A.I.R. 1938 Sind 11.**

——*Defence—Honest belief in guilt of accused—Sufficiency.*

Where it is pleaded in defence to a suit for damages for malicious prosecution that the defendant honestly believed in the guilt of the plaintiff, the Court has not to consider the state of the defendant's mind in prosecuting a man. In order to justify a defendant, there must be a reasonable cause such as would operate on the mind of a discreet man; there must also be a probable cause such as would operate on the mind of a reasonable man. (*Haveliwala, J. C.*) KANYALAL *v.* MAHOMED IDRIS ABDULLAH. **A.I.R. 1938 Sind 11.**

——*Essentials to be proved—Existence of malice—Question of fact—Want of reasonable and probable cause—If itself evidence of malice.*

In order to succeed in a case of malicious prosecution, the person suing has to prove that he was innocent and his innocence was pronounced by a tribunal, that there was a want of reasonable or probable cause for the prosecution and that the proceedings were initiated by a malicious spirit, that is from indirect or improper motives and not in furtherance of justice. But the burden lies on the person suing to prove want of reasonable and probable cause and the existence of malice. Malice, like intention or motive is a state of one's mind known to himself. The existence of malice is purely a question of fact to be gathered from the circumstances of the case and the conduct of the parties, and the absence of a reasonable and probable cause is not by itself sufficient evidence of malice. (*Haveliwala, J.C.*) KANYALAL *v.* MAHOMED IDRIS ABDULLAH. **A.I.R. 1938 Sind 11.**

——*"Prosecution"—Meaning of—When commences—Prosecution by police—Complainant engaging and paying Counsel—Liability of.*

Malicious "prosecution" begins when proceedings are instituted in a Court, although it may be very material to consider the steps taken by the complainant before that date with a view to determining who is the person really behind the prosecution. Although the prosecution might be a police prosecution, if the defendant was active as complainant and engaged and paid Counsel who conducted the proceedings before the Magistrate, the defendant must in truth and fact be considered to be the real prosecutor and becomes liable if the other conditions are satisfied. (*Stone and Puranik, JJ.*) KODULAL *v.* KALLULAL. **20 N.L.J. 261.**

——*"Prosecution"—When commences—Initiation and prosecution—If enough.*

The prosecution commences as soon as the complaint is made; and it is not necessary in order to maintain an action for malicious prosecution that the charge should

have been acted upon by a Magistrate or a conviction arrived at and it is not necessary that the proceedings should have been heard out to the sufficient if it is shown that the criminal were initiated and that the accused was prosecuted. (*Havelivala, J.C.*) KANYALAL *v.* MAHOMED IDRIS ABDULLAH. **A.I.R. 1938 Sind 11.**

——*"Reasonable and probable cause"—What amounts to.*

A business man who finds his goods in another man's godowns and finds them there as a consequence of a forged railway receipt is certainly entitled to think that there has been a case of forgery; such a man, whether or not he is malicious, must be taken to have reasonable and probable cause for taking steps for launching a prosecution. (*Stone and Puranik, JJ.*) KODULAL *v.* KALLULAL. **20 N.L.J. 261.**

MASTER AND SERVANT—*Rights of servant—Wages for period of service—Servant leaving without notice—Master claiming damages—Procedure.*

A monthly servant who leaves service without giving notice is entitled to be paid down to the date when wages were last due, but is not entitled to be paid any wages for that portion of the time during which he has served since wages were last due. If in a suit by the servant for wages due, the master wishes to claim that he is entitled to retain that money as damages for leaving without notice, then he could only claim that either as a set off or as damages, and such a claim would have to be stamped. (*Baguley, J.*) TRIBENI MISSER *v.* JAGARNATH BHAGWANDAS. **1937 Rang.L.R. 444.**

MORTGAGE—*Integrity—Breaking of—What amounts to—Suit on prior mortgage impleading subsequent mortgagee—Decree—Sale of part of property—Purchase by members of puisne mortgagee's family—Integrity of subsequent mortgage—If broken by such sale and purchase.*

In a suit to enforce a prior mortgage a decree was passed for sale. The mortgagors and the subsequent mortgagee who were parties to the suit failed to redeem ... the subsequent mortgagee for sale of the remaining property in enforcement of his mortgage the mortgagors pleaded that the integrity of the mortgage was broken up by reason of the execution purchase and that they were therefore entitled to redeem the property piecemeal.

Held, that the property left for the satisfaction of the second mortgage was the only property on which it could operate and that the integrity of the mortgage had not in any sense been broken. (*Niamatullah and Allsop, JJ.*) KABULCHAND *v.* BADRI DAS. **1937 A.W.R. 1070 = 1937 A.L.J. 1240 = A.I.R. 1938 All. 22.**

——*Rights of mortgagor—Usufructuary mortgage—Unpaid balance of loan—Suit to recover—Nature of—If maintainable—Measure of compensation.*

In the case of possessory mortgage where a mortgage has been completed and possession has been given to the mortgagee but the full amount of the consideration is not paid to the mortgagor, a suit by the mortgagor for the balance of the amount due is maintainable as a suit for compensation and the measure of compensation is the difference between the amount stipulated to be paid by the mortgagee and the amount actually paid by him. Such a suit is not for the specific performance of a contract. (*Jail Lal, J.*) THAKAR DAS *v.* AMAR CHAND. **A.I.R. 1938 Lah. 21.**

MUTATION—Theka granted by mortgagee pending ... applying for mutation after decree by Civil Court—Application opposed by thekadar—Mortgagee's remedy. *See* AGRA TENANCY ACT, S. 237. **1937 R.D. 391.**

OUDH CIVIL RULES R. 269-A 1 (b)—*Pre emption suit—Valuation for purposes of jurisdiction.*

The valuation of a suit for pre emption for purposes of Jurisdiction should, according to R. 269-A 1 (*b*) of the Oudh Civil Rules, be thirty times the land revenue. (*Thomas and Zia-ul-Hasan, JJ.*) MANRAJ KUER *v.* BASANT TAI. **171 I.C. 891 = 1937 O.L.R. 579 = 1937 O W.N. 1217.**

OUDH LAWS ACT (XVIII OF 1876), S. 5—Effect—Position of a wife to whom dower debt is due. *See* T. P. ACT, S. 53—FRAUDULENT TRANSFER. **1937 O W.N. 1176.**

——**Ss. 6 to 13**—*Partial pre-emption—Permissibility.*

The Legislature in enacting the provisions of the Oudh Laws Act did not take into consideration the case of a composite sale deed in which several distinct properties are sold together for a lump price. Accordingly suits for pre-emption of part of the properties sold which necessarily involve apportionment of price are not maintainable. (*Srivastava, C.J. and Smith, J.*) BAIJ NATH *v.* MAHABIR PRASAD. **171 I.C. 987.**

——**S. 9**—*Under-proprietor—If can pre-empt a share of superior proprietary right.*

An under-proprietor is not entitled under S. 9 of the Oudh Laws Act to pre-empt a share of the superior proprietary rights. 61 I.A. 235, Rel on. (*Thomas and Zia-ul-Hasan, JJ.*) MANRAJ KUER *v.* BASANT TAI. **171 I.C. 891 = 1937 O L.R. 579 = 1937 O.W.N. 1217.**

OUDH RENT ACT (XXII OF 1886), S. 7-A—*Deed of gift executed in respect of Sir ...—Donor subsequently suing to have it set aside on ... ground of fraud—Suit withdrawn on payment of consideration by donee—Effect of—Donor, if entitled to ... proprietary rights.*

Under S 7-A of the Oudh Rent Act no ex-proprietary rights can accrue as the result of a voluntary alienation through a deed of gift. Where, after the execution of a deed of gift in respect of certain *Sir* land, the donor sues to have that deed set aside on the ground that it had been executed as a result of fraud and undue influence, and the suit is compromised and withdrawn on the donee paying a certain sum of money, the payment of this consideration for the withdrawal of the suit cannot convert the deed of gift into a sale, and no ex-proprietary rights therefore accrue to the donor in the *Sir* land in question. (*Darling, S.M. and Bomford, J.M.*) GHULAM MUSTAFA *v.* HASIBULNISA. **1937 R.D. 439.**

PARTNERSHIP—Interest—Right to—Advances by partner. *See* PRINCIPAL AND AGENT—SUIT FOR ACCOUNTS. **A.I.R. 1938 Mad. 38.**

PENAL CODE (XLV OF 1860), Ss. 109 and 302—Charge under—Non specification of species of abetment—Legality. *See* CR.P. CODE, SS. 222 (1) AND (2). **66 C.L.J. 196.**

——**S. 120-B**—*Charge for conspiracy—Known overt act amounting to an offence—Proper procedure.*

Per *Biswas, J.*—Where proof of the conspiracy is sought to be rested on proof of participation in an overt act which itself amounts to an offence, the proper course is to put the accused on trial for that offence. It

PENAL CODE (1860), S. 120-B.

is not right in such a case to charge conspiracy on the off chance of being able to secure a conviction for the overt act. (*McNair and Biswas, JJ.*) GOLOKE BEHARY TAKAL *v.* EMPEROR. 42 C.W.N. 129 = 66 C.L.J. 225.

——Ss 120-B, 302 and 201—*Charge under S. 120-B read with Ss. 302 and 201—Single conspiracy charged—Prosecution if can prove different conspiracy—Conviction for offences alleged to constitute the object of the conspiracy—Legality—Cr. P. Code, S. 237, if applies.*

A conspiracy must be established as charged and the prosecution is not entitled to prove a different conspiracy in furtherance of a minor offence. Where the charge is one of a single conspiracy, conspiracy to commit both an offence under S. 302 and an offence under S. 201, the prosecution must stand or fall according as they can or cannot establish the conspiracy as charged. A conspiracy to commit a particular offence or offences having been charged, it would not be open to the prosecution to prove a different conspiracy. Nor could the prosecution, conspiracy failing, ask for a conviction for one or more of the offences alleged to constitute the object of the conspiracy, or for any minor offence. To such a case, S. 237 of Cr. P. Code hardly applies, for it does not deal with a case where the evidence falls far short of proving the offence which the prosecution had set out to prove. (*McNair and Biswas, JJ.*) GOLOKE BEHARY TAKAL *v.* EMPEROR. 42 C.W.N. 129 = 66 C.L.J. 225.

——S. 193—*False evidence—Knowledge of falsity—Sufficiency—Direct bearing on material issue—If necessary.*

For the purpose of proving an offence under S. 193 of the Penal Code, it is sufficient, if it is shown, that the false evidence was intentionally given, that is to say, the person knowing the statements to be false made them advisedly and with the intent of deceiving the Court. It is not necessary in such a case that the false evidence should always be concerning a question material to the decision of the case before the Court in which the false evidence is given. (*Guha and Lethbridge, JJ.*) JUGAL CHANDRA DALAL *v.* EMPEROR. 42 C.W.N. 31.

——S. 477-A—*Falsification of accounts—Intent to defraud—Meaning —Ignorance that wrongful loss would be caused—If a good plea in defence.*

A reference to S. 25 of the Penal Code shows that the expressions 'fraudulently' and 'with intent to defraud' are synonymous. If there is the intention by the deceit practised to cause wrongful loss that is dishonesty; but even in the absence of such an intention, if the deceitful act wilfully exposes any one to risk of loss, there is fraud. Where the accused had prepared certain bills for payment to a contractor on the basis of fictitious entries in his measurement book, of works which admittedly were not measured, and thereby enabled the contractor to draw more sums than were due to him.

Held, that there was wilful falsification of measurement book and bill with intent that the contracter's bill might be passed without measurements and that these acts were fraudulently and amounted to an offence punishable under S. 477-A, Penal Code.

Held further, that it was no answer to the charge, for the accused to say that he did not know that wrongful loss would be caused to one party and a wrongful gain to the other. (*Varma and Rowland, JJ.*) SUKHAMOY MAITRA *v.* EMPEROR. 16 Pat. 688.

——S. 478—*Trade mark—Requisites—Mark to be "distinctive"—Pictorial representation.*

A trade mark as defined by S. 478, Penal Code, implies that the mark must be 'distinctive' in the sense of being "adapted to distinguish the goods of the proprietor of a trade mark from those of other persons". A merely descriptive mark would be obviously not a 'distinctive.' mark'. The device of a pictorial representation may be a trade mark, but it will still have to be 'distinctive'. (*Biswas, J.*) LOKE NATH SEN *v.* ASWINI KUMAR DEY. 66 C.L.J. 210.

——S. 482—*Offence under—Facts to be determined.*

Where a person is charged with an offence under S. 482, Penal Code, what the Court has to determine is whether the trade mark claimed by the complainant was a 'distinctive' mark, and for that purpose, it has to take into consideration the extent to which its user had rendered the mark in fact distinctive of the goods in question. (*Biswas, J.*) LOKE NATH SEN *v.* ASWINI KUMAR DEY. 66 C.L.J. 210.

POSSESSION—*Suit for, based on title—Compensation for improvements* bona fide *made by defendant—Latter, if can claim in defence.*

It is a settled principle that where the plaintiff who has the legal title sues to recover possession of land from the defendant, the Court will not allow the plaintiff to recover except on terms of allowing to the defendant sums of money which he had spent on permanent improvements, if the circumstances raise an equity in the defendant's favour. (*M. C. Ghose and Mitter, JJ.*) MAJDUDDIN *v.* LUNGLA SYLHET TEA CO. 42 C.W.N. 110.

PRACTICE — *Appeal—New plea—Objection as to frame of suit.*

Where a suit is brought under O. 21, R. 63 by a defeated claimant to declare his right to attach certain property after setting aside a transfer as having been made with a view to defeat creditors and no objection to the frame of suit (*i.e.*) as not being of a representative character, had been raised in the trial Court, but which was raised only for the first time in appeal, such an objection could not be allowed in the appellate Court. (*Smith and Madeley, JJ.*) GIRRAJ *v.* SANKTA PRASAD. 171 I.C. 927 = 1937 O.L.R. 582 = 1937 O.W.N. 1169

——*Appeal—New point—Plea that mortgage being* lahan gahan *no decree for sale is permissible—Permissibility in appeal—Case in lower Court proceeding on basis that decree for sale or foreclosure can be passed.*

A plea that a mortgage is a mortgage by conditional sale and not an anomalous mortgage, and that the mortgage was not entitled to a decree for sale cannot be permitted to be raised for the first time in appeal, when that point was not raised in the trial Court and the case has proceeded there on the basis that the mortgage was a type which enables either a decree for sale or for foreclosure being passed.

Quaere.—Whether a *lahan gahan* mortgage comes within the definition of a mortgage by conditional sale. (*Stone, C.J. and Digby, J.*) BHAGWANTRAO *v.* DAMODAR. 20 N.L.J. 285.

——*New plea—Plea not set up in pleadings—If can be allowed to be set up.*

A party cannot be allowed to change his case set up in the pleadings and to urge a new case. Where in a suit for ejectment, the defendant claims in his written statement that he is the full owner of the premises, he should not he allowed to set up a case that he is a licensee which he has never pleaded, and claim immunity from ejectment on that ground. (*Mahomed Ismail, J.*) MAHOMED HASAN *v.* BUDDHU. 1937 A.W.R. 1085 = 1937 A.L.J. 1297 = A.I.R. 1938 All. 32.

——*Pleadings—Amendment—Court holding suit not cognizable by it—Amendment bringing suit within*

PRE-EMPTION.

jurisdiction of Court—Refusal on ground that Court not competent to allow a suit not within jurisdiction—Propriety.

It may be technically correct that a Court which has no jurisdiction to entertain a suit is not competent to allow an amendment of the plaint which, if granted, would bring the suit within its jurisdiction; but such a view is of no practical importance in a case where the amended plaint would be within the jurisdiction of the Court; for it is open to the plaintiff to amend his plaint as soon as it is returned to him and then re-present it in the same Court which would then be bound to entertain

Where the property by virtue of the ownership of which a plaintiff had a right of pre-emption

decree for pre-emption, puts a plaintiff out of Court. (*Thomas and Zia-ul Hasan, JJ.*) MANRAJ KUER *v.* BASANT TAI. 171 I.C 891=
1937 O.L.R. 579=1937 O.W.N. 1217.

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 43—*Effect of—Acts of insolvent subsequent to discharge—Validity.*

Although under S. 43 it is the duty of the discharged insolvent to assist the C
of his property, this doe
him subsequent to his
invalid, but only that in some circumstances the discharge may be revoked. An order of conditional discharge is not a
(*Roberts, C.J. a*
CHOTALAL.

——S. 52—*Mortgage of book debts—Reputed ownership of mortgagor—How to put an end to—Taking possession—If enough—Subsequent insolvency of mortgagor—Effect.*

prima facie leaves them—and voluntarily leaves them—in the order and disposition and reputed ownership of the assignor. In view of the fact that he might at any time since the commencement of the security by giving notice have terminated his consent to the insolvent's reputed ownership, it is not open to him if he waits until the very last moment to say that he has
do it. In 1931 a person mortgaged his b
5th January, 1937, the assignee took po
transferor's property under the charge a
press notices to the same effect at the
express notice of the charge was despa
debtors. On 6th January, 1937, the tra
and got himself adjudicated insolvent;

Held, that the act of the assignee did not constitute notice to the debtors. It did not result in ending the reputed ownership of the insolvent. Hence the debts outstanding on 6th January, 1937, were property of the insolvent divisible among his creditors. (*Braund, J.*) AVIET STEPHENS, *In the matter of.*
A.I.R. 1938 Rang. 1.

PROV. INSOL. ACT (1920), S. 28.

PRINCIPAL AND AGENT—*Suit for accounts—Agent entitled to share of profits—Interest on capital—If allowable.*

The ordinary rule of law as between partners or as between the principal and an agent who is paid for his services by a share of the profits of the business is that interest on capital is not to be charged in taking accounts unless there is some agreement to that effect. The agreement between a principal and agent provided that 'interest expenditure' was to be allowed before profit was ascertained.

Held, that the provision in the agreement meant that

credit transactions on termination of agency—Agent's right to credit in respect of those assets

isiness, parti-
t transactions
lizable assets,
events, *i.e.*,
on account of change in the situation of the debtors or because of laches or negligence on the part of the principal or his agent in making the collection some of these outstandings have not been realized, should not be insisted on to the prejudice of the agent in calculating the profits in the taking of accounts between the principal and agent in cases where the agent is to be remunerated by a share in the profits. (*Varadachariar and Pandrang Row, JJ.*) SUBRAMANIA IYER *v.*
1938 Mad. 38.

(V OF 1920),
—*Liability of transferee for mesne profits—Question as to—Jurisdiction of Court to inquire into.*

perty, on the transfer being annulled. Whether it should inquire into it or not is a matter for the discretion of the Court. (*Pollock, J.*) KISANLAL *v.* DINAJI.
20 N L J. 271.

—S. 4(1)—*Construction—"Or of any nature whatsoever"—Meaning—If includes all questions of whatever nature—*Ejusdem generis *rule.*

The terms of S. 4(1) of the Provincial Insolvency Act are very wide. The phrase, "or of any nature whatsoever," though very wide, must be read in conjunction with the earlier part of the section which refers to "question whether of title or priority" and with the opening words of the section "subject to the provi-

BUDHSEN *v.* ASHARFI LAL. 1937 A.L.J. 1071=
1937 A.W.R. 1068=A.I.R. 1938 All. 28.

——S. 28—*Hindu manager's insolvency—Debts due from manager brother—Shares of others, if vest in Official Receiver.*

In a joint Hindu family consisting of brothers, on the insolvency of the brother, who is a manager of the family, the shares of other brothers do not vest in the

PROV. INSOL. ACT (1920), S 28.

Official Receiver when such manager brother is adjudged insolvent for debts due personally from him. (*Jai Lal, J.*) KISHAN LAL *v.* LAL CHAND.

A.I.R. 1938 Lah. 20.

——Ss. 28 (2) (7) and 37—*Leave of Court—Absence—Suit after presentation of petition for but before adjudication—Relation back—Limits—Subsequent annulment, effect of.*

It is not imperative on a creditor to obtain leave to commence a suit when his debtor has merely applied to be adjudicated insolvent. Subsequent adjudication would not affect the maintainability of a suit without such leave. The intention of Sub-S. (7) is only that the title of the Court or the Receiver appointed by it to the insolvent's property shall relate back to the date when the petition for adjudication was filed. When an adjudication is annulled, it is annulled for all purposes and the position with reference to a suit filed without leave of Court is as though there had never been any necessity for obtaining leave of the Court. (*Panckridge, J.*) CHANDMULL *v.* SATYA CHURN.

42 C.W.N. 34.

——S. 28 (7)—Relation back—Limits of rule. *See* PROV. INSOL. ACT, SS. 28 (2) (7) AND 37.

42 C.W.N. 34.

——S. 37—Effect of annulment—Suit filed without leave of Court. *See* PROV. INSOL. ACT, SS. 28 (2) (7) AND 37. 42 C.W.N. 34.

——S. 75 (1)—*Second appeal—Scheme propounded by Official Receiver accepted by Insolvency Act and by District Judge on appeal—Provision for higher rate of interest than permissible under Act—Second appeal on ground of—Maintainability.*

Where the Official Receiver in an insolvency propounds a scheme which receives the approval of the Insolvency Court and also of the District Judge on appeal, no second appeal lies to the High Court under S. 75 (1) of the Provincial Insolvency Act on the ground that the scheme in question allows a higher rate of interest on the debts than is permissible under the Act. Such a question is not one in respect of which a second appeal lies to the High Court from the District Court. (*Thom Ag.C.J. and Mahomed Ismail, J.*) BUDHSEN *v.* ASHARFI LAL.

1937 A.L.J. 1071=1937 A.W.R. 1068=
A.I.R. 1938 All. 28.

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887, S. 17 (1) as amended by Act IX of 1935)—*Scope—Procedure to be followed—Extension of time—Powers.*

The applicant applying under S. 17 (1) for a review of judgment or for an order to set aside a decree passed *ex parte* shall and must, at the time of presenting his application, do one of two things, namely, either deposit in Court the amount due from him under the decree or give such security for the performance of the decree as the Court may have directed on a previous application made by him in this behalf. If he does not make the previous application, he must put in the decretal amount in full. If he has made it and been successful in getting an order for security instead of depositing the money in full, he can furnish the security which the Court may have previously directed. It is no longer open to the Court to extend the time within which the deposit is to be made or security furnished. (*Addison and Din Mohammad, JJ.*) MAHOMED RAMZAN KHAN *v.* KHUBI KHAN. A.I.R. 1938 Lah. 18.

——S. 17 (1), proviso—*Surety under—Discharge—* Ex parte *decree set aside—Effect.*

A surety under S. 17 (1), proviso of the Provincial Small Cause Courts Act is discharged as soon as the *ex parte* decree is set aside. (*Bose, J.*) SETH DAWOOD *v.* RAM PRASAD. 20 N.L.J. 266.

——S. 25—*Remedy under—Availability—Decision on a preliminary issue.*

A Court can only act under S. 25 of the Provincial Small Cause Courts Act, where a decree or order has been passed. So when after deciding the issue as to limitation, the case is adjourned to a future date, for trial of other issues, there is neither a decree nor order which could be revised by the High Court. (*Leach, C.J. and Burn, J.*) BAKTHAVATSALU NAIDU *v.* SALEM MUNICIPALITY. 1937 M.W.N. 1343=46 L.W. 924.

PUBLIC GAMBLING ACT, (III OF 1867), S. 5—*Magistrate issuing search warrant—If can try case—Cr. P. Code, S. 526.*

It is ordinarily undesirable that a Magistrate who believes that the information that a house has been used as a public gaming house is credible and issues a search warrant, should not try the case. He cannot, however, be said to be personally interested in the case, and S. 526, Cr. P. Code, would not apply. (*Pollock, J.*) KHEMCHAND GIRDHARILAL *v.* EMPEROR.

171 I.C. 1007.

——S. 5—*Search warrant—Receipt of credible information—If must be stated.*

S. 5 of the Public Gambling Act merely requires that the search warrant should be issued after the receipt of credible information. The warrant is, therefore, not invalid if it does not state that it was issued after the receipt of credible information. (*Pollock J.*) KHEMCHAND GIRDHARILAL *v.* EMPEROR. 171 I.C. 1007.

——S. 6—*Persons present during game—Presumption—Rebuttal.*

When a gambling game is being played there is a strong presumption that the persons present are taking part in it; but when bets are being made at intervals and legitimate business is being carried on throughout, the presumption is not a strong one, and if persons found there give a reasonable explanation of their presence, it should ordinarily be accepted. (*Pollock, J.*) KHEMCHAND GIRDHARILAL *v.* EMPEROR.

171 I.C. 1007.

——S. 13—*Scope—Order confiscating money found on persons convicted—Legality.*

A Magistrate has no power on a conviction under the Public Gambling Act to order confiscation of the money found on the persons of the accused. Such an order is clearly in the teeth of the provisions of S. 13 of the Act and is illegal. (*Yorke, J.*) HARIHAR *v.* EMPEROR. 1937 A.W.R. 960 (1)=
1937 A.L.J. 973 (1)=A.I.R. 1938 All. 11.

PUNJAB MUNICIPAL ACT (III OF 1911), S. 81 (as amended in 1933)—*Scope of—Recovery under—Conditions necessary—Use of word 'rent' if enough.*

The operation of S. 81 is controlled by the words "claimable by a committee under this Act" in the same section. It is not any sum that can be described as rent or fee which can be recovered under the summary provisions of section, but only a sum that is claimable by the committee under the express provisions of the Act. The mere use of the word 'rent' applied to a sum recoverable by the committee will not of necessity make that sum recoverable as rent "claimable by committee under the Act". A.I.R. 1934 Lah. 699, Ref. (*Young, C.J. and Monroe, J.*) GURANDITTA MAL *v.* EMPEROR.

A.I.R. 1938 Lah. 29.

REGISTRATION ACT (XVI OF 1908), S. 17—*Document varying rent in respect of existing tenancy—requires registration.*

REGISTRATION ACT (1908), S. 17.

A document which merely varies the rent in respect of an existing tenancy requires registration if the earlier lease is registered, or the deed itself might be compulsorily registrable because it purports to limit a right in respect of an immovable property worth one hundred rupees or upwards. (*Mukherjea, J.*) KAILASH CHANDRA *v.* MADAN MOHAN. **42 C.W.N. 107.**

———**S. 17 (2) (vi)**—*Scope—Compromise deed creating charge—Decree passed before* 1929—*Registration.*

A decree passed prior to 1929, embodying the terms of a compromise between the parties, whereby the maintenance payable to a lady is secured by a charge on immovable property and the lady is given a right of residence in a specified house, does not require registration, as it falls under S. 17 (2) (*vi*) of the Registration Act, as it stood before its amendment in 1929. (*Thom,*

Necessity for registration.

Sub-S. (2) of S. 17 of the Registration Act reserves only those documents which are included in Cls. (*b*) and (*c*) of Sub-S. (1) and Cl. (*d*) is not controlled by this sub-section. Accordingly a solenama eml decree which creates a lease of immovab from year to year is not exempted from the registration. (*Mukherjea, J.*) KAILA MADAN MOHAN.

———**S. 34 (1), proviso**—*Extension signed by District Sub-Registrar—Valu*

Wh clear time, him by the District Sub-Registrar.

Held, that it might be more proper for the District Registrar, when he makes an order of it himself, but the effect of this c regarded as invalid because the Distric signed it for him. (*James and Dhavle, JJ.*) THAKUR PRASAD MARWARI *v.* CHAMAN RAM MARWARI. **16 Pat. 660.**

———**S. 36**—Failure to observe procedure under—Attendance of executants not procured of suit under S. 77. *See* REGISTRA AND 36.

———**S. 49**—*Invalid usufructuary sibility to prove nature of possession.*

In a suit for possession of property on repayment of the amount borrowed from the defendants, evidence of an abortive or invalid usufructuary mortgage may be given by the plaintiff for the collateral purpose of showing the nature of the defendant's possession (*i.e.*) that it is not adverse to the plaintiff. (*Mosely, J.*) U THE PAN *v.* MA PU SAING. **1937 Rang.L.R. 44**

———**S. 49**—*Unregistered lease—Admissibility prove rent.*

An unregistered teral purposes an the party for thes lease cannot be p itself and not a t KAILASH CHAN

42 C.W.N. 107.

———**Ss 77 and 36**—*Right of suit under S. 77—If affected by failure of Sub-Registrar to secure attendance of executants.*

The Sub-Registrar when he is mo under S. 36 of the Act, ought to prescribed local Court for issue of a fact that he did not take the proper attendance of the defendants (executants) cannot in any way prejudice the right of the plaintiffs to institute a suit under S. 77 of the Act. (*James and Dhavle, JJ.*) THAKUR PRASAD MARWARI *v.* CHAMAN RAM MARWARI. **16 Pat. 660.**

REVENUE RECORDS—*Entries in* khatauni—*Presumption of correctness.*

An entry in the *khatauni* of a settlement is to be accepted unless its incorrectness is demonstrated in a convincing manner. (*Darling, S.M. and Bomford, J.M.*) BENI *v.* DORI **1937 R.D. 458.**

———*Settlement entries—Presumption of correctness.*

Settlement entries must be taken to be correct until the contrary is proved. The onus of proving the settlement *khatauni* to be incorrect lies entirely on the party who questions its correctness. (*Darling, S.M. and Bomford, J.M.*) SUKRA *v.* TULSHI. **1937 R.D. 460.**

———Syaha—*Entries as to payment of rent—Value*

Unsigned *Syaha* entries are not evidence of payment of rent. (*Darling, S.M. and Bomford, J.M.*) SUCHIT *v.* MANOHAR CHAMAR. **1937 R.D. 459.**

wide words intentionally used Ss. 12 and 13 must be read S. 8 which is the general missioner in Sind and the District Magistrate to refer cases to a Council of Elders. This S. 8 puts no limitation of time within which such powers may be exercised. This power may be exercised in Court or before the case is Court, or it may be exercised after the trial of such a case has commenced in that Court. All the three sections are easily reconcilable. That being so, there is no reason why the very wide words of S. 13 should not receive their full and proper meaning. Thus S. 13 permits the Public Prosecutor to

missioner or District Magistrate has not exercised his discretion to refer the case to the Council of Elders, before the trial in that Court commenced. (*Rupchand Bilaram, Ag. J.C. and Lobo, A.J.C.*) MINHO *v.* EMPEROR. **A.I.R. 1938 Sind 9.**

———**Ss. 12 and 13**—*Reference to Council of Elders*

SPECIFIC RELIEF ACT (I OF 1877), Ss. 12 and 27-A—*Oral agreement to lease—If can be specifically enforced.*

An agreement to lease which does not create a present writing or registered, and agreement can be specifi of the Specific Relief Act. applies to a contract in writing does not operate as a bar to a claim for specific

SPECIFIC RELIEF ACT (1877), S. 18.

performance of the oral agreement. (*Nasim Ali and Mukherjea, JJ.*) GOKUL CHANDRA *v.* HAJI MOHAMMAD. **42 C.W.N. 97.**

——**Ss. 18 (b) and 25 (b)**—*Lessee not entitled to sub-lease without lessor's consent—Agreement to sub-lease without such consent—If can be enforced specifically—Objection to specific performance raised by sub-lessee in second appeal—Permissibility.*

S. 18 of the Specific Relief Act lays down certain rights which the purchaser or the lessee of a property has against the vendor or lessor who, having an imperfect title thereto, contracts to sell or let. It does not make the contract invalid. Where, therefore, a lessee who has no right to sub-lease without the consent of the lessor enters into a contract to sublease without such consent, there is no reason why the contract cannot be specifically enforced if the lessee obtains the concurrence of his lessor when called upon to do so by the sub-lessee or by the Court. An objection that the lessee is not entitled to claim specific performance of the contract to sub-lease as he did not obtain the consent of the lessor for granting a sub-lease cannot, therefore, be raised for the first time in second appeal. (*Nasim Ali and Mukherjea, JJ.*) GOKUL CHANDRA *v.* HAJI MOHAMMAD. **42 C.W.N. 97.**

——**Ss. 25 (b) and 18 (a)**—*Contract to sub lease for five years when lessor's own lease had only two years to run—Lessor subsequently obtaining renewal of his lease—Right to specific performance of his contract.*

Where at a time when a contract to sub-lease for five years was entered into, the lessor had only two years to run under his own lease, but under the terms of his unexpired lease he had a right to renew the lease, and subsequent to the contract to sub-lease he got a renewed lease in accordance with those terms for another period, his claim for specific performance of the contract to sub-lease cannot be refused on the ground that he is not in a position to give the lessee a title free from reasonable doubt. (*Nasim Ali and Mukherjea, JJ.*) GOKUL CHANDRA *v.* HAJI MOHAMMAD. **42 C.W.N. 97.**

——**Ss. 25 (b) and 18 (b)**—Lessee not entitled to sub-lease without lessor's consent—Agreement to sub-lease without such consent—If can be enforced specifically—Objection to specific performance raised by sub-lessee in second appeal—Permissibility. *See* SPECIFIC RELIEF ACT, SS. 18 (*b*) AND 25 (*b*). **42 C.W.N. 97.**

——Ss. 27-A and 12—Oral agreement to lease—If can be specifically enforced. *See* SPECIFIC RELIEF ACT, SS. 12 AND 27-A. **42 C.W.N. 97.**

——**S. 42**—*Declaratory suit—When maintainable.*

Under S. 42 of the Specific Relief Act no Court shall make a declaration where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so. Where a plaintiff asked for a declaration that the record of rights was wrong and prayed that it might be corrected, such a suit is maintainable. (*M. C. Ghose, J.*) BHABADAS MUKHERJEE *v.* KARPUR KAMINI DEBI. **42 C.W.N. 96.**

STAMP ACT (II OF 1899), Sch. I, Art. 1—Applicability—Admission of liability saving limitation—Stamp duty—If necessary. *See* LIMITATION ACT, S. 19. **20 N.L.J. 276.**

SUCCESSION ACT (XXXIX OF 1925), S. 361 and Civil Procedure Code, S. 52—*Creditor's right to refund—Property in possession of executor as specific legatee—Enforcement of decree—Attachment of legacy or separate suit.*

A claim for refund by an unpaid creditor based upon S. 361 of the Succession Act, cannot be resisted by a specific legatee on the ground that there is property not specifically bequeathed available to satisfy the creditor's claim. The right of a creditor to follow the assets in the hands of a legatee is a right which has to be exercised by a separate suit. But where the executor is himself the specific legatee, the administration decree is in the nature of a decree passed against a legal representative of a deceased person within the meaning of S. 52 (1) C. P. Code, and it can be executed directly by attachment and sale of the property in the hands of the executor specific legatee. The creditor need not be relegated to separate suit. (*Panckridge, J.*) SUSIL K. MITTER *v.* SAMARENDRA NATH MITTER. **42 C.W.N. 65.**

——**S. 370 (1)**—*Scope—Deceased leaving will—Succession certificate—Grant of—If barred.*

Where the deceased person has left a validly executed will, all the estate of that person vests in the executor of the will and no succession certificate can be granted in respect of any part of that estate. The grant of a succession certificate in such a case is barred by S 370 of the Succession Act. (*Pollock, J.*) KISAN GOPAL *v.* CHUNNILAL. **20 N.L.J. 272.**

TRADE MARK—Meaning of. *See* PENAL CODE, S. 478. **66 C.L.J. 210.**

——*Right to—Mode of acquisition—Proof.*

A registration of the ownership as regards a particular design under the Registration Act is nothing more than the opinion and claim of the declarant. As there is no statute for registering trade marks in India 'a right to a trade mark is acquired by user'. (*Biswas, J.*) LOKE NATH *v.* ASWINI KUMAR DEY. **66 C.L.J. 210.**

TRANSFER OF PROPERTY ACT (IV OF 1882), Ss. 3 and 130(1)—*'Debt' contemplated by—'Existing'—Meaning—Liability to arise in future—Relationship not yet arisen—If covered by Ss. 3 and 130 (1).*

Prima facie a liability to arise in the future on the part of an unknown person out of a relationship, contractual or otherwise, which does not yet exist, cannot, on any ordinary use of language, be described as a "debt", still less can it be described as an "existing" debt. Neither can it be "accruing" or "conditional" and it cannot be "contingent." A contingency is something that may happen in future which affects a present relationship. For instance, a contingent interest such as a contingent life-interest presupposes an existing interest which may or may not develop into interest in possession. The interest is there all the time. It is even saleable as such. When S. 3 refers to an "existing" debt, it intends thereby to exclude a debt which does not yet exist at all. So also S. 130 (1) in its terms points to an immediate interest of some sort passing. While it is in every way appropriate to an accruing, conditional or contingent debt, it cannot be reconciled with a debt which does not exist at all. (*Braund, J.*) AVIET STEPHENS, *In the matter of.* **A.I.R. 1938 Rang. 1.**

——**S. 43**—*Applicability—Mortgage by co-sharer of village mahal—Deed including mortgagor's share and also share of another co-sharer to be pre-empted by mortgagor—Subsequent pre-emption of such share—Rights of mortgagee—Such share—If mortgaged—Creation of charge.*

S. 43 of the T. P. Act cannot apply to a case where the transferee is aware of all the circumstances and the state of the transferor's title, where it could not be said that the transferor fraudulently or erroneously represented to the transferee that the property transferred belonged to him and that he was authorised to transfer it. The mortgagor in a hypothecation deed executed by him included not only his own share or portion in a mahal in a village, but also the share of another co-sharer who has executed a sale-deed in favour of a

T. P. ACT (1882), S. 53.

stranger which gave rise to a right of pre-emption exercisable by the mortgagor. The mortgagor at the time he executed the hypothecation deed also contemplated a suit for pre-emption in respect of the share of the co-sharer which was sold to a stranger. Subsequently the mortgagor acquired the share by pre-emption.

Held, that S. 43, T. P. Act, did not apply to the case and the deed of hypothecation did not create a mortgage in respect of the share so pre-empted, but that it created a charge on that share, and that share therefore became a security for the money borrowed by the mortgagor under [illegible] *and Allsop, JJ.*)

193[illegible]

——S. 53—F[illegible] be raised in appe[illegible] PLEA.

——S. 53—[illegible] *creditor—If amounts to—Transfer in lieu of dower—Effect of S. 5 of Oudh Laws Act* (1876).

The preferring of one creditor to another by a debtor, does not make the transfer a fraudulent one. A debtor for all that is contained in S. 53, T. P. Act, may pay his debts in any order he pleases, and prefer any creditor he chooses, only he should not retain any benefit to himself. There is nothing in S. 5 of the Oudh Laws Act to imply that the position of wife to whom a dower is due, is not that of a creditor. (*Srivastava, C. J. and Thomas, J.*) BANSIDHAR *v.* NAWAB JAHAN BEGAM. 171 I.C. 887 = 1937 O.L.R. 576 = 1937 O.W.N. 1176.

——S. 53—*Intent to defeat—Motive—Relevancy.*

In looking at a transaction for purposes of S. 53 of the T. P. Act, one must look to the intention of the transfer and not to the motive. Where th[illegible] the transferor was to safeguard the [illegible] of his family, but the intention was clearl[illegible] properties out of the reach of creditors, the[illegible] one intended to defeat or delay creditors. ([illegible] *J.*) CHANDMULL *v.* SATYA CHURN. 42[illegible]

——S. 53 (1)—Frame of suit—Suit under O. 21, R. 63, C. P. Code—If to be of a representative character *See* C. P. CODE, O. 21, R. 63 AND T. P. ACT, S. 53. 1937 O.W.N. 1169.

——(as amended), S. 53-A—*Retrospective effect—Suit after* 1st *of April* 1930 *in respect of transaction prior to that date—If affected—Act XX of* 1929, *S.* 63 *—Effect of.*

When no action is pending and the suit is commenced after the Act came into force, S. 53-A of the Transfer of Property Act would apply and it would be open to the defendant to avail himself of the protection conferred by the section, even though the transaction itself was much earlier in point of time. S. 63 of Act XX of 1929 prevents only certain specified sections of the amended Act from being retrospective, with regard to the rest which includes S. 16 (which introduced S. 53-A) the implication is that they would be retrospective with this exception that pending suits would n[illegible] by the new section. (*Nasim Ali and M*[illegible] MAHAMMED HUSHEN *v.* JAMINI NATH. 4[illegible] O.W.N. 5[illegible].

——S. 58 (c) and (g)—Applicability—*Lahan gahan* mortgage—Nature of—Right to decree for sale. *See* PRACTICE—APPEAL. 20 N.L.J. 285.

——(as amended in 1929), S. 67—Anomalous mortgage—Remedy by way of sale. *See* C. P. CODE, O. 34, R. 4 (3). 20 N.L.J. 285.

T. P. ACT (1882), S. 130.

——S. 89—*Order absolute under—Effect of—Suit on first mortgage without impleading a latter mortgagee—Decree and sale—Auction-purchaser—Rights as against non impleaded later mortgagee.*

Under old S. 89 of the T. P. Act, on the making of an order absolute for sale, the security as well as the right of redemption are both extinguished and for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree. A second mortgagee who is not made a party to a suit by the first mortgagee, is not affected by the decree [illegible]

[illegible] co-sharer to be pre-empted—Subsequent pre-emption—charge on pre-empted share—If created. *See* T. P. ACT, S. 43 1937 A.W.R. 1070 = A.I.R. 1938 All. 22.

——S. 105—*'Lease'—Kabuliyat executed by occupant of premises to owner of premises—If creates lease—Admissibility against executant.*

A kabuliyat executed by a person occupying certain premises and accepted by the owner of the premises can in no way be considered to be a lease as defined by S 105, T. P. Act, and is not sufficient to bestow title on the occupant of the premises. But though it does not operate as a lease it is not on that account inadmissible against the executant himself, when the kabuliyat contains a statement against his own interest. (*Mahomed Ismail, J.*) MAHOMED HASAN *v.* BUDDHU. 1937 A.W.R. 1085 = 1937 A.L.J. 1297 = A.I.R. 1938 All. 32.

[illegible]

to confer without notice to the debtor, a legal title on the transferee as opposed to an equitable title only. But it cannot be too strongly emphasised that its purpose and effect is merely to confer a title and to enable the assignee to sue in his own name and has nothing to do with possession. It is merely designed to circumvent the necessity for notice to be given to the debtor before the assignee sues him. (*Braund, J.*) AVIET STEPHENS, *In the matter of.* A.I.R. 1938 Rang. 1.

——S. 130 (1)—*"Hypothecation" or "charge"—If a transfer.*

A mere "hypothecation" or "charge" is a "transfer" for the purpose of S. 130 (1). (*Braund, J.*) AVIET STEPHENS, *In the matter of.* A.I.R. 1938 Rang. 1.

——S. 130 (1)—*Right to sue conferred by—If Conflicts with 'reputed ownership' under S.* 52 (2) (c) *of Presidency Towns Insolvency Act.*

The express right of the assignee to sue a debtor in [illegible] T. P. Act, and [illegible]ing rise to a [illegible] 52 (2) (*c*), [illegible] two entirely separate and distinct things. It may very well be that so far as the assignee's right to sue is concerned it is complete, and yet there may be left with the assignor such an appearance of continued or reputed ownership as to invoke the order and disposition clause. (*Braund, J.*) AVIET SLEPHENS, *In the matter of.* A.I.R. 1938 Rang. 1.

TRANSFER OF PROPERTY (AMENDING) ACT (XX OF 1929), S. 63—Scope and effect of. *See* T.P. ACT, S. 53-A.—RETROSPECTIVE EFFECT.
42 C.W.N. 38.

UNITED PROVINCES AGRICULTURISTS' RELIEF ACT (XXVII OF 1934)—Scope—If derogate from O. 20, R. 11, C. P. Code. *See* C. P. CODE, O. 20, R. 11. 1937 A.W.R. 1074=1937 A.L.J. 1247.

——**S. 2 (2), Expl. II**—*Scope and effect of—Hindu joint family—Individual members—If agriculturists—Right to apply under Ss. 5 and 30—Karta of joint family held not agriculturist—Subsequent application by another member of family—Competency.*

Though under Expl. II to S. 2 (2) of the Agriculturists' Relief Act each member of a joint Hindu family or each joint owner or joint tenant may for certain purposes apply for certain benefits conferred by the Act, it is equally clear that each member of a joint family or joint owner or joint tenant cannot claim the benefits conferred by S. 5 or by S. 30 of the Act, because S. 5 and Ch. IV which contains S. 30 are expressly excluded in the Explanation. Each member of a joint Hindu family can be regarded as an agriculturist only in certain specified cases, *e.g.*, proceedings for redemption of mortgages under Ch. III, proceedings under Ss. 37 and 38, etc. But in other cases than those expressly covered by the Explanation it is only the karta of the joint family or the person actually recorded as holding the property or paying the revenue that can be treated as the agriculturist, and the other individual members cannot claim the same benefits and privileges. For the purposes of an application under S. 5 or Ch. IV, therefore, the karta of a joint Hindu family, who is normally the person recorded as owner or person paying revenue, etc., is the only person who can apply and who can be regarded as an agriculturist. If he is found to be not an agriculturist, that concludes the matter and the other members of the family cannot avail themselves of Expl. II to S. 2 (2) and apply under Ss. 5 and 30. (*Sulaiman, C.J. and Harries, J.*) ALLAHABAD BANK, LTD., MEERUT *v.* PRAKASH NATH.
1937 A.L.J. 970=1937 A.W.R. 890=
1937 R.D. 534=A.I.R. 1938 All. 12.

——**S. 3 (1), Provisos 1 and 2**—*Scope—Power of Court under—Mortgagor agriculturist—Instalments spread over period exceeding four years—Legality—Judgment-debtor military officer with Small pension—If justifies such an order.*

In the case of a mortgagor agriculturist to whom Ch. III applies, instalments can be granted and spread over a period not exceeding four years. The Court has no jurisdiction in such a case to order instalments to be spread over a period exceeding four years. The fact that the judgment-debtor happens to be a military officer with a small pension does not entitle the Court to make such an order. To do so would be contrary to the clear terms of the statute and *ultra vires.* (*Harries and Rachhpal Singh, JJ.*) UMRAO ALI *v.* SUBEDAR RUP SINGH. 1937 A.L.J. 1291=1937 A.W.R. 1035=
A.I.R. 1938 All. 26.

——**S. 5**—*Application under—Subsequent application to executing Court for stay of sale—Rejection—Appeal—Competency—Power of High Court to interfere in revision.*

Where after applying under S. 5 of the Agriculturists' Relief Act for instalments, the judgment-debtor applies to the executing Court for stay of the sale in execution, but that Court rejects the application for stay, no appeal lies against that order. But the High Court would interfere in the matter in the exercise of its revisional jurisdiction. (*Niamatullah and Allsop, JJ.*) SHYAM LAL *v.* RAM GOPAL. 1937 A.W.R. 989=
1937 A.L.J. 1197.

——**Ss. 5 and 30**—Right to apply under—Hindu joint family—Individual member of—Application by—Competency. *See* U. P. AGRICULTURISTS' RELIEF ACT, S. 2 (2), EXPL. II. 1937 A.W.R. 890=
A.I.R. 1938 All. 12.

——**S. 5**—*Successive applications under—Maintainability.*

A second application under S. 5 of the Agriculturists' Relief Act asking the Court which has already passed an instalment decree to vary its own decree is incompetent, and the Court has no jurisdiction to entertain such an application. If a judgment-debtor is dissatisfied with the member or periods of instalments he can appeal to the superior Court, under S. 5 (2), and the decision of such Court shall be final. But he has no right to prefer a separate application to the same Court again. (*Harries and Rachhpal Singh, JJ.*) UMRAO ALI *v.* SUBEDAR RUP SINGH. 1937 A.L.J. 1291=
1937 A.W.R. 1035=A.I.R. 1938 All. 26.

——**S. 5 (2)**—*"Subordinate"—Small Cause Court—Appeal from—Forum—District Court or High Court.*

The term "Subordinate" in the Agriculturists' Relief Act in connection with appeals is used in the sense in which that term is used in S. 3, C. P. Code. A Court of Small Causes being subordinate to the District Court, an appeal from the Court of Small Causes under S. 5 (2) of the Act lies to the District Court and not to the High Court. (*Niamatullah and Allsop, JJ.*) KEDAR NATH *v.* SHIAM LAL. 1937 A.W.R. 1079=
1937 A.L.J. 1094.

——**S. 23**—*Appeal under—Court-fee payable—Court Fees Act, Sch. I, Art. 1, and Sch. II, Art.* 11—Ad valorem *fee—If payable.*

An appeal under S. 23 of the Agriculturists' Relief Act is not an appeal falling under Art. 11 of Sch. II of the Court-Fees Act, but falls under Art. 1 of Sch. I, and therefore *ad valorem* Court-fee must be paid on the amount of the subject-matter in dispute. (*Niamatullah and Allsop, JJ.*) ANAND GIR *v.* RAM NAZAR CHOUBE. 1937 A.L.J. 1173=1937 A.W.R. 932=
A.I.R. 1938 All. 14.

——**Ss. 30 and 33 (1)**—*Applicability to mortgages—Usufructuary mortgage—Right of mortgagor to apply for account.*

S. 33 (1) is applicable even to a mortgagor who has executed a usufructuary mortgage. The section applies to every agriculturist debtor, no matter whether the debt is due by him under a promissory note, simple bond or mortgage deed, whether the mortgage be a simple, usufructuary or conditional mortgage. S. 30 does apply to mortgages. A mortgagor who has executed a usufructuary mortgage is therefore entitled to apply for an account under S. 33 (1). (*Sulaiman, C. J. and Harries, J.*) DHARAM SINGH *v.* BISHAN SARUP.
1937 A.W.R. 892=1937 R.D. 536=
A.I.R. 1938 All. 1.

——**S. 30 (1)**—*Construction and scope—"Loan"—"Interest"—Meaning of—Mortgage—Renewal—Execution of fresh usufructuary mortgage with possession for amounts due under prior hypothecation bond—No fresh advance—If fresh advance of loan—Right of debtor to re-open.*

The words "loan" and "interest" occurring in S. 30 (1) of the Agriculturists' Relief Act must be understood as having the meanings given to them by the definitions of those words in S. 2; and it is only the principal amount actually advanced that is the "loan", and anything paid

U. P. AGRICULTURISTS RELIEF ACT (1934), S. 30.

over and above that is "interest", no matter what form or shape it may take. T[illegible] by the execution of a [illegible] amounts due under the [illegible] advance of money can[illegible] vance of a loan in cash [illegible] transaction is by way of a possessory mortgage under which the mortgagee takes possession undertaking to set-off the income against interest if there is no fresh ad-[illegible]

[illegible] nction might be imagined to have been indirectly advanced. The previous transaction cannot be deemed to have been closed by the execution of a fresh document, [illegible]

Court to reduce without application by the judgment-debtor.

If the Court passing the decree has not reduced interest under S. 30 (1) of the Agriculturists' Relief Act, it must do so under S. 30 (2) [illegible]

[illegible] interference by the Board in revision when the decree-holder has not in any way been prejudiced. Though the order is not technically in accordance with S. 30 (2), since it results in justice being done, it will not be interfered with. (*Harries and Rachhpal Singh, JJ.*) UMRAO ALI *v.* SUBEDAR RUP SINGH.

1937 A.L.J. 1291 = 1937 A.W.R. 1035 = A.I.R. 1938 All. 26.

UNITED PROVINCES COURT OF WARDS ACT (IV OF 1912), S. 19 (3) Proviso—*Scope and effect—Failure of Collector to discharge full amount within two years of reduction of interest—Effect—Rights of creditor.*

Under the proviso to S. 19 (3) of the U. P. Court of Wards Act, it is incumbent on the Collector or Deputy Commissioner, when he reduces the interest on a debt, to discharge the debt within two years of the date on which he so reduces the interest; and if the claim is not so discharged, the order passed by him reducing the interest would be deemed to be inoperative. A partial payment is no discharge, and unless the full amount [illegible]

[illegible] A.I.R. 1938 All. 18.

[illegible] RED ES-[illegible] *to special* [illegible] *hat appli-* [illegible] *and deter-* [illegible]

[illegible] states Act, which has *prima facie* not been duly made has been forwarded to the Judge without any enquiry [illegible]

[illegible] revision. The only Court which can decide whether an application has been duly made is the Court of the Collector, and if a *prima facie* case is made out by an [illegible] must be made by the Collector. (*Darl-* [illegible] *Bomford, J. M.*) RAM BHAROSEY *v.* [illegible]

1937 R.D. 478 = 1937 A.W.R. 1030.

[illegible] *efective application—Amendment after* [illegible] *missibility.*

Where an application under S. 4 of the Encumbered Estates Act fails to disclose the existence of a son who is [illegible]

KHUBCHAND *v.* RAM NARAIN. **1937 R.D. 368.**

———**Ss. 4 and 6**—*Order under S. 6—Cancellation—Applicant not recorded in* khewat *at time of application* [illegible] *time of forwarding to special Judge—If a ground* [illegible] *ancellation.*

[illegible] *ewats* are only to be filed with the application [illegible] S. 4 of the Encumbered Estates Act to serve as [illegible]ence that the applicant is a landlord there may well be cases where the *khewats* might be brought into conformity with the facts after the expiry of the Act without thereby invalidating a claim to have a right to apply under the Act. An order under S. 6 of the Act cannot [illegible] the applicant [illegible] the applica-[illegible] the special [illegible] *M. and Bomford, J. M.*) BATU-[illegible]

1937 R.D. 482 = 1937 A.W.R. 1032.

———**S. 4**—*Persons entitled to protection of Act—'Landlord'—Meaning of.*

A person who was a landlord on the date on which the Encumbered Estates Act came into force and also on the date on which he presented the application under S. 4 of the Act, is entitled to the protection of the Act, [illegible] divested himself [illegible] secure the pro-[illegible] a portion just [illegible]ition of a landlord (*Darling, S. M. and Bomford, J. M.*) BHOLA NATH *v.* ROSHAN. **1937 R.D. 358.**

———**S. 4 (4)**—*Construction—"Prevented"—Meaning—Omission to apply under Act in the hope of settling claims by private negotiations—Subsequent application beyond time after negotiations prove infructuous—Righ[t] to benefit of S. 4 (4).*

The word "prevent" connotes some physical disability which actually hinders a man from applying in time, such as serious illness or absence from India and the like. The Act has to be interpreted strictly. A man who [illegible] by private negotiations [illegible] Act, and abstains from [illegible] ivate negotiations would [illegible] application unnecessary [illegible]d" from applying within [illegible] the U. P. Encumbered Estates Act, so as to be entitled to the benefit of that clause. If he applies only when his hopes are finally disappointed, he cannot claim the benefit of S. 4 (4). (*Darling, S.M. and Bomford, J. M.*) SHEONANDAN PATHAK *v.* EMPEROR. **1937 R.D. 396 = 1937 A.W.R. 868.**

———**S. 4 (4)**—*"Sufficient cause"—Discretion of Collector—Exercise of—Delay*—[illegible] the [illegible] (4) [illegible]cant gives no adequate reason to explain the delay beyond the

plea that he was advanced in years and was continuously ill. It is the duty of the applicant to support his allegations by evidence. (*Darling, S.M. and Bomford, J.M.*) JAGAT SINGH *v.* KUNWAR SEN.

1937 R.D. 484=1937 A.W.R. 1034.

——**S. 4, Proviso 2**—*Scope—If mandatory—Failure to disclose existence of sons living jointly with applicant—Amendment after period of limitation—If permissible.*

Proviso 2 to S. 4 of the Encumbered Estates Act is a mandatory provision. The omission on the part of an applicant to disclose the existence of sons living jointly with him, whether accidental or deliberate, is a most material omission. The application is not one duly made. An amendment of such an application would be permissible only, if an application therefor, is made within the period of limitation prescribed for presenting an application under S. 4 of the Act. (*Darling, S. M. and Bomford, J. M.*) MAINI BIBI *v.* RAM RATTAN.

1937 O.W.N. 1173.

——**S. 6**—*Order under—Cancellation — Assistant Collector—Jurisdiction of.*

An Assistant Collector has no jurisdiction to cancel an order passed by him under S. 6 of the U. P. Encumbered Estates Act. His duty is to report to the Board of Revenue to take action in revision, if he finds that the order was not properly made. (*Darling, S. M. and Bomford, J.M.*) BATULAN *v.* ADIT PRAKASH,

1937 R.D. 487=1937 A.W.R. 1032.

——**S. 6**—*Order under—Objections subsequently filed by creditor—Duty of Collector—Objecting creditor—If can be referred to special Judge.*

It is only the Revenue authorities that can decide whether an applicant under S. 4 of the Encumbered Estates Acs is entitled as a landlord within the meaning of S. 2 to the protection of the Act. If, therefore, after the Collector passes an order under S. 6, a creditor files an objection that the applicant is not entitled to the protection of the Act, it is the duty of the Collector to enquire into the objection and to reject it, if he thinks that the objection could not be maintained. If on the other hand he comes to the conclusion that the applicant under S. 4, not being a landlord within the meaning of the Act, is not entitled to the protection of the Act, he should submit the case to the Board for orders in revision under S. 46 of the Act with a recommendation that his order inadvertently passed under S. 6 should be cancelled. The Collector should not refer the objecting creditor to the special Judge. (*Darling, S. M. and Bomford, J.M.*) BHOLA NATH *v.* ROSHAN.

1937 R.D. 358.

——**S. 6**—*Order under—Power of Sub-Divisional Officer to cancel his own order.*

Except by way of review, a Sub-Divisional Officer has no power whatsoever to cancel his order under S. 6 and to reject the application under S 4, which has been thereby accepted. If the Sub-Divisional Officer thinks that he has made a mistake in certifying the applicant under S. 4 to be a landlord, he should submit the proceedings to the Board of Revenue with his recommendation, and the Board would then deal with the case in revision under S. 46 of the Act. (*Darling, S. M. and Bomford, J.M.*) BADRI DASS *v.* RAM NARAIN.

1937 R.D. 371.

——**Ss. 6 and 7**—*Scope—Application under Act—Effect on proceedings under Regulation of Sales Act.*

Once an application under the Encumbered Estates Act has been sent to the Judge, the proceedings under the Regulation of Sales Act which are pending are automatically stayed. (*Darling S.M. and Bomford, J. M.*) BHARATH PRASAD *v.* LACHHMAN PRASAD.

1937 R.D. 479=1937 A.W.R. 1031.

——**Ss. 6 and 7**—*Scope—Duty of special Judge—Power to question legality of Collector's order—Order under S. 6—Effect of.*

The obvious interpretation of S. 7 of the U. P. Encumbered Estates Act is that the Courts, whether Revenue or civil, shall stay proceedings to which that section applies as soon as an order under S. 6 has been made. The special Judge has no jurisdiction to question the legality or otherwise of the orders of the collector under S. 6; the collector alone is competent to decide whether an application under S. 4 is in order. The collector's order forwarding the application is conclusive proof of the fact that the applicant is entitled to the benefit of S. 7. The special judge has to assume that the applicant is entitled to the benefits of the Act and to proceed upon that assumption. (*Niamatullah and Mahomed Ismail, JJ.*) BRAHMA NAND *v.* SHIAM LALA. **1937 A.L.J. 1207=1937 A.W.R. 1084.**

——**S. 7**—*Applicability—Proceedings for restitution—If can be stayed—"Debt".*

A "debt" under the Encumbered Estates Act means any pecuniary liability, and includes money which a party is liable to refund by way of restitution on reversal of a decree under S. 144, C. P. Code. Proceedings for restitution can therefore be stayed under S. 7 of the Encumbered Estates Act, if the application for stay is a genuine application and not intended to defeat the particular debt alone. (*Darling, S. M. and Bomford, J.M.*) RAM ADHAR PATHAK *v.* INDRADEO SINGH.

1937 R.D. 444=1937 A.W.R. 1029.

——**S. 7 (1) (a)**—*Application under—Proper Court.*

The appropriate Court to which an application for stay under S. 7 (1) (*a*) of the Encumbered Estates Act is the Court which is executing the decree and in which the execution proceedings are pending. (*Sulaiman, C. J. and Harries, J.*) BABU RAM *v.* MANOHAR LAL.

1937 A.W.R. 986=A.I.R. 1938 All. 6.

——**S. 7 (1) (a)**—*Construction—Joint decree against several persons—Application by one only—Stay—If to be granted.*

In the case of a decree jointly against several persons, the judgment-debt being a joint debt, the execution has to be stayed under S. 7 (1) (*a*) of the Encumbered Estates Act even if one only of the judgment-debtors applies under the Act, until the special Judge has determined the amounts required to be determined under S. 9 (5) (*a*). (*Sulaiman, C. J. and Harries, J.*) BABU RAM *v.* MANOHAR LAL. **1937 A.W.R. 986=A.I.R. 1938 All. 6.**

——**S. 7 (1) (b)**—*Applicability—Suit for possession of immovable property—If barred by order under S. 6.*

S. 7 (1) (*b*) of the Encumbered Estates Act has no application to suits for possession of immovable property. A claim to possession of such property does not fall within the purview of S. 7 and is consequently not barred by reason of a prior order under S. 6 of the Act. (*Iqbal Ahmad and Allsop, JJ.*) CHAMPA DEVI *v.* ASA DEVI. **1937 A.W.R. 933=1937 A.L.J. 945=A.I.R. 1938 All. 8.**

——**S. 7 (1) (b)**—*"Debt"—Claim for mesne profits.*

A claim for recovery of mesne profits is not a claim in respect of a debt within the meaning of S. 7 (1) (*b*) of the Encumbered Estates Act. Mesne profits at best amount to unliquidated debts. (*Iqbal Ahmad and Allsop, JJ.*) CHAMPA DEVI *v.* ASA DEVI.

1937 A.W.R. 933=1937 A.L.J. 945=A.I.R. 1938 All. 8.

——**S. 7 (1) (b)**—*"Debt"—Suit to enforce pecuniary liability imposed by deed of settlement.*

A suit to enforce a pecuniary liability imposed on the defendant by a deed of settlement is a suit in respect of

U. P. ENCUMBERED ESTATES ACT, S. 7.

a "debt" as defined by the Act. (*Iqbal Ahmad and Allsop, JJ.*) CHAMPA DEVI *v.* ASA DEVI.
1937 A.W.R. 933 = 1937 A.L.J. 945 = A.I.R. 1938 All. 8.

——**S. 7 (1) (b)**—*Scope—Suit comprising several reliefs—Some falling under S. 7 [illegible] falling under—Order staying en[illegible] Order recalling and cancelling sta[illegible]*

Where in a suit it is found that [illegible] claimed fall within the purview [illegible] U. P. Encumbered Estates Act, but that the others do not so fall, there is no bar to the granting of relief in respect of the claims which do not fall within the mischief of S. 7 (1) (*b*). An order staying the entire suit in such a case is wrong in law and unjust, but the Court has jurisdiction to recall its order staying the entire suit; and its order so recalling the previous order cannot be challenged, because a Court has inherent jurisdiction to recall and cancel its invalid orders. (*Iqbal Ahmad and Allsop, JJ.*) CHAMPA DEVI *v.* ASA DEVI. **1937 A.L.J. 945 = 1937 A.W.R. 933 = A.I.R. 1938 All. 8.**

——**S. 7 (2)**—*Pledgee of firm in which applicant landlord is a partner—If can be restrained from selling pledged goods.*

Under Cl. (2) of S. 7 of the Encumbered Estates Act, the person who is debarred from dealing in the property defined in that clause, without the consent of the Collector, is the landlord. A pledgee not even of the applicant landlord, but of the firm in which he is one of the partners, cannot, therefore, be restrained from exercising his right of sale under S. 176 of the Contract Act in respect of the pledged goods. (*Darling, S.M. and Bomford, J.M.*) ALLAHABAD BAN[illegible] HATHRAS *v.* HARCHARAN DASS. **1937 [illegible]**

——**Ss 9(3) and 13**—*Expiry of time allo[illegible] S. 9 (3)—Effect of—Discharge of debt—Powe[illegible] further time.*

The Encumbered Estates Act allows a claimant a certain definite period within which to put forward his claim in a written statement. He has got the period specified in the notice, and in addition a further period of two months at the discretion of the special Judge who may grant it under S. 9 (3) of the Act. But no further time beyond this can be granted. As soon as the period of two months under S. 9 (3) expires, the claim is deemed to have been duly discharged under S. 13 of the Act. (*Niamatullah and Allsop, JJ.*) ASHRAF *v.* SAITH MAL. **1937 A.L.J. 1101 = 1937 A.W.R. 1081.**

——**Ss. 45 and 46**—*Applicability—Order accepting application under S. 4—Creditor's right of appeal to Board—Revision.*

A creditor has no right of appeal to the Board of Revenue under S. 45 of the Encumbered Estates Act, against an order accepting an application under S. 4 of the Encumbered Estates Act, because he is not a party to the proceedings before the Collector on the application. He can, however, apply to the Board [illegible] revision under S. 46 of the Act. (*Darling, [illegible] Bomford, J.M.*) JAGAT SINGH *v.* KUNWAR [illegible]
1937 R.D. 484 = 1937 A.W.R. 1034.

——**S. 45 (5)**—*"Final"—Meaning of—Revision by High Court—If precluded.*

The term "final" used in S. 45 (5) of the U. P. Encumbered Estates Act only means "not subject to appeal." It cannot be final in the sense that the power of the High Court to interfere in revision is shut out. (*Niamatullah and Allsop, JJ.*) ASHRAF *v.* SAITH MAL. **1937 A.W.R. 1081 = 1937 A.L.J. 1101.**

USURIOUS LOANS (C. P. AMENDING) ACT (1934), S. 2.

UNITED PROVINCES LAND REVENUE ACT (III OF 1901), S. 23—*Acceptance of resignation tendered by patwari—If equivalent to order of removal—S.D.O. if can add reference that patwari should not [illegible]*

[illegible] entitled to add a reference to the effect that the patwari should not be re-appointed again (*Darling, S.M. and Bomford, J.M.*) CHAUHARJA PRASAD *v.* EMPEROR. **1937 R.D. 446.**

——**S. 23 (2) (c)**—*Hostility between patwari and one Zamindar of his circle—If sufficient reason for transfer.*

Hostility between the patwari and one Zamindar of his circle is not a sufficient reason for the transfer of the patwari when the other co-sharers have at least not complained against the man. (*Darling, S.M. and Bomford, J.M.*) SURAJ BANSI LAL *v.* BISHWA NATH CHAKRAWARTI. **1937 R.D. 447.**

——**S. 42**—*Scope.*

S. 42 only comes into force when proceedings have been started under S. 33. It is not an alternative for proceedings under the declaration sections. If as a result of a change it is necessary to alter the status of a recorded and an admitted tenant then indeed the procedure has to be under S. 42. But this procedure cannot be used to decide cases which can only be decided by regular suits. (*Darling, S.M. and Bomford, J.M.*) MUNNI SARAN TEWARI *v.* DRIGPAL LOHAR.
1937 R.D. 450.

UNITED PROVINCES [illegible] OF [illegible] *con-* [illegible] ...ubt a [illegible] the creditor in any sense at all and its value for purposes of sale is nil. (*Darling, S.M. and Bomford, J.M.*) BALMAKUND *v.* CHANGER. **1937 R.D. 411.**

——**S. 3**—*Property valued consisting of grove—Duty to show details of trees in valuation statement.*

When the property valued consists of groves, the the details of the trees valued should be shown in the valuation statement to enable the Collector or the Board in appeal to see if the valuation was approximately correct. (*Darling, S.M. and Bomford, J.M.*) BALMAKUND *v.* CHANGER. **1937 R.D. 411.**

——**S. 3**—*Valuation of trees—How to be made.*

In valuing trees which are leased out annully, their annual value and not their capital value should be taken. (*Drake Brockman, S.M. and Knox, J.M.*) RAM CHANDER *v.* ROSHAN SINGH.
1937 R.D. 380 (1).

——**Ss. 3 and 4**—*Transfer of whole share of judgment debtor when 11/12ths of his share will suffice to meet decree—Propriety.*

[illegible] though the difference between the old and the revised valuation is small and the share left to the judgment-debtor will be negligible. Because, it is the policy of Government to transfer as small an area as possible in satisfaction of decrees. (*Darling, S. M. and Bomford, J.M.*) MUNESHAR SINGH *v.* RAM BECHAN RAI.
1937 R.D. 341.

USURIOUS LOANS (C. P. AMENDING) ACT (XI OF 1934), S. 2 (a)—*Scope—If retrospective.*

WHIPPING ACT (1909), S. 4.

S. 2 (*a*) of the C. P. Usurious Loans Amending Act (XI of 1934) is not retrospective in operation so as to enable the Court to exercise wider powers to re-open loan transactions made before the 15th June, 1934, at any rate when the amount due under such a loan has become the subject-matter of a litigation instituted before that date. (*Stone, C.J. and Digby, J.*) BHAGWANTRAO *v.* DAMODAR. **20 N.L.J. 285.**

WHIPPING ACT (IV OF 1909), S. 4 (b)—*Applicability—Attempt to commit offence—Sentence of whipping—Legality.*

S. 4 (*b*) of the Whipping Act does not apply to the case of an attempt to commit the offence mentioned in it; a sentence of whipping on a conviction under S. 377

WORKMEN'S COMPENSATION ACT (1923), Sch. II.

read with S. 511, I.P. Code, is therefore illegal. (*Ganga Nath, J.*) MUNSHI RAM *v.* EMPEROR.
1937 A.W.R. 902=1937 A.L.J. 944= A.I.R. 1938 All. 16.

WORKMEN'S COMPENSATION ACT (VIII OF 1923), Sch. II, (1) and S. 2 (1)—*'Workman'—Conductor of motor omnibus.*

A conductor of a motor omnibus, though not employed in operating is employed "in connection with" the operating of the motor omnibus, and is, therefore, a workman within the meaning of the Act. (*Costello, A.C.J. and Lethbridge, J.*) NANDA KUMAR SINGH *v.* PRAMATHA NATH. **42 C.W.N. 123.**

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"THE YEARLY DIGEST"

OF

INDIAN AND SELECT ENGLISH CASES.

I—INDIAN DECISIONS.

ADVERSE POSSESSION—*Religious endowment—Exclusion of shebait by person having no title—Physical presence of idol or performance of puja by wrongdoer—If material.*

An idol acts through its shebait, prosec [illegible] defends suits through its shebait. Its shebait [illegible] tector and defender of its rights. An exclusi[illegible] shebait accordingly from the endowed properties can have the effect of excluding the idol from it. In all cases of adverse possession, the extent of the interest acquired by adverse possession depends upon the assertion of intention expressed or necessarily implied of the wrongdoer when dispossessing and keeping out of possession the rightful owner. When therefore a shebait is turned out and kept out of the endowed properties by a person who has no title on the assertion [illegible]

[illegible] not material. Nor would the mere fact that in law the wrongdoer would become the idol's shebait on the exist- [illegible]

——Void alienation—Possession under—Nature of. *See* LIMITATION ACT, ART.144. **A.I.R. 1938 Mad. 60.**

AGRA PRE-EMPTION ACT (XI OF 1922), S. 4 (1)—*Mahomedan* waqf—*Right of pre-emption, if can be claimed by.*

Where a *waqf* represented by the mutwalli sued for pre-emption, on a contention that the suit [illegible] tainable as the plaintiff is not a person cont[illegible] S. 4 (1) of the Pre emption Act.

Held, that for purposes of procedure, in [illegible] *waqf* the mutwalli represents the *waqf* pr[illegible] estate under O. 31, C. P. Code; there is no difficulty in the conception of God [illegible] person in the case of a Mahomeda[illegible]

Held, further, that the plaintiff [illegible] pre-emption and that no disabili[illegible] to the juristic [illegible] *Ismail, JJ.*) RAJ KALI. [illegible]

AGRA [illegible] 21—*Per*[illegible] *tenant*— [illegible] *of such person on death of widow.*

AGRA TENANCY ACT (1926), S. 32.

Where the name of a person was recorded in the *Khatauni* along with that of the widow of the occu[illegible] Zamindar, and [illegible] not merely in [illegible] the course of [illegible] s not, on the death of the widow, liable to be ejected as a trespasser but as a non occupancy tenant. The fact that the Zamindar treated him as a joint tenant constitutes no recognition of him as entitled to any occupancy rights in the holding. Under S. 45 of the Agra Tenancy Act, he has three years from the death of the widow in which to apply for fixation of rent and consolidation of his status as a statutory tenant. If he fails to do that, he will be liable to ejectment as a non occupancy tenant. [illegible] *J. M.*) JAFAR ALI [illegible]
1937 R.D. 560.

[illegible] *separated from his* [illegible] *with descendants of* [illegible] *nt.*

Where a tenant who is separate from his brothers is at death co-sharing in cultivation with the descendants [illegible]s, the nearest of these collaterals is [illegible], *S. M. and Bomford, J. M.*)
1937 R.D. 596.

[illegible] *of occupancy tenant—Widow in possession—Re-marriage—Ejectment—Plea of re-admission—Holding over for number of years and acceptance of rent from her—Effect.*

Where on the death of an occupancy tenant, his widow continued in possession and subsequently remarried, the landlord sued to eject her, she pleaded a re-admission as tenant relying on her possession for a [illegible] re not such, (*Darling,* [illegible] v. SYED [illegible] 2 (B.R.). [illegible] *marrying* [illegible] f the fact [illegible] *J. M.*)
[illegible] 2 (B.R.).

[illegible] 32 and 99—*Tenant filing surrender but not* [illegible] *rocess fee and resiling from same—Effect*—[illegible] *ejecting sub-tenant—Right of tenant to sue under S.* 99, *for illegal ejectment.*

AGRA TENANCY ACT (1926), S. 37.

Under S. 32 of the Agra Tenancy Act to constitute a surrender which would extinguish the interest of the tenant, there must be cessation of cultivation. A mere notice of surrender does not constitute surrender. A tenant who files a surrender but who never pays the necessary process-fees and resiles from his wish to surrender,—the file of the case being ordered to be deposited—remains liable for the rent of the holding and there is no change in his status. He must be regarded as remaining in possession at least constructively of the holding. If the landholder ejects the sub-tenant acting on the alleged surrender, that amounts to illegal ejectment of the tenant giving the latter a right to sue under S. 99 of the Agra Tenancy Act. (*Darling, S. M. and Bomford, J. M.*) SARUP KOHAR *v.* PARBHU SHANKAR. 1937 A.W.R. 1205.

———Ss. 37 and 121—*Co-tenant seeking possession against tenants in possession—Proper remedy.*

A co tenant who is out of possession and desires possession should bring a case under S. 37 of the Tenancy Act. If, however, the Zamindar has challenged his status as tenant, he is entitled to bring a declaratory suit under S. 121 of the Act in the first instance. (*Darling, S. M. and Bomford, J. M.*) CHHATARDHARI AHIR *v.* GANESH. 1937 R.D. 584.

———S. 44—*Tenant persisting in holding after formal ejectment—Zamindar's right to eject when estate is under attachment by Collector—U. P. Land Revenue Act, S.* 151.

If a tenant persists in holding on to the tenancy even after a formal ejectment in a proceeding under S. 79 of the Tenancy Act, the Zamindar is entitled to bring another suit for his ejectment as trespasser under S. 44 of the Act, although the Collector has attached his estate for default in paying the land revenue. (*Darling, S. M.*) PAHLAD SINGH *v.* SETH BANSIDHAR. 1937 R. D. 581.

———S. 99—*Applicability—Conditions—Act of* 1901, *S.* 79—*Relative scope—Rulings under—If proper guides in applying S.* 99.

Under S. 99 of the Agra Tenancy Act of 1926, if a tenant is wrongfully ejected or prevented from obtaining possession of his holding or any part thereof otherwise than in accordance with the Act by any co-sharer of the land-holders, a suit would lie in the Revenue Court. It is not necessary for the application of the section that the ejectment should be by the whole body of the landholders. S. 99 of the Act of 1926 is much wider in scope than S. 79 of the Act of 1901, and the rulings under the latter section of the old Act cannot be relied upon as guides in applying S. 99 of the new Act. (*Ganga Nath, J.*) RAM CHANDER SINGH *v* MIJLI. 1937 A.L.J. 1249=1937 A.W.R. 1174.

———S. 99—Applicability—Tenant filing surrender but resiling and not paying process-fee for notice—Landlord ejecting sub-tenant on basis of surrender—Suit by tenant under S. 99—Competency. *See* AGRA TENANCY ACT, SS. 32 AND 99. 1937 A.W.R. 1205.

———Ss. 196 and 197 (h)—*Scope of—Planting of grove by occupancy tenant with permission of landholder—Removal of trees—Effect—Liability of groveholder to ejectment.*

An occupancy tenant who plants a grove in a plot of his occupancy holding with the permission of his landholder, holds that plot as a groveholder in supersession of all subsisting rights and liabilities under S. 197 (*h*). The effect of this is that when the plot ceases to retain the character of a grove, the groveholder cannot rely on his former occupancy rights to protect him from ejectment as a non-occupancy tenant. (*Darling, S. M.*

AJMER COURTS REG. (1877), S. 24.

and Bomford, J. M.) RAM SAHAI *v.* HET SINGH. 1938 A.W.R. 1 (B.R.).

———S. 197—*Grove ceasing to be such—Status of groveholder—Right to plant new trees.*

If a plot ceases to be a grove, the groveholder becomes a non occupancy tenant and without written permission is not entitled to plant new trees. (*Drake Brockman, S. M. and Knox, J. M.*) KAILASH BIHARI LAL *v.* MUKTA PRASAD. 1937 R.D. 599.

———S. 223—*Suit by assignee of revenue—If can be brought against lambardar alone.*

A suit under S. 223 of the Tenancy Act by the assignee of revenue should be brought against all the co-sharers collectively, not merely against the lambardar. (*Darling S.M. and Bomford, J.M.*) BOHREY LEKHRAJ *v.* SPECIAL MANAGER COURT OF WARDS, MATTRA. 1937 R.D. 563.

———S. 227—*Co-sharers—Suit by one for profits—Mortgagee of specific plots from one co-sharer—Decree against—If can be passed.*

Where a co-sharer mortgages specific plots of which he is in exclusive possession, the Court in a suit for profits instituted by another co-sharer should regard the mortgagor—Co-sharer and his mortgagee as a single unit, and a decree can be passed under S. 227 of the Agra Tenancy Act against the mortgagee from the co-sharer as well. (*Bennet, J.*) SHEOMURAT SINGH *v.* BIP NARAIN SINGH. 1937 A.L.J. 1354= 1938 A.W.R. 19 (H.C.).

———S. 227—*Lambardar — Suit for settlement of accounts—Competency.*

Every lambardar is a co-sharer first, and the fact that he is a lambardar does not make him any the less a co-sharer, and a lambardar is competent to maintain a suit for settlement of accounts under S. 227 of the Agra Tenancy Act. He may have to implead all the co-sharers or such of them as may be interested in the result of the suit as parties to the suit. But the suit cannot be dismissed on the ground that the lambardar has no right of suit under S. 227. (*Niamatullah and Ismail, JJ.*) GAJRAJ SINGH *v.* TEJ SINGH 1937 A.W.R. 1169=1937 A.L.J. 1277.

———S. 242 (1) (a) and (d)—*Appeal to District Judge—Essentials.*

Though a suit may be one under S. 221 of the Agra Tenancy Act, it is only when the amount of revenue annually payable is in issue that an appeal lies to the District Judge. When a person denies his liability to pay the amount claimed, there is no issue about the amount as there is no contention about it. (*Ganga Nath J.*) MOHAMMAD YUSUF ALI KHAN *v.* SHIAM KUNWAR. 1938 A.W R. 24 (H.C.)=1938 A.L J. S.

AJMER COURTS REGULATION (I OF 1877), Ss. 14, 15 and 17—*Appeal against order of abatement by first appellate Court—If competent.*

An appeal against an order of the first appellate Court that an appeal had abated, is not competent under any of the Ss 14, 15 or 17 of the Ajmer Courts Regulation. (*Weston.*) MANGI LAL *v.* GOPI NATH. 1937 A.M.L.J. 107.

———(1926) S. 24—*Exemption under—If extends to benefits arising from land.*

The exemption from attachment and sale given by S. 24 of the Ajmer Courts Regulation is confined to land and does not include benefits arising from land. (*Weston.*) MAN MAL *v.* KANWARI LAL. 1937 A.M.L.J. 89.

———S. 24—Lands exempted under—Receiver in respect of—If can be appointed. *See* CIVIL PROCEDURE CODE, S. 51. 1937 A.M.L.J. 89.

APPEAL—*Appellate Court—Functions and duties of Court of first appeal—Necessity for determination of all questions of fact.*

of first appeal cessary for deci- think that on a on the plaintiff may affect its o say what view

placed the burden on the other party. possible for the Court of first appeal tc unnecessary harassment to the parties which is involved when in second appeal it is found that there is no ascertained set of facts to which the la... (*Rowland, J.*) RAJPATI NARAYAN ... NARAYAN SINGH.

1937 P.W.N. ...

——*Appellate Courts—Power—Remand on issues not raised in pleadings—Competency.*

An appellate Court is competent to remand a suit for re-hearing on issues not raised in the pleadings, when such remand is on questions of jurisdiction which can be raised at any time. (*Courtney Terrell, C.J. and Madan, J.*) BARAIK RAM GOBIND SINGH *v.* CHOWRA URAON.

16 Pat. 632.

——*Right of—Necessary party impleaded in suit but not in appeal—Such party, if has right of second appeal*

Where a necessary party is impleaded in a suit but not impleaded in first appeal, such a party has a right of second appeal as he is interested in its right decision. (*Bhide, J.*) PALA SINGH *v.* MT. HARNAMI.

A.I.R. 1938 Lah. 70

ARBITRATION ACT (IX OF 1899), S. 11—*Order declining to file award—Appeal.*

There is no provision in the Arbitration appeal against an order refusing to file an awarc an appeal filed through mistake can be heard as sion. (*Mir Ahmad, A.J.C.*) PEOPLES BANK OI THERN INDIA LTD. *v.* LEKHU RAM.

A.I.R. 1938 P

——S. 15—*Decree passed on award—If a ba force award.*

... to which the of a decree there

which must be ignored and i

moneys temporarily—Offence—Proper punishment.

(Per *C.J. and Gentle, J.*) An advocate who misappropriates his client's moneys is not fit to remain a member of an honourable profession of advocates of ...

might have a harmful effect on the profession whole. The fact that the misappropriation is only porary does not lessen the offence or the gravity of misconduct.

Varadachariar, J.—Though the conduct of an advocate who misappropriates the moneys ... must be strongly disapproved and of the profession should observe th- professional conduct, the Court

BENG. AGRI. DEBTOR'S ACT (1936). S. 34.

question of punishment, cannot shut its eyes to the fact that those standards have not unfortunately yet come to be generally observed and the way that advocates and clients carry on their pecuniary dealings sometimes leads advocates to imagine that they can persuade their clients to condone the faults on their part in dealing with their client's money. The possibility or even the fact of condonation ... is, however, no justification for

C.J., Varadachariar and Gentle, In the matter of.

1937 M.W.N. 1322 (F.B.).

BENAMI—*Burden of proof.*

The burden of proof is on the person seeking to esta- ... It ...ordi- ... the benami arrangement in its integrity, and if it is once established that a transaction is benami, the fact that the deeds bear the benamidar's name is necessarily consistent with the benami case and is of no essential weight on one side or the other. Since therefore it is unlikely that there will often be any other relevant circumstances from which the conclusion can be drawn that a transaction is a benami one, the usual mode of proving that a purchase is a benami transaction is by showing that the funds from which the purchase was made were exclusively the funds of the person alleged to be real owner of the property. The main test is to find out the real intention of the parties. All the peculiar circumstances and probabilities of each particular case must be carefully considered. Although no one of those circumstances taken by itself may be of any particular value to afford any conclusive proof of the intention to transfer the ownership from one person to the other, yet a com-

ACT (XII OF 1877), Ss. 3 and 13—*Jurisdiction of Munsif to attach property lying out of his jurisdiction though within the district.*

t and with e his ce to transfer it to the munsif of another sub division where the property is situated; but his jurisdiction as munsif of the district is unimpaired, and he has jurisdiction to attach property in any part of the district. (*Courtney Terrell, C.J and Manohar Lall, J.*) RAM BILAS MAL ... SAHAY.

172 I.C. 30 = 1937 P.W.N. 757 = 18 Pat.L.T. 822.

... AGRICULTURAL DEBTORS' ACT ... S. 34—*Sale in execution of decree— ... than decretal amount— ... confirmation of sale—*

...cree certain property is put up to sale and purchased by the decree-holder for

BENG. AGRI. DEBTOR'S ACT (1936), S. 34.

cultural Debtors Act, although the sale has not been confirmed. No doubt, if the decree-holder makes an attempt to realise the balance of the debt, S. 34 would come into play. (*Henderson, J.*) RAMENDRA NATH *v.* DHANANJOY MONDAL. **42 C.W.N. 218.**

——**S. 34**—*Sale in pursuance of money decree—Purchase by decree-holder for less than decretal amount—Notice received by Court before confirmation of sale—Jurisdiction to stay proceedings.*

Where the judgment-debtor's properties were sold in pursuance of a money decree and purchased by the decree-holder for a sum which was less than the amount of the decree which sum was credited towards the satisfaction of the decree, the executing Court has no jurisdiction to stay further proceedings on receipt of a notice under S. 34 of the Bengal Agricultural Debtors' Act, although the sale has not been confirmed. (*Bartley and Nasim Ali, JJ.*) JAGABANDHU ROY *v.* BHUSAI BEPARI. **42 C.W.N. 217.**

——**Ss. 34 and 20**—*Notice received by Insolvency Court—Power of latter to decide if insolvent is 'debtor'.*

Under S. 20 of the Bengal Agricultural Debtors' Act if any question arises in connection with proceedings before a Board under this Act, whether a person is a debtor or not, the Board shall decide the matter and it would seem that such a decision must precede any notice issued under S. 34 of the Act. It is not for the Insolvency Court which receives the notice to decide, more especially without taking any evidence whatsoever, whether a person is or is not a debtor within the meaning of the Act. (*Bartley and Nasim Ali, JJ.*) SHIB DULAL *v.* KISHOREGANJ LOAN OFFICE, LTD. **42 C.W.N. 173.**

BENGAL CESS ACT (IX OF 1880), Ss. 4 and 6—*"Annual value of land"—Fees levied for privilege of selling goods in* hats*—Assessment to cess.*

Where the vendors attending the *hats* do not sit in any particular place and tolls or fees are realised by the plaintiff on the quantity and quality of articles actually sold and no fee is payable if there is no sale, and fees are also realised on sales from hawkers who do not sit in the *hat* but stroll about the *hat* compound, the money realised by the plaintiff from the vendors of articles is not rent, but fees levied for the right or privilege of selling their goods in the *hats* and does not therefore represent the "annual value of land" as defined in S. 4 of the Cess Act. Consequently an assessment to cess under Chapter II of the Act on the basis of such income is illegal and *ultra vires.* (*Mitter and Biswas, JJ.*) SECRETARY OF STATE *v.* HINGUL KUMARI DASSI. **42 C.W.N. 169.**

BENGAL COURT OF WARDS ACT (IX OF 1879), S. 6—*'Proprietor of an estate'—Executrix and tenant for life under a will—If a proprietor.*

Where a Hindu testator had bequeathed a life-estate in all his properties to his wife and also appointed her as an executrix, the widow after the death of the testator is the 'proprietor of the estate' within the meaning of S. 6 of the Bengal Court of Wards Act. (*Panckridge, J.*) INDUMATI DEBI *v.* BENGAL COURT OF WARDS. **42 C.W.N. 230.**

——**S. 6 (a)**—*Declaration by Court of Wards under—If a Judicial act—Notice to persons affected—Necessity.*

In making a declaration that a person is a disqualified proprietor under S. 6 (*a*) of the Act the Court of Wards acts judicially. It would be wrong to say that it is a purely administrative act. Hence the person affected by such a declaration is entitled to notice. (*Panckridge, J.*) INDUMATI DEBI *v.* BENGAL COURT OF WARDS. **42 C.W.N. 230.**

——**S. 6 (a)**—Declaration under—If a matter concerning revenue under S. 226 (1) of Government of India Act. *See* GOVERNMENT OF INDIA ACT, S. 226 (1). **42 C.W.N. 230.**

——**S. 7**—*Taking charge of property—Facts to be considered prior to—Opportunity to person affected to show competency to manage.*

Before the Court of Wards can take charge of the property of a person under S. 7 of the Act, after a declaration of the incompetency of the proprietor to manage it, the Court of Wards must consider whether there exist materials to warrant such a declaration. Principles of natural justice require that the proprietor should have an opportunity of testing those materials and of establishing competency to manage. (*Panckridge, J.*) INDUMATI DEBI *v.* BENGAL COURT OF WARDS. **42 C.W.N. 230.**

BENGAL ESTATES PARTITION ACT (V OF 1897), Ss. 22 and 25—*Scope—Partition by Collector—Lands claimed as raiyati treated as bakasht—Suit in Civil Court for declaration that such land is occupancy jote or falls under S 22 (2) B.T. Act, and for decree directing to be entered as jama in batwara papers—Maintainability—Specific Relief Act, S. 42—Jurisdiction of Civil Court.*

The High Court (or a Civil Court) cannot set aside or alter a partition which has been effected by a Revenue Court of competent jurisdiction; it cannot be said that the Revenue Court was acting without jurisdiction merely because, regarding a matter for which there is no special provision in the Bengal Estates Partition Act, it adopted a view which, though contrary to the view taken by the High Court, cannot yet be said to have been unreasonable. A co-sharer landlord of a village which has been partitioned by the Collector, who was a party to the collectorate partition proceedings and was allotted his due share of the assets of the *mahal* which was fixed in his presence, cannot maintain a suit for a declaration that certain lands treated as *bakasht* lands in such partition are his occupancy jote and in the alternative that he has the peculiar right in them which is defined in S. 22 (2) of the Bengal Tenancy Act and for a decree directing that the amount of rental payable by him before the partition may be entered in the batwara papers as the jama of the said lands. To give a decree to the plaintiff-co-sharer in such terms would involve the re-adjustment of the assets not only so far as he is concerned, but also so far as the other co-sharer-landlords are concerned. Such an order is clearly beyond the jurisdiction of the High Court or Civil Court. Nor can a mere declaration of the plaintiff's right under S. 22 (2) of the B.T. Act be granted, though he would be entitled to it, because no consequential relief can be granted to him. In view of S. 42, Specific Relief Act, and the settled practice of the Court not to grant any declaratory decree when that would be of no avail to the party seeking it, the suit cannot be maintained. It is a matter for the revenue authorities to decide whether the partition should be re-opened in order to relieve the plaintiff of the hardship involved. (*Fazl Ali and Madan, JJ.*) BHAIRO SINGH *v.* SHAMSUNDER PRASAD. **18 P.L.T. 843 = 1937 P.W.N. 816**

BENGAL EXCISE ACT (V OF 1919), Ss. 46 and 62—*Accused charged under S. 46 having previous conviction—Summons case procedure—Legality.*

Where the accused who is charged with an offence under S. 46 of the Bengal Excise Act is liable to enhanced punishment under S. 62 of that Act by reason

BENG. FOOD ADULTERATION ACT (1919), S. 6.

of a previous conviction, and the Magistrate is cognisant of this fact at the commencement of the trial, the proper procedure for him to adopt is that laid down for a warrant case. The irregularity of following the summons case procedure instead of the procedure for a warrant case is not a mere matter of form and would not be cured by S. 537, Cr. P. Code. (*Biswas, J.*) SUFAL GOLUI *v.* EMPEROR. 42 C.W.N. 222.

BENGAL FOOD ADULTERATION ACT (VI OF [illegible]

public analyst is against accused.

Where in a case under S. 6 (1) (*e*) of the Bengal Food Adulteration Act the Magistrate acquitted the accused and directed the return of the tins of mustard oil to him, and the order of acquittal was not appealed from, the Sessions Judge cannot, on appeal proceed on the basis that the order of acquittal is wrong and direct the forfeiture of the tins in case the report of the public analyst is against the accused (*Guha and Lethbridge, JJ.*) KISHAN LAL *v.* SASHI BHUSAN. 42 C.W N. 220

BENGAL LAND REGISTRATION ACT (VII OF 1879), Ss. 57 and 84—*Decision in mutation proceeding—If conclusive as to possession.*

The plaintiff brought a suit against the defendant for possession of certain lands on the ground that they were purchased by him out of his own funds. The plaintiff and the defendant were members [illegible] family. The lands were mutated in [illegible] alone. The defendant contended th[illegible] partition but it was found that he never tried to get them mutated in his own name. The lands were sold in 1931 by the defendant to another who applied in 1932 for mutation of his own name in the record of rights. But his application was rejected by the sub-divisional Officer in 1932. He however got his name entered in 1933 in the settlement records,

Held, that the decision of the Sub-divisional Officer in the mutation proceedings of 1932 was conclusive as to the plaintiff's possession of the lands in suit under S. 57. (*McNair, J.*) BEROJULLAH SARKAR *v.* AYATULLAH AKAND. A.I.R. 1938 Cal. 117.

BENGAL LAND REVENUE ASSESSMENT (RESUMED) REGULATION (III OF 1828), S. 13—*Government granting lands in Sunderbans area—Government if a 'landlord'—Demand described as 'revenue', if only 'rent'—Grant*[illegible] *ment of rent in case of diluvion—*

By the force of S. 13 of the R[illegible] alone, the state does not bec[illegible] [illegible]

'landlord' and 'tenant' and the Government demand described as 'revenue' in the grant cannot be construed to mean 'rent'. Hence in respect of such a land a grantee cannot claim abatement of rent under S. 52 of the B. T. Act on account of some portion of his lands being diluviated. (*Mitter and Biswas, JJ.*) AMBUJ BASHINI CHOWDHURANI *v.* SECRETARY OF STATE. 42 C.W.N. 239.

BENGAL, N.W.P. AND ASSAM CIVIL COURTS ACT (XII OF 1887), S. 13 (2)—*Order by District Judge re-distributing work in Courts of Subordinate Judges—If affects jurisdiction of latter.*

BENG. TENANCY ACT (1885), S. 26.

Under S. 13 (1) of the Civil Courts Act, the Local Government fixes as well as alters the local limits of the jurisdiction of the Civil Courts. The local jurisdiction of a Subordinate Judge which extends over the whole District, is not altered by an order of the District Judge under Cl. (2) of that section re-distributing the Civil business of the District. Such an order under S. 13 (2) therefore cannot operate to take away the jurisdiction of a Subordinate Judge who passed a mortgage decree from [illegible] although the civil business relat[illegible] [illegible]a within which the mortgaged [illegible]l is assigned by the District Judge [illegible] Judge of the District. (*Bartley and Nasim Ali, JJ.*) JITENDRA NATH *v.* BIRENDRA KRISHNA ROY. 42 C.W.N. 167.

BENGAL PUBLIC DEMANDS RECOVERY ACT (III OF 1913), S. 57—*Security bond in favour of certificate-officer—Nature of—District Board, if can sue upon.*

A judgment-debtor under arrest, under the Public Demands Recovery Act, in respect of certificate dues, was released from such arrest on a surety executing a security-bond in favour of the certificate-officer agreeing to stand surety for the payment of the decree amount due to the District Board, and to produce the judgment-debtor on a particular date. In a suit on the bond by the District Board,

Held, that the agreement was in the nature of a contract of guarantee under S. 126 of the Contract Act and that though a suit could not be maintained by the certificate-officer on such a bond, he being deemed to be a [illegible] entitled to maintain a suit to enforce the security which was admittedly for its benefit unless of course it is barred by any other principle.

Held, further, that case came within the well-recognised exception to the general as laid down in *Tweedle* v. *Atkinson*, founded on the creation of a trust, and that the certificate-officer being a nominee or trustee of the District Board, the Board was entitled to sue upon the contract. (*Henderson and Biswas, JJ.*) MALDA DISTRICT BOARD *v.* CHANDRA KETU NARAYAN SINGH. I.L.R. (1937) 2 Cal. 698 = 66 C.L.J. 373.

BENGAL TENANCY ACT (VIII OF 1885), S. 4—*Under-*raiyat—*Status of—Power to sub-lease—Purchaser of under-*raiyati's *right—If can eject sub lessee.*

Under S. 4 of the B. T. Act an under-*raiyat* is a [illegible]ectly a tenant under [illegible] In either case he is [illegible]ving the status of an under-*raiyat*. S. 4 (3) gives an indication that under-[illegible] let their under-*raiyatis* and [illegible] Where such a sub-lessee has [illegible]upancy to the land by a local [illegible]ected by a purchaser of the under-*raiyati* at a sale in execution. (*Nasim Ali and Remfry, JJ.*) DWARKA MANDAL *v.* NALINI KANTA MITRA. I.L.R. (1937) 2 Cal. 689.

——**S. 26-C (2)**—*Instrument of transfer stating sale price as Rs. 200—Recital in body that certain mortgage debts were satisfied—Amount of such debts not stated—Validity of registration.*

Where an instrument of transfer stated the sale price as Rs. 200 and in the body of the instrument one mortgage in favour of the transferee and another mortgage decree in favour of his son were recited and stated to have been satisfied but the amount due on the mortgage

or on the mortgage decree was not mentioned, and the registering officer accepted Rs. 200 as the sale price of the holding and on that footing registered the document,

Held, that the document was validly registered as contemplated by S. 26 C, Cl. (2) of the B. T. Act. (*Bartley and Nasim Ali, JJ.*) KUNJA KAMINI *v.* MANGAL CHANDRA. 42 C.W.N. 209.

——S. 26-F—*Instrument of transfer stating sale price as Rs. 200—Notice under S. 26 C also stating same amount—Recital in body of instrument that certain mortgage debts were satisfied—Amount of such debts not stated—Amount to be deposited by landlord for pre-emption.*

Where the instrument of transfer and the notice issued to the landlord under S. 26-C of the B. T. Act stated the sale price as Rs. 200 and in the body of the instrument one mortgage in favour of the transferee and another mortgage decree in favour of his son were recited and stated to have been satisfied but the amount due on them was not mentioned and it appeared that the mortgage was in respect of a different property and the mortgage decree directed a sale not only of the holding sold but also of other properties.

Held, that the transferee was not entitled to ask the Court to consider the amount payable on the mortgage or the mortgage decree as part of the consideration for the purposes of S. 26-F of the Act, and that the landlord was not bound to deposit for pre-emption anything more than what was stated in the instrument of transfer and in the notice issued under S. 26. (*c*) (*Bartley and Nasim Ali, JJ.*) KUNJA KAMINI *v.* MANGAL CHANDRA. 42 C.W.N. 209.

——Ss. 44 (c) and 116—*Applicability—Verbal lease for one year—If one for "term of years"—Status of tenant—Ejectment—Liability of tenant.*

The words 'term of years' in S. 116 in the context in which they occur cannot be read as applying to a verbal lease for one year or less. And unless a proprietor when letting out zirat takes the precaution of letting "under a lease for a term of years or under a lease from year to year", the tenant inducted on the land, if he is a raiyat within the definition of S. 5 (2), will get the benefit of the provisions of Ch. 6 thereof. Therefore a tenant who has been inducted on the zirat land as a *raiyat* by a verbal lease for one year only, becomes a non-occupancy *raiyat* as S. 116 does not apply so as to bar the operation of Ch. 6. Nor is he liable to be ejected under S. 44 (*c*) at the expiry of his lease as he has not been admitted to occupation of the land under a registered lease. (*Rowland, J.*) KUNJ BIHARI THAKUR *v.* UMASHANKAR PRASAD. A.I.R. 1938 Pat. 38.

——S. 48-H—*Under-*raiyati *lease registered without payment of landlord's fee—Landlord's right to sue for such fee.*

If an under-*raiyati* lease by an occupancy *raiyat* is registered without payment of the landlord's fee in contravention of S. 48-H of the B. T. Act, the lease itself would be void as against the superior landlord. But the section does not entitle that superior landlord to sue for the unpaid landlord's fee. (*Bartley and Nasim Ali, JJ.*) HARENDRA NATH MITTER *v.* HOSSAINALI SANA. 42 C.W.N. 215.

——S. 52—Abatement of rent—Grantee of Sunderbans land under S. 13 of Regulation III of 1828—If can claim. *See* BENGAL LAND REVENUE ASSESSMENT (RESUMED) REGULATION (III OF 1828), S. 13. 42 C.W.N. 239.

——S. 52 (2)—*Right conferred by—Availability.*

Even assuming a grant of Sunderbands land to be a lease, its terms which provide for a measurement and revised assessment only once during the whole term of 99 years, militate against the right conferred by S. 52 (2) of the B. T. Act. (*Mitter and Biswas, JJ.*) AMBUJ BASHINI CHOWDHURAIN *v.* SECRETARY OF STATE. 42 C.W.N. 239.

——S. 103-B—*Presumption under—Extent of.*

The record-of-rights raises a strong presumption in favour of the recorded holder, but it is only presumptive evidence of the state of things at the date the record-of-rights was prepared, and cannot ordinarily raise a presumption in favour of the recorded holder of his possession at some earlier date. A.I.R. 1934 Cal. 707, Foll. (*McNair, J.*) BEROJULLAH SARKAR *v.* AYATULLAH AKAND. A.I.R. 1938 Cal. 117.

——S. 104-H—*Parties—Suit for declaration that status of defendant should be altered—Under-tenants recorded as occupancy raiyats—If necessary and proper parties.*

In a suit framed under S. 104-H the relief claimed must determine the question whether the under-tenants are or are not necessary parties. Where the plaintiff asks for a declaration that the status of the defendants should be altered, the under-tenants or the persons who have been recorded as occupancy raiyats of a portion of the same holding are necessary and proper parties, as the decision would not only affect the status of the defendant but would also affect the status of the under-tenants. (*Wort and Manohar Lall, JJ.*) KAMESHWAR SINGH BAHADUR *v.* BIBI FATMA. A.I.R. 1938 Pat. 48

——S. 116—Applicability—"Term of years"—Verbal lease for one year. *See* B.T. ACT, SS. 44 (*c*) AND 116. A.I.R. 1938 Pat. 38.

——S. 174—*Appeal—Order of Munsif refusing to set aside sale—Appealability—Revision.*

No appeal lies against an order of a Munsif refusing to set aside a sale under S. 174, B.T. Act. The remedy is by way of revision. (*Courtney-Terrell, C.J. James and Manohar Lall, JJ.*) SUKHOO SAO *v.* SITA RAM HAJJAM. 18 Pat.L.T. 933 = 1937 P.W.N. 934 = A.I.R. 1938 Pat. 21 (S.B.).

——S. 174—*Compliance with—Decree-holder and judgment-debtor certifying satisfaction of decree—Deposit by judgment-debtor of five per cent. for payment to auction-purchaser—Sufficiency—Sale—If to be set aside—Deposit of decretal amount in Court—Necessity.*

After a sale of a holding in execution of a rent decree and within thirty days of the sale the decree-holder and the judgment-debtor certified to the Court that the decree had been satisfied and fully paid, and the judgment-debtor deposited five per cent. of the purchase-money for payment to the auction-purchaser and prayed that the sale be set aside.

Held, that the provisions of S. 174, B.T. Act, had been substantially complied with and the sale should be set aside; it was not necessary for the judgment-debtor to deposit the amount of the decretal debt in Court for the benefit of the decree-holder when the decree-holder himself had certified satisfaction of the decree. (*Courtney-Terrell, C.J. James and Manohar Lall, JJ.*) SUKHOO SAO *v.* SITA RAM HAJJAM. 18 Pat.L.T. 933 = 1937 P.W.N. 934 = A.I.R. 1938 Pat. 21 (S.B.).

BERAR INAM RULES, (1859), R. IV—*Inam—Service grant—Succession to—Sister and Father's brother's son—Preferential right—Watan belonging to family—Succession to.*

A person who is disqualified by reason of sex from performing a particular service cannot be considered a successor to an Inam within the meaning of R. IV of the Berar Inam Rules. In the case of an Inam grant for

BIHAR TENANCY ACT (1885), S. 148.

the purpose of performance of Abhishek to a Maruthi. Samsthan, it is an essential feature of the service grant that it should be held by the person who performs the service. A sister of the deceased certified holder, though she is a nearer heir than the [illegible] son for purposes of Hindu Law, car [illegible] the successor for the purposes of R. [illegible] perform the service herself. As the [illegible] the family on her marriage she cannot inherit a watan which belongs to the family. A watan is not the same thing as an Inam. (*Roughton, F.C.*) HARNABAI *v.* GANGADHAR. 1938 N.L.J. 22.

BIHAR TENANCY ACT (VIII OF 1885), S. 148—*Scope—Suit for rent of part of holding—Maintainability—Money decree—Power of Court to pass.*

A suit for rent in respect of a part of a holding is not maintainable at all; nor can the Court pass a money decree even (*Agarwala, J.*) DWARKA PRASAD SINGH *v.* BABU LAL SINGH. 18 Pat.L.T 1021.

——S. 148 (h)—*Applicability—Decree for arrears of rent in favour of landlord—L[illegible] est in zamindari to superior [illegible] assignment of decree to another—[illegible] tion by assignee of decree—Compet[illegible]*

An assignee of a decree for arre[illegible] not obtained assignment of the lan[illegible] make an application to execute the decree even as a simple decree for money. Where a landlord who has obtained a decree for rent assigns his interest in the zamindari to the superior land[illegible] decree for rent to another, [illegible] Tenancy Act is a complete bar [illegible] assignee of the decree for ren[illegible] become exempt from the bar [illegible] the fact that the landlord has parted with his interest before the execution is applied for. (*Fazl Ali and Rowland, JJ.*) KEDAR NATH *v.* [illegible]

——S. 153—*Appeal—Conflicting [illegible] rent below Rs. 50 against A—A alleging that B was in possession of lands—B joined and allowed to contest—* [illegible]

[illegible] party and allowed to contest the suit.

Held, that the appeal lay to the District Judge also second appeal to the High Court, as there was [illegible] flict of interest a[illegible] and *B.* (*Manol*[illegible]) NONIA. [illegible]

——S. 171—[illegible] *by mortgagee of* [illegible] *payable by tenan*[illegible] *regain possession from amount deposited by mortgage*[illegible] *gagee in respect of his share of rent paya*[illegible]

[illegible] possession under S. 171 of the Bihar T[illegible] only on repayment of the amount so [illegible] mortgagee to prevent the sale that the judgment-debtor tenant (mortgagor) w[illegible] sion of his holding. [illegible] debtor of any lesser a[illegible] from the amount deposited by the mortgagee an amount which the judgment-debtor claims to be due to him from the mortgagee as the share of the rent payable by the mortgagee and the price of crops reaped by the mort-

BOM. MUN. BOROUGHS ACT (1925), S. 33.

gagee, is not a valid deposit and is not in compliance with S. 171. (*Agarwala, J.*) RAM LAL JHA *v.* THAKUR DAS. 18 Pat.L.T. 1019.

——S. 171—*Jurisdiction—Mortgagee of tenant de*[illegible] *of holding and* [illegible] *ant to be put back* [illegible] *amount deposited*

Quaere.—Whether the Court has jurisdiction under S. 171 of the Bihar Tenancy Act to entertain an application by the tenant-judgment-debtor, who has been dispossessed under the section by a deposit made by his mortgagee to prevent a sale, praying to be put back in possession by offering to pay the mortgagee the amount deposited by him. (*Agarwala, J.*) RAM LAL JHA *v.* THAKUR DAS. 18 Pat.L.T. 1019.

——(as amended in 1934), Sch. II, Art. 2 (b) (ii) —*Scope—If retrospective—Suit for produce rent after act on cause of action arising before—Limitation.*

Quaere—Whether the Bihar Tenancy Amending Act is [illegible] or the longer [illegible] produce rent [illegible] use of action [illegible] (*Wort and* [illegible] N SINGH *v.* [illegible] 2 I.C. 202= [illegible] Pat.L.T. 812= A.I.R. 1937 Pat. 639.

BOMBAY HIGH COURT RULES (APPELLATE SIDE) [illegible]

[illegible] are sought to be compulsorily acquired for a declaration that the notifications under the Land Acquisition Act [illegible]

BOMBAY MUNICIPAL BOROUGHS ACT [illegible]

[illegible] paration of [illegible] offices of [illegible] and the [illegible]

[illegible] amounts to a removal or reduction within the meaning of S. 33 of the Act. (*Broomfield and* [illegible]) [illegible] ROUGH OF DHULIA *v.* [illegible] 39 Bom.L.R. 1269.

——S. 33—*Construction—Resolution passed by majority of Councillors present at meeting—Majority not amounting to two thirds of the whole number of*

Councillors of Municipality—Effect—Action taken upon such resolution—If ultra vires.

Where a resolution of removal from office or reduction is passed by a majority of fifteen to eleven Councillors out of those present, the total number of Councillors of the Municipality then being thirty-one, there is no majority of two-thirds of the whole member of Councillors as required by S. 33 of the Bombay Municipal Boroughs Act, and the resolution therefore contravenes the statutory provisions of S. 33 of the Act. The rule contained in that section is conducive to stability in the higher grades of service and is essentially for public good. Any action taken by the Municipality in contravention of or in violation of that rule must be regarded as *ultra vires*. Although every resolution passed by a majority of votes is an expression of the will of the public body passing it, when the law as laid down in S. 33 requires that the resolution upon the particular matter must contain the expression of the pleasure or will of a stated number of members of the Municipality, the failure to comply with such provisions would render the expression nugatory and of no consequence. Consequently any action taken on a resolution passed by a majority which less than two-thirds of the whole number of Councillors is wrong and irregular. (*Broomfield and Wassoodew, JJ.*) MUNICIPAL BOROUGH OF DHULIA *v.* RAMACHANDRA BAPUJI KALE.

39 Bom.L.R. 1269.

———**S. 33**—*Dismissal of Chief-Officer in contravention of—Suit for damages—Measure of damages.*

The Chief Officer of a Municipality is only entitled to one month's notice before discharge like any other Municipal officer or servant, the only difference between his position and that of the other servants and officers being that he cannot be discharged except in the manner provided by S. 33. He cannot claim as of right to remain in service until he reaches a particular age fixed by the rules under the Act; nor can he claim a gratuity the grant of which is entirely at the discretion of the Municipality under the rules made under the Act. Since there is nothing to prevent him from being removed from office at any time by a valid resolution under S.33, the only damages which he can claim and which can be awarded to him in a suit for damages for wrongful dismissal are wages for the period of notice, *i.e.*, one month's pay. (*Broomfield and Wassoodew, JJ.*) MUNICIPAL BOROUGH OF DHULIA *v.* RAMACHANDRA BAPUJI KALE. **39 Bom.L.R. 1269.**

———**S. 33**—*Scope and effect—Removal of Chief Officer in contravention of procedure prescribed—Suit for damages in Civil Court—If barred—Servants of Municipalities and local bodies—Tenure of—Rule as to Crown servants—Applicability—Right of suit—If to be expressly given by statute—Jurisdiction of Civil Courts.*

The general rule applicable to the tenure of servants holding office under the Crown and their liability to dismissal without notice and without reason assigned cannot be applied in its entirety to other public servants not in the employment of the Crown, *e.g.*, servants holding offices under a Municipality under the Bombay Municipal Boroughs Act. Whatever justification there may be for bringing the servants of local bodies within the statutory definition of public servants, it cannot be concluded from that circumstance that local bodies enjoy all the prerogatives of the Crown governing its relations with its servants. Even the Crown's prerogative of dismissal can be curtailed by a statute, and if a statute regulates the procedure of dismissal of a public servant the Crown will be bound by it. The provision in S. 33 of the Bombay Municipal Boroughs Act is a limitation

of the right to dismiss at pleasure; that section may reasonably be said to affect the tenure of the post of the Chief Officer and to give him a right to hold his office until removed from his Office in the manner prescribed by the section. Even if the general rule as to the tenure and dismissal of Crown servants be applicable to the case of the Chief Officer of a Municipality, S. 33 of the Act would take the case out of the general rule and would prevent the officer from being removed from office except in accordance with the provisions of that section. The removal of the Chief Officer in contravention of S. 33 is an infringement of his right to hold office unless or until he is lawfully removed, it gives him a cause of action for a suit for damages for wrongful dismissal in the Civil Court, as it cannot be denied that the infringement of the right causes damage. Nor is it necessary that a right of suit should be expressly given by statute. The maxim *ubi jus ibi remedium* may fairly be applied.

Wassoodew, J.—Where the act complained of is professedly done under the sanction of the law and in the exercise of the power conferred by statute upon the Municipality, the fact that it is done by the Municipality under a supposed delegation of Sovereign authority but in actual disregard of the procedure in that respect laid down by law will not afford justification in a Civil Court. Even the Crown could not put forward such a plea in such a case. There is no warrant for holding that no action lies against the Municipality even if it violates the rules of procedure laid down by the law of its incorporation. Where a right and an infringement thereof are alleged, and a cause of action is disclosed, the Civil Courts are bound to entertain the same in the absence of any legal bar. (*Broomfield and Wassoodew, JJ.*) MUNICIPAL BOROUGH OF DHULIA *v.* RAMACHANDRA BAPUJI KALE. **39 Bom.L.R. 1269.**

———**S. 114 (2)**—*"Purchase"—Meaning—If includes compulsory acquisition.*

The words "purchase" in S. 114 of the Bombay Municipal Boroughs Act includes compulsory acquisition, if necessary, and not merely acquisition by private negotiations. (*Broomfield and Wassoodew, JJ.*) PARSHOTTAM *v.* SECRETARY OF STATE.

39 Bom.L.R. 1257.

———**S. 206**—*Limitation—Starting point—Wrongful dismissal of Municipal servant—Suit for damages—Period of six months—When commences to run—Date of resolution of dismissal or date of actual handing over of charge.*

A suit by a dismissed servant of a Municipality for damages for wrongful dismissal is not barred by limitation because it is brought after six months of the municipal resolution finally removing the servant from office or after six months of the intimation given to him that he would have to hand over charge. Until the plaintiff is actually forced to vacate his office by the appointment of his successor, he is entitled to say that he is not actually damnified, and the cause of action for the suit does not arise until he actually hands over charge. A suit brought within six months of the date of handing over charge is in time under S. 206 of the Bombay Municipal Boroughs Act. (*Broomfield and Wassoodew, JJ.*) MUNICIPAL BOROUGH OF DHULIA *v.* RAMACHANDRA BAPUJI KALE. **39 Bom.L.R. 1269.**

BOMBAY REGULATION (IV OF 1827),—**S. 26**—Law to be applied in the trial of suits. *See* CONFLICT OF LAWS. **39 Bom.L.R. 1324.**

BUDDHIST LAW—(Burmese)—*Adoption — Proof —Keittima Daughter.*

A applied for letters of administration to the estate of *D* on the ground that *A* was the keittima adopted daughter of *D* and her sole heir. *D* and her husband were a

BUDDHIST LAW (Burmese).

childless couple. *A* was living at *D's* house since she was four years old, and so she was not dence of actual adoption but there w evidence to show that she had been so a reputation of an adopted daughter. *A* was married to the nephew of *D* and even afte- with her children at the house of evidence that her reputation as still persisted. The opposite lived at *D's* house not as an adopted daughter but as a servant girl.

Held, that the evidence was sufficient to establish the adoption as keittima daughter. The fact that *A* was married to the nephew of *D* and that she lived with her children at the house of *D* even after her divorce with him made it impossible that she had the position of a servant girl. As *D* and her husband had no child and *A* lived with them for many years, there was nothing surprising in their adopting *A* as keittima daughter. (*Baguley and Spargo, JJ.*) U TUN PE *v.* MA AYE KI. **A.I.R. 1938 Rang. 40.**

———(**Burmese**)—*Marriage—Validity—Hindu becoming Buddhist, marrying according to customs of Buddhists.*

chaplain, he is going a long way further than any Hindu can be expected to go if he retains Hinduism. When this is coupled with his completely cutting himself off from his relations in India and settling down per-

legal marriage on the principle of *lex loci contractus.* (*Baguley and Sharpe, JJ.*) CHINNASWAMI PILLAY *v.* MA TOKE. **A.I.R. 1938 Rang. 51.**

BURDEN OF PROOF—Suit for arrears of produce rent. *See* LANDLORD AND TENANT—RENT. **19 Pat.L.T. 4 (S. B.).**

BURMA LAND AND REVENUE ACT (II OF 1876), S. 45—*Sale certificate—If document of title.*

It is not the owner that signs a sale certificate; a revenue officer signs it and he signs it to give effect to the sale that has taken place; and the power of selling property belonging to other people is strictly limited by

officer sigining sale certificate in wrong f

Where the attachment for sale is und sale proclamation is also under S. 45, under that section, and it would transfer only the right, title and interest of the owner. The mere fact that after some months the revenue officer in the wrong form cannot alte (*Mya Bu, Offg. C. J. and* HLAING *v.* CHETTYAR FIRM.

CENTRAL PROVINCES BORSTAL ACT (IX OF (1928), S 5—*Scope—Order of detention for non-payment of fine—Legality.*

S. 5 of the C. P. Borstal Act authorises detention only in lieu of transportation or imprisonment. There is no provision in it for any detention in default of payment of fine imposed. An order of detention in default of payment of fine is therefore illegal and liable to be set aside. (*Gruer, J.*) EMPEROR *v.* PANNALAL. **1938 N.L.J. 8.**

C. P. DEBT CONCILIATION ACT (1933), S. 16.

CENTRAL PROVINCES DEBT CONCILIATION —*Jurisdiction of Debt Conciliation not agriculturist—Jurisdiction of decree-holder to object—Subsequent objection in Civil Court—If precluded.*

activities only to cases where the debtors are agriculturists. If the applicant for relief is not a debtor, *i.e.*, a person whose main source of livelihood is agriculture, the Act would not apply to him, and the Conciliation Board would have no power to afford him any relief. The Board has absolutely no jurisdiction in a case where the judgment-debtor applicant is not an agriculturist. The fact that the decree-holder omits to protest against the Board's exercising jurisdiction in the matter cannot confer on the Board a power which it did not possess under the Act and does not preclude him from raising the question of jurisdiction before the Civil Court sitting in execution or the Civil Court from considering and trying the issue as to jurisdiction. (*Niyogi, J.*) TIKA RAM *v.* GANPAT SAHAI. **1938 N.L.J. 17.**

———**S. 4**—*Duty of Debt Conciliation Act*—Bona fides *of applicant—Scrutiny of.*

The Debt Conciliation Act lends itself to abuse and fraud very easily, and must be very strictly construed and vigilantly applied by the sepcial authority created by the Act. The Debt Conciliation Boards should therefore be alert and should first satisfy themselves about the *bona fides* of every application for settlement of debts. *J.*) TIKA RAM *v.* GANPAT SAHAI. **1938 N.L.J. 17.**

—*Right to apply to under—"Debtor"—Person earning livelihood as pleader's clerk for many years. —Acquisition of tenancy for purpose of application—Right of such person to apply.*

A person who earns his livelihood mainly by agriculture is a debtor entitled to apply under S. 4 of the C. P. Debt Conciliation Act. It is not merely necessary that he should have tenancy or proprietary land but also that it should be the main source of his maintenance. A person who has been earning his livelihood as a pleader's clerk for many years and as a private servant and who acquires some tenancy land only to enable himself to apply for settlement of his debts, is not an agriculturist and is not a debtor entitled to apply under S. 4 of the Act. (*Niyogi, J.*) TIKA RAM *v.* GANPAT SAHAI. **1938 N.L.J. 17.**

Conciliation Act has no restrospective operation. An order of the Debt Conci-

J.) TIKA RAM *v.* GANPAT SAHAI. **1938 N.L.J. 17.**

———**S. 16**—*Jurisdiction—Civil Court sitting in execution—Power to question jurisdiction of Debt Conciliation Board to entertain application under S. 4.*

A Civil Court sitting in execution has power to inquire into the question whether the Debt Conciliation Board had jurisdiction to entertain and hear an application under S. 4 of the Debt Conciliation Act made by a person who was not an agriculturist. (*Niyogi, J.*) TIKA RAM *v.* GANPAT SAHAI. **1938 N.L.J. 17.**

CENTRAL PROVINCES MONEY-LENDERS' ACT S. 11—*Applicability—Conditions—Relationship of decree-holder and judgment-debtor—Sufficiency—Debt in respect of sale and purchase of cotton—Decree-holder not money-lender—Effect.*

Before the benefit of S. 11 of the Money-Lenders' Act can be availed of, it must be shown by the applicant that the decree-holder is a money-lender and that the transaction giving rise to the decree was a loan as defined by the Act. It is not enough that the relationship of decree-holder and judgment-debtor exists between the parties. A debt in respect of the sale and purchase of cotton is not a loan under the Act. (*Stone, C.J. and Puranik, J.*) GULABCHAND UTTAMCHAND *v.* BRUEL & CO. **1938 N.L.J. 9.**

——**S. 11**—*Construction—"At any time"—Application for instalments after acceptance of bid at execution sale—Competency—S. 11, if controls O. 21, R. 92, C. P. Code.*

S. 11 of the Money-Lenders' Act has to be construed strictly, as it restricts existing rights under the law, and should not be allowed to override the provisions of the existing law, *i.e.*, the *provisions of O. 21, R. 92, C. P.* Code, S. 11 cannot be interpreted so as to permit of an application for instalments being entertained after the bid at an auction sale in execution of a decree has been accepted and when the confirmation of the sale has become inevitable. Once the bid has been accepted, the court has to confirm the sale under O. 21, R. 92, C. P. Code, unless good cause is shown under Rr. 89, 90 or 91 of O. 21. (*Roughton, F. C.*). KRISHNARAO *v.* BHANU. **1938 N.L.J. 15.**

CENTRAL PROVINCES MUNICIPALITIES ACT (II OF 1922), S. 25 (1), Proviso—*Scope—Post of Secretary to Civil Station Sub-Committee—If protected post.*

The post of a Secretary to the Civil Station Sub-Committee in a Municipal Committee is virtually a post of additional Secretary in the Municipality and is therefore covered by the proviso to S. 25 (1) of the C. P. Municipalities Act. (*D. P. Mishra.*) CIVIL STATION COMMITTEE *v.* G. T. MESHRAM. **1938 N.L.J. 34.**

——**S. 25 (7)**—*Rules under, R. 2 (1) (a)—Appeal—Employees under S. 25 (1), Proviso—Dismissal by Municipal Committee—Right of appeal.*

Employees referred to in the proviso to S. 25 (1) of the C. P. Municipalities Act have no right of appeal against their dismissal by Municipal Committees under R. 2 (1) (*a*) of the rules framed under S. 25 (7) of the Act. (*D. P. Mishra.*) CIVIL STATION COMMITTEE *v.* G. T. MESHRAM. **1938 N.L.J. 34.**

CENTRAL PROVINCES TENANCY ACT (I OF 1920), S. 12 (4)—*Scope—Deed of relinquishment by one tenant in favour of other in settlement of dispute—If prohibited.*

S. 12 prohibits certain transfers mentioned in the body of the section. A deed of relinquishment by an occupancy tenant for valuable consideration in favour of another claiming a right to the holding of a deceased tenant in settlement of a dispute with him is not a transfer and therefore there is no contravention of S. 12. Hence such document can rightly be admitted to registration. (*Bose and Puranik, JJ.*) SAHANDRA BAI *v.* SHRI DEO RADHA BALLABHJI. **A.I.R. 1938 Nag. 30.**

——**S. 89**—*Compliance—Deed of relinquishment by occupancy tenant in favour of landlord temple—Tenant being panch of temple and holding deed on behalf of trustees of temple—If sufficient delivery.*

An occupancy tenant executed a deed of relinquishment in favour of the landlord temple. The tenant was one of the panchas of the temple and therefore *prima facie* had authority to hold the deed on behalf of th[e] trustees of the temple till they were in a position [to] consider the matter.

Held, that this amounted to a sufficient delivery [of] the deed and hence the provisions of S. 89 were sati[s]fied. (*Bose and Puranik, JJ.*) SAHANDRA BAI [v.] SHRI DEO RADHA BALLABHJI. **A.I.R. 1938 Nag. 3[0].**

C. P. CODE (1908), S. 2,

CERTIORARI—*Writ of—Power of High Court [to] issue—Regular exercise of* quasi-*judicial powers—En[]forcement—Issue of writs of* certiorari *and prohibitio[n] for the purpose of.*

The power of the High Court to issue writs of *certi[o]rari* and prohibition to enforce the regular exercise [of] *quasi*-judicial powers by departments of Government, [is] unquestioned. (*Panckridge, J.*) INDUMATI DEBI [v.] BENGAL COURT OF WARDS. **42 C.W.N. 23[0]**

CHOTA NAGPUR TENANCY ACT (VI O[F] 1908), S. 190 (1)—*Applicability and scope—Omissio[n] to issue notice under—Execution sale—If void.*

Failure to issue a notice required under S. 190 (1) [of] Chota Nagpur Tenancy Act, is a matter of jurisdictio[n] and renders void the subsequent execution sale. Th[e] section applies to all warrants or notices, whethe[r] against the person or movable property or immovabl[e] property. (*Courtney-Terrell, C. J. and Madan, J.*) BARAIK RAM GOBIND SINGH *v.* CHOWRA URAON. **16 Pat. 632**

——**Ss. 213 and 214**—*Scope—Rent sale—Applica[]tion to set aside—Dismissal—Subsequent suit on groun[d] of want of jurisdiction to sell—If barred.*

S. 213 of the Chota Nagpur Tenancy Act applies t[o] irregularity or fraud in conducting the sale, but has n[o] application to cases where the Court has no jurisdictio[n] to sell. The dismissal of an application under S. 21[3] of the Act is no bar to a suit under S. 214, on the ground that the sale is void as being without jurisdiction owing to the omission to issue the notice required under S. 190 (2). (*Courtney-Terrell, C. J. and Madan, J.*) BARAIK RAM GORIND SINGH *v.* CHOWRA URAON. **16 Pat. 632.**

CIVIL PROCEDURE CODE (V OF 1908), S. 2 (2)—*"Decree"—Order rejecting appeal for non-payment of additional court-fee—Appealability—O. 43, R. 1.*

No appeal lies against an order rejecting a memorandum of appeal for non-payment of additional court-fee demanded. Such an order is not a decree as defined by S. 2 (2), C. P. Code; nor is it made appealable under O. 43, R. 1, C. P. Code. The remedy of the party is by way of revision. (*Stone, C. J., Bose and Gruer, JJ.*) BALAJI DHUMNAJI *v.* MST. MUKTABAI. **1938 N.L.J. 1 (F.B.).**

——**Ss. 2 (2) and 148**—*"Decree"—Dismissal of suit—Order directing plaint to stand rejected on default of payment of deficient court-fee within fixed time—Appeal—Time given by appellate Court for payment of court-fee—Payment within such time—Sufficiency—Plaint if to be deemed rejected for non-payment within time fixed by trial Court—Powers of appellate Court to extend time.*

An order rejecting a plaint in case of non-payment of deficient court-fee is a decree as defined by S. 2 (2), C. P. Code, and an appeal lies from that order. Where the trial Court, while dismissing a suit on the merits, directs that on failure of the plaintiff to pay the deficiency in court-fee within a certain time, the plaint should stand rejected, and on appeal the plaintiff makes good the deficiency in court-fee within the time allowed by the appellate Court, it cannot be said that there was no decree on the merits from which an appeal would lie because the plaintiff failed to pay the court-fee within

C. P. CODE (1908), S. 2.

the time allowed by the trial Court. Once the appeal was filed, the power of the trial Court to extend the time for payment, under S. 148, C. P. Code, which it could do before the filing of the appeal, is gone, and thereafter, the appellate Court which becomes seized of the case can give an extension, under the powers conferred upon it by O. 41, Rr. 32 and 33, C. P. Code. If the court fee is paid within the extended time given by the trial Court, there is sufficient compliance with the

1938 A.W.R. 13 (H.C.).

——S. 2 (11)—Suit against wrong legal representative—Decree—Binding nature of—Duty of plaintiff in such cases. *See* C. P. CODE, S. 50. **40 P.L.R. 25.**

——S. 9—*Jurisdiction of Civil Court—Suit to declare right to first honours at a festival in a temple—Maintainability.*

A claim to first honours at a festival in a temple is only a right to a dignity or precedence and cannot be regarded as a right of civil nature, whether it is in a temple or elsewhere so long as it was not attached to an office. A suit in respect of such a right is not maintainable. (*Pandrang Row and Abdul Rahman, JJ.*) THATHACHARIAR *v.* SRINIVASARAGHAVA IYENGAR. **1938 M.W.N. 18 (2).**

——S. 11—*Applicability—Assessment proceedings under Income tax Act*—Res judicata—*Income-tax Officer—If "Court".*

The doctrine of *res judicata* cannot operate in respect of an assessment to tax made by an Income-tax Officer. The Income-tax Officer is not a Court, and therefore the doctrine has no application. His assessments are,

FUND, L

MADRAS.

——S. 11—*Cause of action, different—Prior suit on the footing that a release was of no legal effect—Subsequent suit for damages for breach of covenant of title contained in the same release.*

The plaintiff obtained a release from the Official Assignee in respect of an insolvent's share in a certain property. But a mortgagee of that share of the property brought it to sale and it was bought by a stranger. Thereupon the plaintiff sued the Official Assignee for a refund of sum paid to him as consideration for the release on the ground that the release was of no legal effect. But it was dismissed. The present suit was brought by the plaintiff against the Official Assignee, for damages for breach of covenant of title contained in the deed of release. On a plea that the later suit is barred by *res judicata.*

Held, that the causes of action in the two suits were entirely different and that the second suit was not

——S. 11—*Competent Court—Prior suit for* ... *of rent in Court of Assistant Collector, I* ... *under Agra Tenancy Act of* 1901—*Decision on* ... *tary rights—Subsequent suit for ejectment* ... *ancy Act (III of* 1926) *in Court of Assistant C* ... *I class—If* res judicata.

For the application of the rule of *res judicata*, Court which decided the former suit should have competent to decide not only the issue which arise

C. P. CODE (1908), S. 11.

the subsequent suit but the subsequent suit itself. The decision of an Assistant Collector of II class, in a suit for arrears of rent *inter partes* under the Agra Tenancy Act of 1901, holding that the defendant was a proprietor and not a tenant, does not operate as *res judicata* in a subsequent suit for ejectment under S. 82 of the Tenancy Act of 1926 before the Assistant Collector of I class, and does not preclude the latter from referring an issue to the Civil Court and deciding it on the merits. In any case, the Civil Court, to whom the issue of proprietary right is to be referred, is not bound by the decision of the Assistant Collector, II class, in the prior suit for arrears of rent. (*Thom, Ag. C.J. and Niamatullah, J.*) SHEODARSHAN LAL *v.* BALMAKUND. **1937 A.W.R. 1215 = 1937 A.L.J. 1339.**

——S. 11—*Competent Court—Suit in Munsiff's Court—Subsequent suit by same plaintiff against same defendant for same relief in Subordinate Judge's Court—Plea of* res judicata—*Contention by plaintiff that former suit not really triable by Munsif's Court—If open—S. 21—Suits Valuation Act, S. 11—Principle of constructive* res judicata—*Extent and scope of.*

A judgment of a Court without jurisdiction is a nullity and want of jurisdiction cannot be waived. To this fundamental rule there are two exceptions recognized by law: (1) S. 11, Suits Valuation Act, which deals with defects of jurisdiction due to wrong pecuniary valuation, and (2) S. 21, C. P. Code, which deals with a wrong place of suing. These two sections recognise that there may be a waiver on the part of the defendant in regard to the pecuniary or territorial jurisdiction of a Court, as the case may be, and the absence of jurisdiction in such cases would not render the decree a nullity. In other words, there is a distinction between inherent incompetency in a Court and irregular exercise of jurisdiction,

...der these sections extends ... Under both these sections even in the absence of waiver, that is to say, even if objection is taken in the Court of first instance, there must further be consequent failure of justice before the objection can be given effect to. Where no such objection is taken or where no failure of justice has resulted, the decree cannot be impeached either in appeal or in revision or in a subsequent suit; and the decree would operate as *res judicata* in a subsequent suit. An objection which a defendant is precluded from raising is *a fortiori* not open to the party who was the plaintiff in the former suit. Where a plaintiff invoked the jurisdiction of a Court of lower grade on the former occasion and subsequently files a suit for the same reliefs in a Court of higher grade, he cannot escape the bar of *res judicata* in the subsequent suit by pleading that the former suit was tried by a Court which had no jurisdiction to try it. Since the decision in the former can be

...am, J.—Assuming that the former suit, if the ... had valued its property, would have been be... in which it ... nstructive *res* ... Valuation Act ... be evaded. ... choosing the ... ies who, ... by un... in one ... is only

artificially limited by minor considerations, such as the value of the suit or the place where the cause of action arose. Inherent defects stand on an entirely different footing. Once a party has chosen the forum which shall bear his cause, he must abide by his choice. (*Venkatasubba Rao and Newsam, JJ.*) KAMMARAN NAMBIAR *v.* VALIA RAMUNI. **1937 M.W.N. 1292.**

——**S. 11**—*Competent Court—Suit in Revenue Court under N.W.F. Rent Act (XII of 1881)—Decision on proprietary righ—If* res judicata *in subsequent suit for ejectment under Agra Tenancy Act of* 1901 *and Act of* 1926.

The N.-W.F. Rent Act (XII of 1881) did not empower the Revenue Courts to decide any question of proprietary right, except incidentally, nor did that Act provide for an ejectment suit of the nature contemplated by the present Agra Tenancy Act of 1926. Revenue Courts have been empowered by the Agra Tenancy Acts of 1901 and 1926 to decide conclusively a question of proprietary right or to have such an issue decided by the Civil Court. The decision of a Revenue Court under Act XII of 1881 on a question of proprietary right in a suit for arrears of rent cannot operate as *res judicata* in a suit for ejectment under the later Acts on the issue of proprietary right, and is no bar to the Revenue Court taking action under the procedure prescribed by Act II of 1901 or under Act III of 1926. (*Thom, Ag. C.J. and Niamatullah, J.*) SHEODARSHAN LAL *v.* BALMAKUND. **1937 A.W.R. 1215= 1937 A.L.J. 1339.**

——**S. 11**—*Consent decree*—Res judicata—*Conditions—Defendant in prior suit not denying fundamental assertion of right and consenting to decree without raising issue on point—Plea in subsequent suit denying such right—If barred.*

A consent decree cannot, merely because it is a consent decree, prevent the application of the doctrine of *res judicata*. If, as is very often the case, the parties in consenting to the decree, do not really intend that the decree should be the final decision of their disputes, it would not operate as *res judicata*. Where the plaintiff in the prior suit asserted a right to recover certain taxes from the defendant, but the latter did not deny it and did not put the matter in issue, and consented to a decree being passed against him, the defendant must be taken to have admitted the claim of the plaintiff, and it could not be said that he did not intend the decree to decide that dispute once for all in favour of the plaintiff. The admission of a fact fundamental to the decision arrived at cannot be withdrawn, and the defendant in a subsequent suit cannot be permitted to plead his non-liability to pay the taxes. Such a plea is barred by *res judicata* by reason of the prior decision and by virtue of his pleading in the prior suit. (*King, J.*) VENKATACHALAPATHY IYER *v.* THE CITY CINEMA CO., LTD. **1937 M.W.N. 1281.**

——**S. 11**—*Execution proceedings—Omission to raise plea of limitation*—Res judicata.

An order passed in execution on the question of limitation cannot operate as *res judicata* unless the point has been specifically decided or unless it must be inferred as a matter of necessary implication that a decision has been arrived at that the application for execution was within time. Where an application for execution is made and is finally dismissed as infructuous, it cannot be inferred necessarily that the question of limitation has been decided. (*Niamatululah, Ag.C.J. and Allsop, J.*) COLLECTOR OF BENARES *v.* JAI NARAIN RAI. **1937 A.L.J. 1349=1937 A.W.R. 1222.**

——**S. 11**—*Heard and finally decided—Suit for proprietary possession of holding dismissed by Civil Court—*

Subsequent suit in Revenue Court to eject tenant for illegal sub-letting—If barred.

Where a suit by a Zamindar claiming to be put in proprietary possession of a certain holding was dismissed by the Civil Court, a subsequent suit by him for the ejectment of the recorded tenant under S. 82 of the Agra Tenancy Act on the ground of illegal sub-letting is barred by *res judicata*, the question of proprietary possession having been settled by the decision of the Civil Court. (*Darling, S.M.*) NANNU PRASAD *v.* RAM CHANDRA SINGH. **1937 R.D. 591.**

——**S. 11**—*Might and ought—Plaintiff undertaking to give credit for certain amounts—Agreement not to execute decree—Execution in breach of agreement—Judgment-debtor depositing money to prevent execution sale—Suit to recover money so deposited—Maintainability*—Res judicata—*C. P. Code, S. 47.*

In a suit brought by the appellant against the respondent, it was agreed between them that although a decree should be passed against the respondent that decree should not be executed by the appellant decree-holder. A decree was passed and in breach of the agreement, appellant executed the decree and brought the respondent's property to sale. The respondent deposited money to save his property from sale in execution, and then brought an action to recover the amount deposited by him, on the ground that the appellant had not given credit for certain payments which he undertook to give credit for.

Held, that the matters alleged should have been raised as a defence to the action ; and failing to do was *res judicata* ; (2) that the appellant had executed a perfectly valid decree, and money recovered under a decree or judgment could not be recovered back in a fresh suit or action whilst that decree or judgment remained in force ; and (3) that consequently the suit did not lie. (*Wort and Manohar Lall, JJ.*) ABDUL HAMID KHAN *v.* DHANI DUSADH. **18 Pat.L.T. 896=1937 P.W.N. 904= A.I.R. 1938 Pat. 41.**

——**S. 17**—*Applicability — Conditions—'Courts'—Meaning—Properties situate within the jurisdiction of a British Indian and a foreign Court—Jurisdiction.*

S. 17 of the C. P. Code does not confer jurisdiction on a Court unless the defendants are in possession of some property within the jurisdiction of that Court. Further, it is necessary for the section to apply, that the 'different Courts' should be Courts in British India. Where a suit was for possession of two items of property one of which was within the jurisdiction of a British Indian Court, while the other was within the jurisdiction of a foreign Court.

Held, that a British Indian Court would have no jurisdiction to entertain the suit as regards the item of property situated within the jurisdiction of the foreign Court. (*Broomfield and Macklin, JJ.*) KARUSINGA *v.* NARSINHA. **39 Bom.L.R. 1287.**

——**S. 17**—*Applicability—Courts in Berar—C. P. Code, extended to Berar under Indian Foreign Jurisdiction Act* (1890).

The Berars are not within the definition of 'British India' in S. 3 (7) of the General Clauses Act (1897). The Courts in Berar are foreign Courts. The words in S. 17 'within the jurisdiction of different Courts', mean Courts to which the code applies *pro prio vigore* and as such, the mere fact that the code has been applied under the Foreign Jurisdiction Act, would make no difference to the application of S. 17 of the Code. (*Broomfield and Macklin, JJ.*) KARUSINGA *v.* NARSINHA. **39 Bom.L.R. 1287.**

——S. 21—Principle of—Applicability and scope—Constructive *res judicata* as to jurisdiction of Court—Right of party to challenge jurisdiction of Court chosen by himself. *See* C. P. CODE, S. 11.

1937 M.W.N. 1292.

——Ss. 24 and 115—*Case transferred under—Revision, if lies.*

Where a case is transferred under S. 24, no revision lies from the order of transfer; but if it is found that the application for transfer is not *bona fide* one, the case can be retransferred. (*Bhide, J.*) KESHO DAS *v.* N. C. GOYAL & CO. **A.I.R. 1938 Lah. 95.**

——S. 24—*Execution proceeding — Transfer of objection proceedings to another Court without transferring execution proceedings—Legality.*

Obiter: Where in execution of a decree certain property of the judgment debtor is attached and a third person files an objection to the attachment on the ground that the property belongs to him, the objection can be decided only by the executing Court and therefore the transfer of the objection proceedings alone to another Court without transferring the execution proceedings to that Court is not in accordance with law. (*Bhide, J.*) KESHO DAS *v.* N. C. GOYAL & CO.

A.I.R. 1938 Lah. 95.

——S. 39—*Application under—Form— Notice to judgment-debtor—Necessity—Requirements of O. 21, R. 11—Compliance with—Necessity.*

S. 39 of the C. P. Code does neither [illegible] notice to judgment debtor is necessary, no [illegible]

[illegible]

for such an application. (*Weston.*) JASRAJ RIKHRAJ *v.* GHISOO LAL. **1937 A.M.L.J. 113.**

——S. 40—*Decree sent for execution to Court of another province—Law governing such executions.*

Where a decree of a Court of one province is transferred to a Court in another province, for purposes of execution, according to S. 40, C. P. Code, the rules governing executions in the latter province are the rules which would apply to executions of decrees sent from anywhere outside that province. (*Addison and Din Mahomed, JJ.*) MURLI DHAR *v.* BASHESTAR LAL MOTI LAL. **40 P.L.R. 14.**

——S. 47—*Appeal—Surety—Question raised by as to executability of decree—Decision on—Appe*

S. 145, C. P. Code, puts the surety footing as an original party to the suit; and S. 47, C. P. Code, be read together, t the Court into a question raised by the su

executability falls under S. 47, C. P. Code, and the decision thereon is appealable. Even if S. 145 does not in terms apply, as for instance where the surety is not personally liable but the money which he has deposited as security is sought to be made liable, the surety has an equal right of appeal. (*Horwill, J.*) RANGASWAMI CHETTI *v.* NARAYANA IYENGAR.

1937 M.W.N. 1259.

——S. 47—*Applicability— Maintenance decree in favour of Hindu widow declaring her right to maintenance and declaring charge on property—Executability—Separate suit to enforce charge by sale—If necessary.*

Where a decree has been passed declaring the right of a Hin[illegible] that the propertie[illegible] separate [illegible] perties. When the decree for maintenance has the

effect of a decree for sale, the decree-holder is entitled to proceed to execution without any further action. If the charge is created by the decree in the action then a separate suit would be necessary to enforce the charge by way of sale of the properties charged. But when the charge has arisen not by reason of the decree made on the maintenance action but under the Hindu Law, bringing the action for the declaration of the right to maintenance and obtaining a decree to that effect would result in the decree having the effect of a decree for sale of the charged property; and it is not at all relevant what language was used by the Court declaring the charge to exist. No separate suit is therefore necessary to enforce the charge. (*Wort and Varma, JJ.*) SAH RADHA KRISHNA *v.* BECHNI DEBI.

172 I.C. 234 = 1937 P.W.N. 830 = 18 Pat L.T. 834 = A.I.R. 1937 Pat. 654.

——S 47—Bar of suit—Agreement before decree to give credit to certain payments and not to execute decree if passed—Breach —Execution — Deposit of money to save sale in execution—Suit to recover money deposited—Maintainability—*Res judicata. See* C. P. CODE, S. 11. **18 Pat.L.T. 896 = A.I.R. 1938 Pat. 41.**

——S. 48—Applicability—Application for personal decree. *See* C. P. CODE, O. 34, R. 6.

1937 A.M.L.J. 99.

——S. 48—Objection under—When to be taken—Plea of limitation after sale and bef[illegible] of [illegible] on [illegible] C. P.

1937 A.W.R. 1222.

——S. 50—*Suit against wrong legal representative—Decree—Binding nature of—Duty of plaintiff in such cases.*

In a suit against the estate of a deceased person, represented by his legal representative, the plaintiff must be diligent and careful to implead all the ordinary legal representatives under the law applicable, if he wishes to bind them by any decree that might be passed. Nevertheless, if a plaintiff has impleaded the ordinary legal representative, and owing to ignorance of facts or circumstances by reason of which it turns out that the proper legal representatives were in fact others than those ordinarily impleaded and there is no fraud or collusion, the estate will still be bound. (*Tek Chand,*

[illegible]

from that of attachment and sale. In the case of lands exempt from attachment under S. 24 of Ajmer Courts Regulation, if they were leased to lessees, a receiver could be appointed to recover the rents. But if the lands were being cultivated by the judgment-debtor personally an appointment of a receiver would probably be inappropriate. (*Weston.*) MAN MAL *v.* KANWARI LAL. **1937 A.M.L.J. 89.**

——S. 52—*Profits of property of deceased accruing after death—If form part of his estate.*

Rents and profits of the property of a deceased person accruing after the property has devolved on his heirs form part of the estate of the deceased. (*Zia-ul-Hasan and Smith, JJ.*) SHAHANSHAH BEGAM *v.* [illegible] R HUSAIN. **172 I.C. 306 = 1937 O.W.N. 1243 = A.I.R. 1938 Oudh 45.**

——Ss. 52 and 53—*Mortgage executed by two mem- joint Hindu family—Death of one of them—Suit by mortgagee decreed against estate of deceased exe-*

C. P. CODE (1908), S. 100.

A finding of adverse possession must, to some extent, be a finding of fact, but more particularly in a case where the judgment of the lower appellate Court is a judgment of reversal, the High Court may inquire into the method adopted by the lower appellate Court in coming to its conclusion, and enquire whether the adverse possession as found is supported by evidence and whether the finding, which is said to be based on the proper legal conclusion to be drawn from the settlement and mutation records, is justified. (*McNair, J.*) BEROJULLAH SARKAR *v.* AYATULLAH AKAND.

A.I.R. 1938 Cal. 117.

———**S. 100**—*New plea—Plea of estoppel not raised in the trial Court—If can be raised in second appeal.*

A plea of estoppel which is not raised in the trial Court and which depends for its decision on many questions of fact which are necessary to be investigated cannot be allowed to be raised for the first time in second appeal. (*Manohar Lall, J.*) BINDESHWARI PRASAD *v.* LAL MUNGARI LAL.

172 I.C. 198 = 1937 P.W.N. 762 = 18 Pat.L.T. 814 = A.I.R. 1937 Pat. 642.

———**S. 100**—*New plea—Question of pure law—If can be raised.*

A question of pure law can be raised in second appeal, especially when the other party knows all the relevant facts which the latter himself has mentioned in his pleadings. (*Niamatullah, Ag.C.J. and Allsop, J.*) GAYA DEEN MISIR *v.* TIRBHUWAN SINGH.

1937 A.W.R. 1183 = 1937 A.L.J. 1252.

———**S. 100**—*Question of fact—Question as to fraud—Finding on—Finality.*

The question whether there was any fraud or not in a transaction is a question of fact, and a finding thereon by the lower appellate Court on the evidence produced by the parties is conclusive and cannot be challenged in second appeal. (*Ganga Nath, J.*) KASHI KURMI *v.* BANSRAJ KURMI. **1937 A.L.J. 1346 = 1938 A.W.R. 13 (H.C.).**

———**S. 107 and O. 1, R. 10 (2)**—Power of Court—Addition of party as respondent in the appeal. *See* C. P. CODE, O. 1, R. 10 (2) AND S. 107.

1938 M.W.N. 75.

———**S. 115**—Applicability—Order of Munsif refusing [to set] aside sale under S. 174. B. T. Act—Revision. [See B.] T. ACT, S. 174. **18 Pat.L.T. 938 = A.I.R. 1938 Pat. 21 (S.B.).**

———**S. 115**—*'Case decided'—Order as to amendment [of] plaint—When amounts to 'case decided'.*

The question whether an order allowing an amendment of the plaint is a 'case decided' depends upon the [fa]cts of the particular case. Where a plaintiff is per[m]itted to amend his plaint in order to sue on an entirely different legal relationship between himself and the defendant from that relied upon in the original plaint, and when the entire nature of suit is sought to be altered, the order allowing such an amendment is a 'case decided' for in effect the original suit has been withdrawn and has been displaced by a different suit. (*Weston.*) NIHAL CHAND *v.* AMAR CHAND.

1937 A.M.L.J. 104.

———**S. 115**—Court-fee—Appeal requiring *ad valorem* court-fee valued and miscellaneous appeal—Application by respondent after disposal of appeal and remand for order staying proceedings until payment of full court-fee—Rejection—Revision—Interference. *See* COURT-FEES ACT (AS AMENDED IN BIHR AND ORISSA) SCH. I, ART. 1 AND SCH. II, ART. 11.

18 Pat.L.T. 864.

———**S. 115**—*Court-fee—Decision as to—Revision—Decision favourable to plaintiff and decision unfavourable to plaintiff—Distinction—Jurisdiction—Refusal to exercise.*

The High Court has power to interfere and will interfere in revision against an erroneous decision of the trial Court adverse to the plaintiff in the matter of Court-fee. The question of court fee is not a matter which really concerns the defendant, though he may raise that question, and the Court in deciding a question of court-fee is diciding an issue not as between the plaintiff and the defendant, but is deciding an issue as between the Crown and the plaintiff. If the decision be adverse to the plaintiff, it amounts to a refusal to exercise the jurisdiction to try the issues as between the plaintiff and the defendant, and is subject to the revisional jurisdiction of the High Court under S. 115, C. P. Code. Where, however, the decision is in favour of the plaintiff, it is not open to the defendant to apply to the High Court in revision, because in the first place he is not a party to the dispute between the Crown and the plaintiff, and, secondly, he has a remedy, should the decision on the merits be against him, in bringing the matter of the court fee duty to the notice of the appellate Court under S. 12 of the Court-Fees Act; and, thirdly and most important, as between the plaintiff and the defendant the trial Court has not refused to exercise its jurisdiction to decide the case on the merits. (*Courtney-Terrell, C.J., James and Manohar Lal, JJ.*) RAMKHELAWAN SAHU *v.* BIR SURENDRA SAHI.

18 Pat.L.T. 977 = A.I.R. 1938 Pat. 22.

———**S. 115**—*Court-fee—Order of Court calling upon plaintiff to make good deficiency in court-fees—Revision if lies.*

Where the trial Court requires the plaintiff to make good the deficiency in court-fees, no revision lies against such order either under S. 115, C. P. Code, as, on rejection of the plaint on non-compliance with such order, an appeal lies or under S. 224, Government of India Act, 1935, as the High Court cannot interfer with the judicial order in the exercise of its administrative functions under that section. (*Bhide, J*) PEOPLES BANK OF NORTHERN INDIA *v.* KANAYA LAL.

A.I.R. 1938 Lah. 80.

———**S. 115**—*Court-fee—Order demanding additional court-fee for memorandum of appeal—Revision—Order favourable to appellant—Distinction.*

An order demanding additional court-fee on a memorandum of appeal is revisable under S. 115, C. P. Code, as it amounts to a refusal to exercise jurisdiction; but an order accepting the court-fee paid as sufficient is not open to revision as then there is no refusal to proceed with the appeal. In such a case jurisdiction is not affected, nor is the other side damnified. (*Stone, C J., Bose and Gruer, JJ.*) BALAJI DHUMNAJI *v.* MST MUKTABAI. **1938 N.L.J. 1 (F.B.).**

———**S. 115**—*Declaration as* ex parte—*If revisable—Subsequent* ex parte *decree, not appealed against—Remedy—Proper procedure.*

Where the petitioners were declared *ex parte*, even if the order was wrong on the merits, the High Court has no Jurisdiction under S. 115, C.P. Code, to interfere with such an order. Where a decree is passed after declaring certain persons as *ex parte* the proper procedure for those persons is to have preferred an appeal against the decree and not to come by way of revision under S. 115 against the order declaring them *ex parte*. (*Madhavan Nair, J.*) THAVASIKANNU THEVAR *v.* SANKARALINGAM PILLAI. **1938 M.W.N. 17**

———**S. 115**—*Error of law—Decision of question of law—When interfered with — Jurisdiction — Order under S. 151 made without jurisdiction — Interference.*

C. P. CODE (1908), S. 115.

The High Court will not generally interfere with a decision on a
jurisdiction
wrongly. E
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arise. Whe
S. 151, C.P. Code, which it has no jurisdiction to make, the order will be set aside in revision. (*Wort and Varma, JJ.*) PHULCHAND RAM MARWARI *v.* NAURANGI LAL MARWARI. 172 I.C. 225= 1937 P.W.N. 836=18 Pat L.T. 826= A.I R. 1937 Pat. 647.

——S. 115—Jurisdiction — Abser
dismissal of appeal under O. 41,
Interference. *See* C.P. CODE, O. 41

——S. 115—*Jurisdiction—Order allowing rateable distribution—Revision.*

The Court executing the decree has jurisdiction to

RAMESHWAR PRASAD NARAIN SINGH.
172 I.C. 195=1937 P.W.N. 823= 18 Pat.L T. 817=A.I.R 1937 Pat. 651.

——S. 115— Jurisdiction — Wrong exercise of— Erroneous decision on valuation of suit—Interference. *See* COURT-FEES ACT, S 7 (*iv*) (*c*) 42 C.W.N. 192.

——S. 115—*Limitation—Practice —Application beyond three months—When entertainable.*

While ordinarily it is the practice of Courts not to entertain revision applications preferred more than three months after the order appealed against, in suitable cases this practice should not be rigorously enforced. (*Weston.*) MANGI LAL *v.* GOPI NATH.
1937 A.M.L.J. 107.

——S. 115—Other remedy—Order refusing delivery under O. 21, R. 99—Revision—Interference. *See* C. P. CODE, O. 21, R 103 18 Pat.L.T. 833.

——S. 115—*Subordinate Court—Land Acquisition Collector—Land Acquisition Act, S.* 18.

A Land Acquisition Collector, assuming that he is a Court while dealing with applications under S. 18 of the Land Acquisition Act, is not a Court subordinate to the High Court, and the High Court has, therefore, no jurisdiction to interfere with his order under that section in revision under S. 115, C.P. Code. (*Bartley and Nasim Ali, JJ*) GOPINATH SHAH *v.* FIRST LAND ACQUISITION COLLECTOR, CALCUTTA.
42 C.W.N. 212.

——Ss. 144 and 151—*Scope—Decree against Hindu father and sons based on compromise—Sale of family property in execution—Purchase by decree-holder—Full satisfaction of decree entered—Subsequent suit by sons to declare compromise decree not binding on them—Decree releasing half share in property—Decree and sale remaining as a whole—Application by decree-holder for compensation—Maintainability.*

In execution of a compromise decree against a Hindu father and his sons, joint family property of the father and sons was put up for sale and purchased by the decree-holder, the sale was duly confirmed and full satisfaction of the decree entered. The minor sons then

and the sale, which itself was not affected, stood as a

C. P. CODE (1908), O. 1, R. 3.

whole. The decree-holder then made an application for

Held, (1) that an auction-purchaser at an execution sale must abide by his bargain, that the Court selling the property would not guarantee the title, and the maxim *caveat emptor* applied, (2) that the fact that the sons brought an action for declaration of the invalidity of the decree as against them did not affect the princi-

against the father and that on no principle was the decree-holder entitled to compensation against the father judgment-debtor under S. 151, C. P. Code. (*Wort and Varma, JJ.*) PHULCHAND RAM MARWARI *v.* NAURANGI LAL MARWARI. 172 I.C. 225= 1937 P.W.N. 836=18 Pat.L.T 826= A I.R. 1937 Pat. 647.

——S. 145—Security bond—Procedure for enforcement. *See* SURETY—SECURITY BOND.
I.L R. (1937) 2 Cal 698.

——S. 148—Scope—Extension of time for payment of deficient court-fee—Jurisdiction to grant after appeal is filed. *See* C.P. CODE, SS. 2 (2) AND 148.
1937 A.L J. 1346=1938 A.W.R. 13 (H.C.).

——S. 149—Discretion under—Exercise of—Rejection of application for leave to sue as pauper—Time for payment of court-fee. *See* C.P. CODE, O. 33, rr. 5 AND 15. 19 Pat.L.T. 8.

——S. 149 — *Memorandum of appeal filed with insufficient court fee—Application under S.* 149 *rejected—Appeal if filed in time.*

Where a memorandum of appeal was filed within the time allowed by law, with insufficient Court-fee, the valuation of the appeal was subsequently reduced and an application filed by the appellant under S. 149, C.P. Code, for extension of time to pay the deficient court-fee was rejected,

Held, that the memorandum of appeal cannot be held to have been presented in time. In the absence of an order granting time under S. 149, presentation of the unstamped or insufficiently stamped memorandum of appeal will not amount to a valid presentation (*Varadachariar and Pandrang Row, JJ.*) SITHARAMAYYA *v.* RAMAYYA. 1938 M.W.N. 71

——S. 151—*Inherent powers—Extent of—Power to give compensation to decree-holder purchaser for loss of part of property purchased as the result of another suit.*

S. 151, C.P. Code, cannot be interpreted as giving the Courts power which under the general law they do not possess. A Court has no power under the section to give compensation to a decree-holder, who after purchasing property in execution in satisfaction of his decree loses part of that property as the result of another suit. (*Wort and Varma, JJ.*) PHULCHAND RAM MARWARI *v.* NAURANGI LAL MARWARI.
172 I C. 225=1937 P W.N. 836= 18 Pat.L T. 826=A.I.R. 1937 Pat 647.

——O. 1, R. 3—*Necessary party—Test for deter-*

iave been
whether a
(*Abdur*
MUTHU
CHETTIAR. 1938 M.W.N. 75.

——**O. 1, R. 10 (2) and S. 107**—*Power of Court—Addition of party as respondent in the appeal.*

The Court has ample powers under the provisions of O. 1, R. 10 (2) read with S. 107, C.P. Code, to implead any person in the appeal as a respondent who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court to adjudicate upon all the questions involved in the appeal effectively. (*Abdur Rahman, J.*) DEVENDRA AYYAR *v.* MUTHU CHETTIAR. **1938 M.W.N 75.**

——**O. 2, R. 2**—*Applicability—Sale deed—Covenant as to land being free from encumbrances—Undisclosed mortgage—Decree and sale—Suit on ground of dispossession by purchaser at sale—Dismissal as dispossession found to be false—Second suit on ground of plaintiff having been compelled to pay claim of prior mortgagee—If barred.*

Although a sale deed contains a single covenant to the effect that the land sold is free from encumbrances, there may be two distinct causes of action giving rise to different suits, arising out of the breach of the same covenant. The dismissal of a suit by the vendee on the ground of dispossession by the purchaser at a sale in execution of a decree on an undisclosed prior mortgage —the dispossession being found to be false—is no bar under O. 2, R. 2, C. P. Code, to a second suit on a separate cause of action, namely, that the vendee, at a time anterior to the date of the alleged dispossession, was compelled to pay off the claim under the undisclosed mortgage. (*Horwill, J.*) ARUMUGHAM CHETTIAR *v.* MARIAPPAN CHETTIAR. **1937 M.W.N. 1256.**

——**O. 6, R. 17**—*Amendment of plaint—Considerations—Legal relationship and nature of suit—Alteration of—If permissible.*

An amendment of the plaint should not be allowed when plaintiff seeks to amend in order to sue on an entirely different legal relationship between himself and the defendant from that relied upon in the original plaint, and when the entire nature of the suit is sought to be changed. (*Weston.*) NIHAL CHAND *v.* AMAR CHAND. **1937 A.M.L.J. 104.**

——**O. 6, R. 17**—Amendment of plaint—Revision. *See* C. P. CODE, S. 115—'CASE DECIDED'. **1937 A.M.L.J. 104.**

——**O. 6, R. 17**—*Discretion—Power of Court—Amendment after claim barred by limitation—If can be allowed.*

The right of allowing an amendment, although a matter of discretion, should not be exercised where the party affected thereby has acquired a valuable right and not unless in very special circumstances. Where in a mortgage suit the mortgagor makes no claim to money decree, allows time to go by and makes no application for leave to amend till his claim is barred by limitation, but subsequently applies for leave to amend, although there is still a discretion in the Court to allow amendment, the discretion will as a general rule be more wisely exercised by refusing it. (*Wort and Rowland, JJ.*) RAMKARAN THAKUR *v.* BALDEO THAKUR. **A.I.R. 1938 Pat. 44**

——**O. 6, R. 17**—*Late stage—Delay in application—If sufficient to justify refusal of amendment.*

Where in a suit for his share in a partnership which the plaintiff alleged was dissolved prior to date of suit but which was denied by the defendants, and the plaintiff applied to amend the plaint after considerable delay, so as to enable him to obtain an alternative relief for partition of the assets in case there was no dissolution of the partnership.

Held, that in the matter of rectifying defects in pleadings which do not affect any substantial rights, it is not consonant with justice to deny a remedy which otherwise would be lost by reason of carelessness or delay.

Held, further, that in the circumstances of the case the lower Court ought to have allowed the amendment of the plaint. (*Pandrang Row and Venkataramana Rao, JJ.*) SAMBASIVA IYER *v.* NATESA IYER. **1938 M.W N. 22 = (1938) 1 M.L.J. 106.**

——**O. 7, R. 10**—*Time for return of plaint—Order returning plaint at stage of arguments—Propriety.*

A Court can return a plaint for presentation to the proper Court even at the stage of arguments, when the question of jurisdiction is raised, especially when the suit has not proceeded very far. (*Collister and Bajpai, JJ.*) BRIJ BEHARI LAL *v.* GOPI NATH. **1937 A.W.R. 1171 = 1937 A.L.J. 1224.**

——**O. 7, R. 11 (c)**—*Applicability to appeals.*

The weight of authority is decidedly against the applicability of the provisions of O. 7, R. 11 (*c*) to appeals. 27 M.L.J. 677, 61 Cal. 663; 1 Lah. 234; 3 Pat.L.J. 74, 50 All. 980, Ref. to. (*Varadachariar and Pandrang Row, JJ.*) SITHARAMAYYA *v.* RAMAYYA. **1938 M.W.N. 71.**

——**O. 9, R. 8**—*Applicability — Plaintiff's counsel asking for adjournment—Adjournment being refused, reporting no further instructions.*

Where the plaintiff's Counsel confines himself to asking for an adjournment and, when it is refused, retires from the case and states that he has no further instructions, R. 8 of O. 9 applies and the plaintiff will not be held to have appeared. However, exact language used by the counsel to that effect is not of great importance and one must look at all the circumstances to see in any particular case whether counsel retired from the case so as not to prejudice his client by appearing or whether he, for reasons which commended themselves to him, abandoned his claim in the suit. (*Panckridge, J.*) BAIJNATH BOTHRA *v.* KEDARNATH. **A.I.R. 1938 Cal. 74.**

——**O. 9, R. 9**—*Application under—Essentials to be proved.*

In an application for restoration under O. 9, R. 9 the plaintiff must show some fact which was either not known to the Court when it dismissed the suit, or at least at that stage lacked satisfactory proof. (*Panckridge, J.*) BAIJNATH BOTHRA *v.* KEDARNATH. **A.I.R. 1938 Cal. 74.**

——**O. 14, R. 2**—*Decision of question of jurisdiction —Finality—If can be re-opened by Court at later stage —Right of succeeding Judge to re-consider decision of predecessor in office—Proper procedure.*

Where a question of jurisdiction to entertain the suit has been decided by the trial Court as a preliminary issue, that decision is final so far as that Court is concerned and cannot be called in question in that Court at a later stage. It is not open to a Judge succeeding the Judge who has decided the question to re-open that question at a later stage and decide it afresh. The proper stage to challenge that decision is when the decree in the suit is under appeal. (*Harries and Rachhpal Singh, JJ.*) KALYAN DAS *v.* KASHI PERSHAD. **1937 A.W.R. 1188 = 1937 A.L.J. 1272.**

——**O. 21, R. 2 (1)**—*Compliance—Certificate by decree-holder—Validity—Order by Court—If essential —Enquiry into truth or otherwise of adjustment—If necessary—Recording of satisfaction—What amounts to —Duty of Court.*

In order that a certification of adjustment by the decree-holder may have effect, it is not necessary that there should be any specific order by the Court. A certificate presented by the decree-holder is none the-

C. P. CODE (1908), O. 21, R. 11.

less operative and enures none the less for the benefit of the judgment debtor, because the Court has passed no order recording satisfaction of the decree. The record contemplated under O. 21, R. 2 (1) is merely an order that the certificate of the decree-holder be placed on the record. The Court is not required to go into the question whether there has or there has not been an adjustment as stated The certificate is sufficient and all that the Court need do is to say that the certificate shall be kept upon the record. It is only under Sub-R. (2) of O. 21, R. 2, when the judgment debtor makes an application that it is necessary for the Court to go into the question whether his allegations are or not true. (*Allsop, J.*) CHAMPI BAI *v.* PEAREY LAL. 1937 A W.R. 1200= 1937 A.L.J. 1305.

——**O. 21, R. 11**—*Absence of verification and particulars—Effect.*

Where an execution application was not verified, nor

tion—Form.

An application to amend an existing or pending execution application, should be in the form prescribed by O. 21, R. 11. (*Weston.*) MAN MAL *v.* KANWARI LAL. 1937 A M.L.J. 89.

——**O. 21, R. 11**—Requirements of—If necessary for applications under S. 39, C. P. Code. *See* C. P. CODE, S. 39. 1937 A.M.L.J. 113.

——**O. 21, R. 15**—*Joint decree—Application for execution not on behalf of all—Defect, if fatal.*

Where an execution application although filed by only one of two joint decree holders, does not purport to have been filed on behalf of both, such a defect is fatal to the application. (*Weston.*) MAN MAL *v* KANWARI LAL. 1937 A M L.J. 89.

——**O 21, Rr. 16 and 18**—*Relative scope—Cross decrees—Assignment of one—If bar to set-off.*

O. 21, R. 18 C. P. Code, is not inapplicable to the case of an assignee of a decree, and R. 16 of O. 21, is no bar to the application of R. 18. When a question of cross-decrees arises the provisions of R. 18 of O. 21 cannot be ignored (*Bennet, J.*) GIRDHAR DAS *v.* TRILOKI NATH. 1937 A.L.J. 1371= 1938 A.W.R. 3 (H C.).

——**O. 21, R. 18**—Applicability—If affected by S. 73. *See* C. P. CODE, S. 73 AND O 21, R. 18. 1937 A.L.J. 1371=1938 A.W.R. 3 (H.C.).

——**O. 21, R 18**—Applicabili
—Set-off—Right to. *See* C P
AND 18. 1937 A L J. 1371=

——**O. 21, R. 49**—*Interest of partner in partnership assets—If movable property.*

An interest of a partner in partnership assets is intended to be treated as movable property under R. 49 of O. 21. (*Addison and Din Mohammad, JJ.*) BARKAT RAM *v* BHAGWAN SINGH . A.I.R. 1938 Lah. 65.

——**O. 21 R. 66**—*Objection to sale by judgment debtor on ground of defect in proclamation—Objection dismissed on ground that remedy under O 21, R. 90 is open—Such remedy not found available—Judgment-debtor's right to claim adjudication upon earlier objection.*

Where the judgment-debtor objec
sale on the ground of material defect
mation at a time when he was not pre
from raising such objection, but the application i
missed solely on the ground that the remedy unc
21. R 90 is open to him and if it is eventually
that that remedy is not available to him under the law,

C. P. CODE (1908), O. 21, R. 94.

the judgment-debtor is entitled to claim an adjudication upon the objections taken by him at an earlier stage. (*Addison and Din Mohammad, JJ.*) BARKAT RAM *v.* BHAGWAN SINGH. A.I.R. 1938 Lah. 65.

——**O. 21, R. 69 (2) (as amended in Nagpur)**—*Collector's sale—Collector accepting bid at sale held by Tahsildar beyond seven days—Legality.*

In a Collector's sale, it is the Collector who has to accept the bid though it may the Tahsildar who holds the sale. The period of seven days in O. 21, R. 69 (2), C. P. Code, has been extended to 15 days in Nagpur, and the fact that the Collector accepts the bid beyond 7 days of the sale does not make such acceptance illegal as beyond time and does not render a fresh proclamation of sale necessary. An order of acceptances within 15 days is in time. (*Greenfield, F.C.*) RAMCHANDRA *v.* ARJUN. 1938 N.L.J. 10.

Scope if exhaustive— by time under S. 48 Court after sale and of Court to refuse to confirm sale.

It cannot be said that in no circumstances can a Court refuse to confirm a sale upon grounds other than those mentioned in rr 89, 90 and 91 of Order 21, C. P. Code. If it is brought to the notice of the Court that the execution application on which the sale is held was obviously barred by limitation under S. 48, C. P. Code the Court is entitled to refuse to confirm the sale on being satisfied that the application is barred. It is the

(*Niamatullah, Ag.C.J. and Allsop, J.*) COLLECTOR OF BENARES *v.* JAI NARAIN RAI. 1937 A W.R. 1222=1937 A.L.J. 1349.

——**O. 21, R. 92**—*Jurisdiction—Collector's sale—Application beyond 30 days of acceptance of bid by Collector for time for payment of decree amount—Failure to offer payment of decree-amount and 5%—Absence of allegation of irregularity—Order setting aside sale on ground of inadequacy of price—Legality.*

In the absence of any application under Rr. 89, 90 or 91, C. P. Code, an execution sale has to be confirmed under R. 92, and the Court has no jurisdiction to set

ts mentioned in R. 89 of O. 21, or alleging any irregularity under R. 90, that cannot be regarded as an application under either R. 89 or R. 90, and the collector has no jurisdiction to set aside the sale on the ground that the price fetched was inadequate (*Greenfield, F.C.*) RAMCHANDRA *v* ARJUN. 1938 N.L.J. 10.

——**O. 21, R 92**—Scope—If controlled or over ridden by S. 11, C. P. Money Lenders' Act. *See* C. P. MONEY LENDERS' ACT, S. 11. 1938 N.L J. 15.

——**O 21, R. 94**—*Sale certificate—Effect of—Pro-*

of his purchases and not on the certificate of sale

the suit came for trial, the Court directed the names of the petitioners to be struck out as they were unnecessary parties and asserted a paramount claim and raised questions of priority. Subsequent to the date of the preliminary decree in the mortgage suit, the petitioners became the auction-purchasers of the property in execution of their money decree. The plaintiff also became the purchaser in execution of the mortgage decree. The petitioners complained against their removal from the record by filing a revision petition to the High Court, after they became purchasers.

Held, that the petitioners as attaching creditors are not necessary parties to the suit but they will be proper parties by virtue of the statutory right of redemption conferred on them under S. 91 (*f*) of the Transfer of Property Act (before amendment). It is not open to a Court to strike out their names as unnecessary parties if they were otherwise proper parties to the suit. Even apart from S. 91, the attaching creditors may intervene as proper parties to enable them to effect a more advantageous sale of the interest of the judgment-debtor and to correctly determine the rights of the latter. The petitioners would be entitled to relief if they applied to the High Court immediately after the passing of the order by the lower Court. They might have got it revised and the preliminary decree re-opened before proceeding to sell the property. When the attaching creditors proceeded to sell the property without having the right, title and interest of the judgment-debtors being defined, they sued their character as such. It is immaterial they became the auction-purchasers. The High Court, taking notice of the altered circumstances, declined to give to the petitioners that relief to which they by their own act in bringing the property to sale before filing revision petition to the High Court disentitled themselves. (*Pandrang Row and Venkataramana Rao, JJ.*) ANNAMALAI CHETTIAR *v.* SRINIVASARAGHAVA AIYANGAR. **1938 M.W.N. 73.**

——**O. 34, R. 1**—Scope—Mortgaged property attached and sold under S. 88, Cr. P. Code, after mortgage—What passes—Suit by mortgagee to enforce mortgage against purchaser at sale under S. 88, Cr. P. Code—Government—If necessary party. *See* CR. P. CODE, S. 88. **18 Pat.L.T. 814.**

——**O. 34, R. 6**—*Liberty reserved to apply for personal decree—Application when to be made.*

Where a decree is drawn up containing a provision that if the proceeds of sale were found insufficient, plaintiff would be at liberty to apply for a personal decree.

Held, that an application for a personal decree in such a case, is not an application for execution. It is an application for a decree and as such not governed by the twelve years rule contained in S. 48, C. P. Code. (*Weston.*) RAM DUTTA *v.* CHATUR BHUJ. **1937 A.M.L.J. 99.**

——**O. 34, R. 11**—*Discretion under—Principles governing exercise of.*

The discretion under O. 34, R. 11 is to be exercised judicially and the principles of S. 74 of the Contract Act must be taken to be the principle which would govern the exercise of such a discretion. (*Weston.*) BENI PRASAD *v.* SARFRAZ ALI SAYED. **1937 A.M.L.J. 97.**

——**O. 38, R. 5 and S. 64**—*Attachment before judgment made without complying with procedure—Effect of—Third party, if can enforce mortgage against claims under attachment.*

Though the order of attachment before judgment should comply with provisions of O. 38, R. 5, that is, the order should be a conditional order accompanied by a notice to the defendant, yet non-compliance with this

procedure and failure to give the defendant an opportunity to furnish security does not make the *ex parte* order of attachment a nullity but simply renders it irregular, liable to be set aside only at the instance of the defendant. But a third party cannot ignore the attachment and enforce his mortgage against decree-holder's claims under attachment. (*Coldstream and Abdul Rashid, JJ.*) DWARKA DAS BADRI DAS *v.* SHRI RAM. **A.I.R. 1938 Lah. 49.**

——**O. 39, R. 1 (Rangoon Amendment)**—*Effect of amendment—Suit under O. 21, R. 63 or appeal from such suit—Power of Court to grant temporary injunction to prevent sale of property under attachment.*

The result of the amendment of O. 39, R. 1, *prima facie*, is that the Court in which a suit under O. 21, R. 63, is pending or the Court in which an appeal from such a suit is pending does not enjoy the power of granting a temporary injunction to prevent the sale of the property under attachment in the execution case which led to the suit and then to the appeal. The reason for the present Rule is this. The claimant in a proceeding under O. 21, R. 58, who files a suit under O. 21, R. 63, is not the judgment debtor against whom execution is taken; and by sale of the attached property attached in the execution case his right, title or interest in the property cannot be impaired, for it is only the right, title and interest of the judgment-debtor which is conveyed to the purchaser at the sale. If his suit or his appeal succeeds, then the interests which are declared in his favour are to be deemed not to have been disposed of by the sale. There is obviously no good ground for thinking that a sale made in the execution case during the pendency of a suit under O. 21, R. 63, or an appeal from such a suit will be injurious to the right, title and interest, if any, of the claimant in the property sold. Hence an application for stay of the sale and also of other steps taken or in contemplation in aid of execution, cannot be granted; nor can it be granted under S. 151, C. P. Code, as the order sought for is not necessary for the ends of justice or to prevent abuse of the process of the Court. (*Mya Bu and Mackney, JJ.*) MOHAMMAD HAJEE *v.* VEDNATH SINGH. **A.I.R. 1938 Rang. 21.**

——**O. 40, R. 1**—*English mortgage—Receiver, if can be appointed in execution.*

In the case of English mortgages, a receiver can be appointed of the mortgaged property in execution in cases where sub-R. (2) of O. 40, R. 1, C. P. Code, would operate to prevent such an appointment. (*Panckridge, J.*) SM. RENULA BOSE, *In re.* **A.I.R. 1938 Cal. 93.**

——**O. 40, R. 1**—*Mortgage decree—Appointment of receiver in execution—Considerations.*

The Court will not appoint a receiver in execution of mortgage decree unless the circumstances are such as to make the sale and of the properties a matter of serious difficulty. Once a receiver in execution is appointed, the mortgagee will, as a rule, have little inducement to bring the properties to sale will tend to let matters drag on indefinitely. If the properties are producing a good income, it is probable that the mortgagee will have a more profitable investment than he will be able to obtain for the sale proceeds if the properties are brought to sale. This does not however mean that if there are substantial difficulties in the way of the sale the Court will not help the mortgagee by appointing a receiver. The Court in considering this question should also take into consideration the diligence of the mortgagee. The person who applies for appointment of receiver in execution of mortgage decree should be able to point to some actual difficulty in carrying out the sale, and not merely to a delay which he foresees on general grounds. It cannot

C. P. CODE (1908), O. 41, R. 1.

be supposed that when a substanti mortgage securities is outside the jurisdiction of the Original Side,

...nt of a receiver ... hich the Courts ... SM. RENUKA BOSE, *In re.* **A.I R. 1938 Cal. 93.**

——**O. 41, R. 1**—*Appeal filed with copy of original decree after it is amended—If liable to dismissal.*

Where an application for review of judgment is granted, no appeal is competent against the original decree as that decree must be deemed to have been superseded and therefore non-existent. But it is doubt-...

A.I.R. 1938 Lah. 76.

——**O. 41, R. 4**—*Scope of—Appeal by some only of the plaintiffs—Others necessary parties.*

The provisions of O. 41, R. 4 simply lay down that one or more plaintiffs *may* prefer an appeal where a decree proceeds on a ground common to all, but it does not lay down that the others are not necessary parties. Where the suit is one for declaration in respect of the partition of joint property, all plaintiffs' co-sharers are necessary parties to an appeal against the dismissal of such a suit. When only some of them alone appeal the appeal is liable to be dismissed owing ... necessary parties. (*Bhide, J.*) KARTA ... WARYAM SINGH. **40 P.L.R. 6.**

——**O. 41, R. 10**—*Security for costs—Appellant being a minor and a pauper—If can ... for security for costs—Minor being ... hands of others—Order for security—I...*

Where a minor pauper is an appella...

does not by itself entitle him to resist the application for security for costs. (*Venkatasubba Rao and Abdur Ra...*) ... IY...

—— ... *of ... ference.*

An appellate Court has jurisdiction to dismiss an appeal summarily under O 41, R. 11, C. P. Code, ...

them.

Where during the pendency of a suit a defendant dies and his legal representatives are brought on record, but

C. P. CODE (1908), O. 41, R. 27.

such persons cannot be deemed to be persons interested in the result of the appeal filed against other defendants. S. 5, Limitation Act, cannot apply to such a case even if some of the appellants are minors. (*Addison and Din Mohammad, JJ.*) HAYAT *v.* MUTALLI. **A.I.R. 1938 Lah. 35.**

——**O. 41, R. 20**—*Discretion under—Exercise of—Principles.*

Where the appellants were not able to show any good reason why the omitted parties were not impleaded though they were obviously necessary parties, the Court ... impleaded in appeal, ... O. 41, R. 20. (*Bhide, ...*) ...M SINGH. **40 P.L.R. 6.**

——**O. 41, R.** ...*tions—If can be entertained ...it, not impleaded as a ... ions filed against such party—Effect.*

Where the plaintiff claimed relief against both defendant 1 and defendant 2 and the first defendant raised the plea that he was an unnecessary party to the suit but the Court found that there were no merits in his objection, but the first appellate Court held that the first defendant was an unnecessary party, and the second defendant filed a second appeal impleading only the plaintiff as a respondent.

Held, the plaintiff-respondent is entitled to file cross-... the first defendant, although he was ... appeal. By putting in ... defendant has been impleaded in the appeal. A respondent is entitled to file cross-objections, which could be raised by him in an ...

——**O. 41, R. 25**—*Power of Court—Issue on point ...—If can be remitted—Right of party to ... prove facts not in accordance with real facts.*

An appellate Court cannot remit an issue at the ins... a party upon a point which was not pleaded ... a party cannot be allowed in effect to say that ... prepared to allege or prove anything which is necessary, even if the allegations are not in accordance with the real facts. (*Niamatullah, Ag. C.J. and Allsop, J.*) GAYA DEEN MISIR *v.* TIRBHUWAN SINGH. **1937 A.W.R. 1183 = 1937 A L J 1252.**

... the determination of the appeal or any other sufficient ... ing on the additional ... points to which the ... ed and did not record on the proceedings the points so specified, he gave no definite reason for admitting the evidence except the formula 'in the interests of justice', and no opportunity

was given to the opposite side to adduce rebutting evidence.

Held, that the procedure adopted by the District Judge is irregular and must obviously have prejudiced the other party and his order in the appeal should be set aside. The formula 'in the interests of justice' may mean everything or may mean very little. The word 'requires' in O. 41, R. 27 (1) (*b*) means 'finds it needful'. (*Pandrang Row, J.*) SRINIVASAM PILLAI *v.* ALAGAPPA CHETTIAR. (1938) 1 M.L.J. 50.

———O. 41, R. 29—*Object.*

The rule in O. 41, R. 29 serves a very useful purpose, namely that it ensures that the appellate Court will consider exactly on what points there is a lacuna which requires to be rectified and also that an opportunity will be given to both sides to adduce additional evidence on particular points on which additional evidence is allowed to be taken in appeal. (*Pandrang Row, J.*) SRINIVASAN PILLAI *v.* ALAGAPPA CHETTIAR. (1938) 1 M.L.J. 50.

———O. 41, Rr. 32 and 33—Scope—Deficiency in court-fee on plaint—Order for payment by trial Court within fixed time—Appeal—Power of appellate Court to extend such time. *See* C.P. CODE, SS. 2 (2) AND 148. 1937 A.L.J. 1346=1938 A.W.R. 13 (H.C.).

———O. 41, R. 33—*Power of appellate Court—Interference in favour of a party not appealing—Conditions.*

O. 41, R. 33 has been enacted to empower the appellate Court to do complete justice between the parties. The appellate Court has power under this rule to vary the decree of the lower Court although the variation may benefit a party who has not appealed, for example, where such party has not been able to find the money for preferring an appeal and the lower Court's judgment is undoubtedly wrong. (*Venkatasubba Rao and Abdur Rahman, JJ.*) PONNARI RAO *v.* LAKSHHI NARASAMMA. 1938 M.W.N. 67

———O. 43, R. 1—Scope—Order rejecting memorandum of appeal for insufficient Court-fee—Appeal. *See* C. P. CODE, S. 2 (2). (1938) N.L.J. 1 (F.B.).

———O. 43, R. 1 (k)—*Scope—"Suit"—If includes appeal—Order refusing to set aside abatement of appeal—Appealability—O. 22, R. 11—Application of.*

An order refusing to set aside an abatement of an appeal is appealable under O. 43, R. 1 (*k*), C. P. Code, the word "suit," in the rule also covers an appeal. O. 43, R. 1 (*k*) has to be read with reference to O. 22, R. 11, which applies to R. 9 of O. 22. (*Wort and Varma, JJ.*) WAJID ALI *v.* FAGOO MANDAL. 18 Pat. L.T. 1014.

———O. 45, R. 7—*Compliance—Security for costs under—Time for—Security bond executed and filed in Court by surety within time—Subsequent withdrawal by surety from undertaking—Deposit of cash—Sufficiency—Security—If furnished within time.*

An applicant for leave to appeal to the Privy Council was allowed at the time of grant of leave to furnish security of another kind than in cash or Government securities. One *S N* executed hypothecation bond, becoming surety for payment of the respondent's costs in the Privy Council appeal and hypothecating immovable property which was declared sufficient. The bond was duly registered and filed in Court within the time limited by O. 45, R. 7, C. P. Code, but when the bond was sent for verification. *S N* stated that he was not willing to stand surety any longer. The applicant then deposited the requisite amount in cash in Court. The respondent objected that the security was not deposited in time as required by O. 45, R. 7.

Held, that the security should under the circumstances be deemed to have been furnished on the date on which the hypothecation bond was filed in Court and not on the date on which the amount was deposited, and that for all technical requirements of O.45, R. 7, the security must be held to have been furnished within time. (*Niamatullah and Verma, JJ.*) BISHAN SINGH *v.* SHIAM LAL. 1937 A.L.J. 1362=1938 A.W.R. 9 (H.C.).

———Sch. II, Para. 8—*Application for stay—When to be made.*

The provisions of Para. 8, Sch. II of C. P. Code, are mandatory and an application under that section for stay should be made at the earliest possible opportunity. Where a suit was filed in August, 1933, and the issues were framed in December of that year, but an application to stay the suit was put in only in 1936 and that at the instance of the Court.

Held, that it cannot be said that the provisions of Para. 18 of Sch. II of the C. P. Code have been complied with. (*Horwill, J.*) MAHOMED MOHIDEEN NACHIAR *v.* MAHOMED NAINA MARACAIR. (1938) 1 M.L.J. 38.

———Sch. II, Para. 18—*Application under—Statement in written statement setting up an agreement to refer to arbitration—If amounts to an application for stay.*

The fact that a defence was raised in the written statement that under the agreement between the parties, the parties are bound to appoint arbitrators is not tantamount to an application for stay under Para. 18, but is only a defence to the suit. (*Horwill, J.*) MAHOMED MOHIDEEN NACHIAR *v.* MAHOMED NAINA MARACAIR. (1938) 1 M.L.J. 38.

———Sch. II, Para. 18—*Order adjourning suit* sine die—*Propriety—Proper order.*

Where the Court refers the suit to arbitration in accordance with the agreement between parties to refer to arbitration under Para. 18 of Sch. II, C. P. Code, an order adjourning the suit *sine die* is not proper and the proper order is to adjourn the suit for a definite period. (*Horwill, J.*) MAHOMED MOHIDEEN NACHIAR *v.* MAHOMED NAINA MARACAIR. (1938) 1 M.L.J. 38.

———Sch. II, Paras. 20 and 21—*Award in arbitration outside Court—Registration—Necessity—Registration Act, S.* 17 (1) (b).

Paras. 20 and 21 of Sch. II, C. P. Code, which provide for the enforcement of awards in arbitrations made outside Court do not require that the awards should be registered before they can be filed or enforced, even though the awards might affect immovable property of the value of Rs. 100 or upwards. Registration is therefore not necessary in the case of such an award. S. 17 of the Registration Act does not affect the matter. The proceedings of arbitrators are judicial in their nature and there is no reason to suppose that the award of arbitrators is a document falling under S. 17 (1) (*b*) of the Registration Act. (*Bennet, J.*) SHEO RAM *v.* RAM DATT. 1937 A.L.J. 1303=1937 A.W.R. 1218.

———Sch. II, Para. 21—*Award leaving undetermined, part of the matters referred—If can be filed.*

An award which has admittedly left undetermined part of the matters referred to arbitration could not be filed under Para. 21 of Sch. II, C. P. Code. (*Agarwala, J.*) BIJADHAR RAM *v.* RAJKARAN SINGH. 19 Pat.L.T. 16.

COMPANY—*Articles of association—Right of inspection of records given to members under—If can be limited by rules.*

COMPANY.

A power to regulate a right cannot be used to abrogate it. If a member has under the Articles of association a contractual right of inspection of the minutes of the committee of the association, the right cannot be reduced by the power given under the articlesto the committee to make rules, into a mere right to claim inspection subject to the committee's approval. No matter how limited the grounds for refusing inspection might be, making the right of inspection a matter of discretion of the committee, fundamentally alters the article, for, a contractual right of inspection, just as a statutory right of inspection, can be exercised whatever the motive or interest of the member may be. (*Remfry, J*) RAMESWAR LAL *v.* CALCUTTA WHEAT AND SEED ASSOCIATION, LTD. **42 C.W.N 161=A.I.R. 1938 Cal. 89.**

——*Articles of association—Right of inspection of records given to members under—If implies right to take copies—Common law right of members.*

A contractual right of inspection does not of itself imply a right to take copies, any more than a statutory right would do. In the case of a statutory right of inspection the Court will not imply a right copies unless the statutory right would wise be of no avail, or practically useless. The is bound by a stricter rule when a question of in... a term in a contract arises than in the case of a statute. S. 21 of the Companies Act merely converts the Articles c i t that the intention was to give a right to take copies of the minutes, the Articles must be construed to mean that the members, though given a right to inspect the minutes, could only take copies of them if that were permissible under their common law rights If the interests of members are sufficiently protected by the

... object of their own. (*Remfry, J.*) RAMESWAR LAL *v.* CALCUTTA WHEAT AND SEED ASSOCIATION, LTD. **42 C W N. 161=A.I.R. 1938 Cal. 89.**

COMPANIES ACT (VII OF 1913) S. 4 (2)—*Scope—Partnership of less than twenty—Subsequent increase of members to over twenty and conversion into joint-stock Company—Member of original firm not aware of increase of members or change and not allotted any share in new firm—New firm not registered—Suit by member for declaration of dissolution of firm and for —If barred.*

Where a firm consisting of less than twenty is subsequently converted into a joint-stock with additional partners so as to consist of more than twenty partners, it must be registered under the Companies Act; if it is not so registered, no suit can be maintained in respect of that partnership. But when a

the increase in the members and of the conversion, he cannot be made to lose his right to a share of the profits because the number of partners had increased beyond twenty without his knowledge. A suit by him for a declaration that there has been a dissolution of the partnership, and for accounts cannot be dismissed on the ground of non-registration under S. 4 (2) of the Companies Act. (*Horwill, J.*) PARASURAMA IYER *v.* SUBBURAMACHARI. **1937 M.W.N. 1189.**

CONTEMPT OF COURT.

——**S. 229**—*Deposits by employees by way of security—Nature of—Trust, if created—Liquidation—Preferential right of such depositors—Tracing.*

Where deposits were made to a bank by the employees or on their behalf as security for their faithful and honest service and interest was also payable on such deposits, on a question whether such depositors were entitled on a liquidation of the bank to a preferrential payment,

Held, that the deposits formed part and parcel of the engagement transaction and the moneys should have been held by the bank in trust, since expressly they were paid as security for good behaviour. The deposits were trust moneys and an agreement to pay interest on such deposits, could not destroy the character as such of those moneys which still remained trust moneys so long as they were in the hands of the bank. Trust moneys could be followed so as to reach the assets of the bank from whatever source they might come, the tracing of the assets in that way is the proper principle of law to apply in regard to those matters. The assets of the bank

CONFLICT OF LAWS—Lex loci *and personal law—... ustom of adoption—Property ... Native State—Adoption dec... Native State—Dispute in respect of property in British India—Law applicable—English rule of* lex loci—*Applicability — Bombay Regulation IV of* 1827.

A Mahomedan lady died leaving properties both in British India and in a Native State. A custom of adoption set up by the adopted son was declared to be valid by the Court in the Native State, and his claim with ...rty in the Native State, was ...with reference to the right to the ...ia, the validity of the adoption ...e question whether the validity decided according to the personal law of the parties or the laws of British India, where the property in dispute is situate,

Held, that the rule of adopting the *lex loci* for the discovery of the right heir to land is not confined to England. It seems to be the law of British India also or rather of Bombay Presidency; for it is enacted in Bombay Regulation IV of 1827, that the law to be observed in the trial of suits shall be Acts of Parliament

India. (*Barlee and Macklin, JJ.*) AYUBSHA *v.* BABALAL. **39 Bom.L.R. 1324.**

CONTEMPT OF COURT—*Terms of settlement bet... -Undertaking given by ...rty—Breach of under-*

by a decree of Court embodying the terms of settlement between the parties one of which was an undertaking given by the defendant not to dispose of his properties until the decree was fully satisfied, and the defendant mortgaged the properties before the satisfaction of the decree,

Held, that the breach of the undertaking given to the Court amounted to contempt of Court and that the breach was not so trivial a matter as to be beneath the dignity of the Court to notice or punish it. (*Panckridge,*

CONTEMPT OF COURT.

J.) HARI CHARAN DEY *v.* RANJIT KUMAR. 42 C.W.N. 203.

——*What constitutes—Newspaper article pending litigation · Attack on and accusations against party—When amount to contempt.*

Any publication which tends to excite prejudice against the parties to a pending litigation or their litigation while it is pending constitutes contempt of Court. Attacks on or abuse of a party, his witnesses or solicitor constitute contempts, but a mere libel on a party, not amounting to an interference with the course of justice, does not, the party being left to his remedy by action.

To publish injurious misrepresentations directed against a party to the action, especially when they are holding that party to hatred or contempt, is liable to affect the course of justice, because it may, in the case of a plaintiff, cause him to discontinue the action from fear of public dislike, or it may cause the defendant to come to a compromise which he otherwise would not come to, for a like reason. The fact that the trial Judge would not be affected by the article has no bearing on the matter. An article published in a newspaper stated the defendants' case and inferred that it was true. It then accused the plaintiff of having ruined the defendants and of having concocted false criminal cases against them ; and it further accused the plaintiff of using his influence maliciously and to the detriment of the defendants. The article was published pending a suit instituted by the plaintiff against the defendants.

Held, that the article constituted grave contempt, and that the fact that the article closed with an appeal for assistance for the defendants did not help the author or publisher of the article, as the appeal for help could well have been made without the accusations which preceded it. (*Leach, C.J. and Madhavan Nair, J.*) RAJA OF VENKATAGIRI *v.* RAMA NAIDU. 1937 M.W.N. 1193.

CONTRACT

CONTRACT—*Construction—Intention of parties—Several contracts for supply of goods—If separate contracts or part of a series.*

The plaintiff and defendant entered into three contracts under which the plaintiff undertook to supply the defendant certain quantities of flour at certain rates. Although the defendant demanded the flour agreed to be supplied, the plaintiff sent only the goods under the last contract, of which the defendant refused to accept delivery. In a suit by the plaintiff for damages for breach of contract,

Held, that the intention of the parties in entering into the third and last contract, at a time when the two prior contracts had not been fulfilled was that the goods under that contract should be supplied in addition to the goods under the former two, and that the third contract should not be treated separately from the other two. The plaintiff could not, therefore, treat the one as an isolated one and to sue for damages for breach thereof. (*Bennet, J.*) HARI KISHEN DAS *v.* BENI PRASAD SHEO PRASAD BHAGAT. 1937 A.L.J. 1250.

——*Currency—Currency in particular country—How determined.*

The currency in any particular country must be determined by the law of that country and that law is naturally in terms limited to defining what is legal tender in that country. But when that is fixed by the local law, it determines what is the legal tender of that country for purposes of transactions in any other country, so that a foreign Court will, when such questions come before it, give effect to the proper law of legal tender so determined. (*Lord Wright.*) OTTOMAN BANK OF NICOSIA *v.* OHANES CHAKARIAN. A.I.R. 1938 P.C. 26 (P.C.).

——*Hire-purchase agreement—Nature of—Construction—Principles.*

The Hire purchase agreements are, on account of their complexity, not easy to construe. The terms used by the parties are frequently so obscure and equivocal that they are calculated to elude an attempt to gather their intention from them. A hire-purchase agreement is ordinarily so complex that it may be described as a compound of agreement of hiring and agreement to sell tinged with an agreement of hypothecation. With all these, it at bottom may well be a contract of sale on credit. The main point in regard to the hire-purchase agreement is to ascertain the precise time when property in the subject-matter of the agreement passes to the hirer, for, on that point turns the nature of the rights and obligations of the parties which have to be ascertained for the purpose of giving appropriate relief. The question whether or not the agreement which wears the garb of hire-purchase agreement transfers by its own force the ownership from one party to the other is one of great moment for the purposes of determining the nature and extent of the remedy that is available to the aggrieved party. If it is found that the agreement is a contract of sale with the condition of retarded payment of the price by instalments, the property in the chattel would pass to the ostensible hirer. If on the other hand the agreement is one of hiring, albeit coupled with an option to purchase, the property will not pass to the hirer as he will be treated only as a bailee until he exercises his option after having fulfilled the required conditions. In the former case the owner who has parted with his ownership is entitled to sue the purchaser for thebalance of the price as a debt owed to him. In the latter case he may seize the chattel or sue for recovering the arrears of hire money or for damages as a consequence of the breach of the contract. To construe a hire-purchase agreement, one must look into the language used by the parties to it for indications of the various stages in the development of the contract in relation to the rights and obligations that the parties contemplated to create, alter or extinguish. Every part of the agreement must therefore be explored to seek out the clue to the real intention of the parties as to the time of the transaction of the property in the subject-matter of the agreement. If the agreement embodies a stipulation which entitles the hirer to terminate the contract at any time he pleases, that stipulation will qualify the contract as a whole and would also serve to shed light on the intention of the parties as to the time of the transfer of ownership from one party to the other. (*Niyogi, J.*) MANIKCHAND *v.* BERAR MOTOR SUPPLY CO. A.I.R. 1938 Nag. 18.

——*Stock exchange transactions—Stockbroker, if must retain for his client specific shares purchased.*

A stockbroker is not considered to be under an obligation to retain for his client the specific shares which may be delivered to him under the contract made for his client. But he has, of course, to get into his possession and retain an equivalent number of shares. (*Lord Atkin.*) W.C. SOLLOWAY *v.* J. P. MCLAUGHLIN. A.I.R. 1938 P.C. 23 (P.C.).

——*Third party—Right to enforce—Rule in* Tweedle *v.* Atkinson—*Extent of applicability.*

The English common law doctrine laid down in *Tweedle* v. *Atkinson* that a contract can create no right or liability in a person who is not a party to it applies in equity also. But certain exceptions (more apparent than real) have been engrafted on the rule. A person not a party to a contract has been held to be entitled to enforce it in case where a trust or an agency

CONTRACT.

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to agency or

———*Variation—Conduct of parties—Inference from.*

If a contract is clear and unambiguous, its true effect cannot be changed merely by the course of conduct adopted by the parties in acting under it. Such conduct, if it is clear and unambiguous, may in certain events raise the inference that the parties have agreed to modify their contract, but short of that, such conduct cannot have the effect of changing the operation of an unambiguous agreement, t
special cases support, along
dence, a claim for rectificati
MAN BANK OF NICOSIA *v.*

CONTRACT ACT (IX OF 1872), S 2 (d)—*Consideration—Cancellation of account of third parties.*

The cancellation or closing of the account of third parties, is 'consideration' within the definition of S. 2 (*d*) of the Contract Act. (*Weston.*) KUTUB UDDIN *v.* DEO KARAN. **1937 A.M.L.J. 110.**

———**S. 16**—*Applicability—Transactions in favour of third parties—If can be voided—Conditions.*

Under S. 16 of the Contract Act, a transaction would be voidable against a third party if it i
undue influence and that party took the
a volunteer or with the knowledge of t

as the other party who occupied the position of confidence. (*Divatia, J. on difference between Barlee and Tyabji, JJ.*) LINGO *v.* DATTATRAYA.

———**S. 16**—*Relief under—Essent*
Burden of proof.

The first thing to be considered u
Contract Act is the relationship between the parties, that is to say, whether one party was in a position to dominate over the other; and then it must be proved that that position was used to obtain an unfair advantage; and even though the transaction may be unconscionable, relief cannot be granted under the section until the initial fact of the position to dominate the will is

TRAYA. **39 Bom.L.R. 1233.**

———**S. 16**—*Scope—Gift deed executed under undue influence—Claim to relief by avoidance—Laches and delay—If a bar—Limitation Act, Art. 91.*

In the case of gift deed executed under undue influence, the fact that the party seeking to avoid it has been guilty of delay and laches will not be
grant of the equitable relief of avoidance
The plea of laches and delay cannot apply
a gift as opposed to a contract. In any

CONTRACT ACT (1872), S. 23.

can only begin from the time when the plaintiff discovers the true nature of the deed. He has a period of *three years in such a case under Art. 91 of the Limitation Act*, which applies to the case; and the period of

in question, relief should not be denied to him on the ground of delay and laches. (*Divatia, J., on difference between Barlee and Tyabji, JJ.*) LINGO *v.* DATTATRAYA. **39 Bom.L.R. 1233.**

———**S. 16**—*Undue influence—What constitutes—Advice and persuasion—If proof of undue influence—Circumstances to be considered—Pressure exerted in bringing about transaction—If vitiates it—Use or threat of force—If necessary—Righteous transaction—If protected.*

Advice and persuasion in the case of a person who does not readily agree to do a thing would not be proof
e. Persuasion, appeals to the affections
, to a gratitude of sentiment for past
or future destitution or the like,—these
te, and may be fairly pressed on a
he other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid contract or transaction can be made. Importunity or threats, such as the promisor has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the promisor's judgment,
constitute undue
or threatened.
his will must be
the record of
entered into a
ressed by those
into it, without
any independent advice or opportunity to acquaint himself as to his rights, S. 16 of the Contract Act will apply, and a Court of equity will protect a young man
ich a transaction as
sition to dominate
ransaction is one of
not the only one.
All the circumstances connected with it must be taken as a whole. (*Divatia, J., on difference between Barlee and Tyabji, JJ.*) LINGO *v.* DATTATRAYA. **39 Bom L.R. 1233**

———**S. 23**—Acts prohibited by statute—Release of certificate debtor under Bengal Public Demands Recovery Act—Security bond therefor—Consideration, if lawful. *See* CONTRACT ACT, SS. 127 AND 23. **I.L.R. (1937) 2 Cal. 698.**

———**S. 23**—Public policy—Contract of betrothal in marriage between parents of Hindu bride and bridegroom—Validity—If marriage brokage contract. *See* HINDU LAW—MARRIAGE. **1937 M.W.N. 1274.**

———**S. 23**—*Stifling prosecution—Bond executed to drop proceedings in respect of a non-compoundable offence—No prior Civil liability—Legality of consideration.*

Where the defendant executed a bond in favour of the plaintiff with a view to see that certain pending
compoundable
and there is
civil liability
consideration

for the bond is really the abandonment of the criminal proceedings pending against the brother of the executant. S. 23 of the Contract Act applies to such a case. (*Janki Nath Wazir, J.*) MT. FATEH BIBI *v.* SHAMAS DIN.
40 P.L.R., J. & K. 11.

———S. 45—*Joint mortgagees—Suit by one—Maintainability.*

Where on the death of one of two joint mortgagees the survivor alone sued on the mortgage,

Held, that the suit was defective owing to the non joinder of the legal representatives of the joint promisee. ([illegible]) HARNAM SINGH *v.* AMAR CHAND
1937 A.M.L.J. 118

———S. 65—*Transactions entered by plaintiff with third persons at defendant's instructions—Remittances by defendant appropriated to losses incurred—Suit by plaintiff for balance—Counter-claim by defendant claiming amount so appropriated alleging transactions entered by plaintiff to be void—If can succeed.*

Where in a suit for recovery of balance, in respect of transactions entered by the plaintiff with a third person, arrived at after appropriating to the losses arising out of such transactions the defendant's remittances, the defendant counter-claims the amount so appropriated on the ground that the transactions entered by the plaintiff are void, the counter-claim falls to be dealt with as a claim for the restoration of an advantage under S. 65. But as the plaintiff has applied the amount as he became legally liable to meet losses arising from the carrying out of the defendant's instructions, the plaintiff cannot be said to have received an advantage within the meaning of S. 65. The fact that there was no privity of contract between the defendant and the third person makes no difference, if the plaintiff has incurred the liability to the third person in carrying out the defendant's instructions. (*Lord Thankerton.*) HARJIVANLAL *v.* RADHAKISON.
172 I.C. 330 = 1938 O.W.N. 10 = 1938 A.L.R. 4 = 1938 O.L.R. 1 = A.I.R. 1938 P.C. 4 (P.C.).

———S. 73—*Advance deposit—Forfeiture—Contract of sale of property—Advance insisted on by vendor and paid by vendee—Breach by vendee—Forfeiture of deposit—Right of vendee to refund—Vendor not taking legal proceedings against vendee—If can be presumed to have treated contract as at an end.*

It is well-known principle of law that if a purchaser on agreeing to purchase a property agrees to pay and does pay, an advance or a deposit, that must be regarded as security for the fulfilment of the contract of sale, more especially when the deposit is insisted upon by the vendor as a term of the contract. Though there is nothing specific said about forfeiture, the mere fact that a deposit is demanded carries with it the implication that it should be forfeited if the contract is broken, unless the vendee proves an agreement to the contrary. Where a sale deed recites that the consideration for the sale should be paid before the registering officer, the implication is that the same must be paid within four months which is the period limited for registration of the document. Where the vendee after paying a deposit and taking delivery of the sale-deed from the vendor returns it to the vendor being unable to find the purchase-money and allows the period of four months' time for registration to pass without making any further payment, he is not entitled to claim back the deposit paid by him and plead that the vendor has treated the contract as at an end. The vendee who holds a deposit which he can forfeit is not bound to institute a suit for damages or other remedy against a vendee who has no money to pay the vendor. It cannot be inferred from the omission of the vendor to take legal proceedings in such a case that he

has treated the contract of sale as at an end. (*King, J.*) GOPALAKRISHNA IYENGAR *v.* RAJARATNA MUDALIAR
1937 M.W.N. 1289.

———S. 73—*Applicability—Marriage—Contract between Hindu parents to give daughter of one in marriage to son of other—Effect of—Breach by father of bridegroom—Damages—Measure of—Suit by father of bride—Claim to amount as increased expenditure in fresh marriage alleged to be due to bride having been discarded—Sustainability.*

Where a contract is entered into between two Hindus that the daughter of the one should be given in marriage to the son of the other, the agreement is between or on behalf of the respective families of the parties to the marriage. When it is broken, damages of two kinds may naturally result. (1) the pecuniary loss, if any, and injury to the feelings and prospects to the bride or bridegroom personally; (2) the pecuniary loss and the loss to the credit and reputation of the family of the injured party. A suit by the father of the bride for damages suffered by him as head of the family and as father of the bride is not strictly an action for breach of promise of marriage as known to English law. S. 73 of the Contract Act which prescribes the general measure of damages for all contracts must be applied to the case. A claim to recover amounts by way of increased expenditure on the bride's subsequent marriage alleged to her having been discarded cannot be allowed because the increased expenditure cannot be said to arise naturally and directly from the breach of the first marriage and is generally too remote a consequence (*Krishnan Pandalai, J.*) VENKATA NARASIMHA *v.* GOVINDA KRISHNA.
1937 M.W.N. 1274

———S. 74—*Construction of—Right to compensation for breach of contract—Proof of actual damage or loss—If condition precedent.*

The right of a party complaining of a breach of contract to reasonable compensation under S. 74 of the Contract Act is not dependant on proof of actual loss or damage. Even when no actual damage or loss is proved to have been caused by the breach the party is entitled to compensation. (*Ganga Nath, J.*) MUNNA LAL BISWANATH *v.* RAHMATULLAH.
1937 A.L.J. 1385 = 1938 A.W.R. 11 (H.C.)

———S. 74—*Contract of lease—Lessee paying certain sum in advance—Contract providing that in case of failure to pay balance by appointed date, advance would be forfeited—Stipulation, if by way of penalty.*

In a contract of lease for three years at Rs. 5,000 per annum, the lessee paid Rs. 1,000 in advance as a guarantee for carrying out the terms of the contract and agreed to pay the balance on an appointed date. The contract contained a clause that if the balance was not paid by the appointed date, the money already paid would be forfeited. On breach of contract, the lessee brought a suit claiming the refund of advance.

Held, that the clause of forfeiture was not a 'stipulation by way of penalty' within meaning of S. 74 but a clause for forfeiture of a deposit already made, which was not of a penal character. (*Dalip Singh and Skemp JJ.*) PARAMPAL SINGH *v.* BUDH SINGH.
A.I.R. 1938 Lah. 62

———S. 74—*Enhanced rate of interest—If a penalty—Relief against—Principles.*

It is settled law that a stipulation for an enhanced rate of interest, if interest is not paid, is not *per se* a penal stipulation. In such a case the most important circumstance on which, the decision would depend, is the difference between the enhanced rate and the original rate. The principle of S. 74 of the Contract Act is that Courts will interfere to vary the contract between parties

CONTRACT ACT (1872), S. 126.

only when equity demands that substantial variation should be made. (*Weston.*) BENI PRASAD *v.* SARFRAZ ALI SAYED. 1937 A.M.L J. 97.

——S. 126—Contract of guarantee—What amounts to — Who can enforce it. *See* BENGAL PUBLIC DEMANDS RECOVERY ACT, S. 57. I.L R. (1937) 2 Cal 698

——S. 126—*Guarantee—Construction—Liability of guarantor.*

In construing a guarantee, the principle is that a guarantee will only extend to a liability precisely answering the description contained in the guarantee. Therefore before a creditor can enforce the liability given by a guarantor, he must satisfy that the conditions of the bond executed by him are fulfilled and that he is seeking the very liability which has been undertaken by the guarantor under the bond. (*Pandrang Row and Venkataramana Rao, JJ.*) VENKAMMA *v.* SANYA SAYYA. 1938 M.W.N. 68.

——Ss. 127 and 23—*Consider Sufficiency—'Lawful' — Release under Public Demands Recovery* 1913)

Under S. 127 of the Contract Act anything done for

doctrine though applicable to a corporation, cannot apply to a Court or an authority exercising judicial functions ; a certificate officer is a Court under the Act. The consideration is also 'lawful' in that the release is in fact, in aid, and not to the detriment, of the purposes of the Act, namely, the speedy realisation of the certificate dues. (*Henderson and Biswas, JJ.*) MALDA DT. BOARD *v* CHANDRA KETU NARAYAN SINGH. I.L R. (1937) 2 Cal 698=66 C L J. 373.

——S. 128—*Special contract—Letter of guarantee—Undertaking to pay amount "after attempts have been made to realise the same from the principal debtor"—Effect—Liability of guarantor—When arises—Mere demand for payment from principal—If sufficient to entitle creditor to proceed against guarantor.*

Where a surety by his letter of guarantee undertakes to pay the creditor the amount which may become due to him under the letter of guarantee "after attempts

guarantor until he has first attempted and failed to obtain satisfaction by some sort of proceedings against the principal debtor. The creditor's right to recover from the grantor is restrained or postponed and does not accrue until the creditor has taken steps to recover the debt by proceeding against the principal debtor or his assets. It is not enough for the creditor to merely demand payment from the principal debtor, as that would not amount to an attempt to realise the debt from the assets of the principal debtor. (*Collister and Bajpai, JJ.*) RADHA KRISHNA DAS *v* AJODHIYA DAS. 1937 A.L J. 1265=1937 A.W R. 1194.

COURT FEES.

——S. 139—*Surety bond — Surety undertaking obligation on behalf of two defendants—Liability in respect of the amount decreed against the defendants—Suit dismissed against one defendant—compromise decree passed against another defendant—Discharg of surety.*

In a prior suit, a surety gave a security bond, on behalf of both the defendants. The bond ran thus: "The plaintiff having accepted my personal security, I hereby agree and bind myself to pay to the plaintiff or his legal representatives and assignees any amount that may be decreed in the said suit against the defendants in case the same is not recovered from the same defendants. The plaintiff in that suit entered into a compromise with one of the defendants as a result of which that defendant suffered a decree to be passed against him for the amount claimed in the plaint. The other defendant contested the claim and eventually the suit was dismissed against that defendant and no decree was passed in respect of the suit claim. The plaintiff's [illegible] the amount by executing [illegible] ought a suit to enforce the [illegible] ond.

Held, that before an obligation can accrue in favour of creditor, there must be a decree against both the [illegible] lure to recover the [illegible] their property. A [illegible] defendants cannot [illegible] defendants' within [illegible] plaintiff cannot be [illegible] recover the amount [illegible] l of the suit against [illegible] accrual of any ob- [illegible] a complete release [illegible] is a principal. So [illegible] son of dismissal of [illegible] emedy of creditor

Hence the surety is discharged from his obligation. (*Pandrang Row and Venkataramana Rao, JJ.*) VENKAMMA *v.* SANYASAYYA. 1938 M W.N. 68.

CO-SHARERS—Joint property—Mortgage of undivided share for private debt—Subsequent partition—Allotment of mortgaged property to another co-sharer—Right of mortgagee to proceed against such property—Remedy. *See* HINDU LAW—ALIENATION. 1937 M.W.N. 1340.

COSTS — *Mortgage action — Discretion— Personal decree for costs against non-mortgagor—If can be passed.*

A decree for costs personally against persons other than the mortgagor can be passed in a mortgage action. Courts have a discretion to pass such a decree (*Madhavan Nair, J.*) TALUK BOARD CHIDAMBARAM *v.* VARADASESHA IYENGAR. 1937 M.W.N. 1280 (1).

COTTON GINNINIG AND PRESSING FAC[illegible] ACT (1925). S. 9 (3)—"Factory"—Meaning [illegible] on under Factories Act—Applicability. *See.* [illegible] ES ACT, S. 2 (j). 1937 M W N. 1335.

COURT FEES—*Ascertainment of— Looking to substance of plaint—Permissibility—Court-fees Act—Rules of construction.*

Though the Court-Fees Act is a fiscal enactment and its provisions have therefore to be strictly construed, yet they should not be so construed as to furnish a chance of escape and means of evasion.

The question of the proper court fee payable in a suit is to be determined on the substance of the claim to be gathered from the whole of the plaint and not merely on the language of the relief claimed in the plaint. A Court ought not to allow itself to be deceived by the

language used for evading the payment of proper court-fee by concealing the real purposes of the suit. ((*Srivastava, C. J. Zia-ul-Hasan and Smith, JJ.*) ROOP RANI *v.* BITHAL DAS. 172 I.C. 81= 10 R.O. 158=1937 O.W.N. 1186= A.I.R. 1938 Oudh 1 (F. B.).

COURT-FEES ACT (VII OF 1870)—Rules of construction—Language of plaint. *See* COURT-FEES—ASCERTAINMENT OF. 1937 O.W.N. 1186. A.I.R. 1938 Oudh 1 (F.B.).

——**Ss. 7, (iv) (b) and Sch. II Art. 17 (vi)**—*Suit for partition of joint family property—Plaint alleging Joint possession of parties—Court-fee.*

Where the suit is for partition of properties, alleged to belong to a joint family, of which the parties are said to be members, and which are stated in the plaint to be in the joint possession of the parties, a fixed court-fee of Rs. 10 is enough and no *ad valorem* court-fee need be paid. (*Tek Chand, J.*) RAM NARAIN KAUL *v.* BISHAN RANI. 40 P.L.R. 2.

——**S. 7 (iv) (c) and Sch. II, Art. 17 (iii)**—*Applicability—Suit by a party to a decree to declare it illegal and void—Court-fee—Consequential relief, if implied.*

Where a party to a decree sues for a declaration that it is illegal and void, the granting of such a declaration in his favour has the effect of setting aside that decree and relieving him of the obligations thereunder. Even though a consequential relief may not be expressly prayed for, yet if such a relief is implicit in the declaration and is a necessary consequence of it, it must be deemed to be included in the declaration prayed for. To such case it is S. 7 (*iv*) (*c*) which applies and not Art. 17 (*iii*), Sch II and an *ad valorem* court-fee is payable. (*Srivastava, C. J., Zia-ul-Hasan and Smith, JJ.*) ROOP RANI *v* BITHAL DAS. 172 I C. 81= 10 R.O. 158=1937 O.W.N. 1186= A.I.R. 1938 Oudh 1 (F.B.).

——**S. 7 (iv) (c)**—*Suit for declaration of title to provident fund money and for injunction—Proper valuation—Erroneous decision on valuation—Revision.*

Where a suit is instituted for a declaration of title of the plaintiff to a certain provident fund money and for injunction restraining the defendant from withdrawing that money, it can not be said that there is no objective standard of valuation, and the correct valuation of the relief claimed is the amount of the provident fund. If in such a suit the Court accepts the plaintiff's valuation holding that the exact money value of the claim cannot be ascertained, and the provident fund money exceeds its pecuniary jurisdiction the Court in trying the suit will exercise its jurisdiction wrongly and its decision accepting the plaintiff's valuation is open to revision under S. 115. C.P. Code (*S. K. Ghose, J.*) URMILA BALA *v.* BINAPANI BISWAS. 42 C.W.N. 192.

——**S. 7 (iv) (c) and (v)**—*Applicability—"Declaration"—Suit for possession of land—Anticipation of possible defence on ground of disposition of property—Defendant challenging title of plaintiff—Court fee payable.*

There is much misunderstanding in India as to the meaning of the word "declaration" as applied to a remedy to be granted by a Court. The habit has grown up of describing a suit for possession of land as being a suit "for a declaration of title together with a decree for possession of the property in suit," and the word "declaration" has been used to mean what would more correctly be described as the finding of fact necessary before the decree for possession can be granted. In every suit for possession the plaintiff cannot succeed unless he proves the facts necessary to establish his title, but the real remedy which seeks is a decree for delivery of

possession. When a question arises as to whether a suit falls under S. 7 (*iv*) (c) or under S. 7 (*v*), the valuation of the suit for purposes of court-fee is to be determined by seeing whether the suit is really one for a declaration in the true sense of the word, or whether the suit is for possession. If there be a claim in the plaint for a declaration, the plaint has to be examined to see whether it is a declaration properly so called, or whether it is an unnecessary claim and the suit is really one for possession. S. 7 (*iv*) (c) has application to declarations properly so called, such for instance as declarations of public status, or a declaration that the plaintiff holds a public office, or a declaration as to the meaning of a will or a trust deed or other public document. It has no reference to the kind of declaration in the sense of a finding of fact as to the plaintiff's title necessary for granting a decree for possession. It is not in the least necessary for a plaintiff in a suit for possession to claim a declaration. If he happens to claim a declaration of title in addition to an order for possession, the Court may and should treat the case as a claim for possession pure and simple, and ignore entirely the claim for a declaration of title. Where the essential claim made by the plaintiff is one for possession, the fact that the plaint attempts to anticipate a possible defence and says that the defendants will rely upon certain dispositions of the property falsely alleged to have been made, the suit is one for possession under S. 7 (*v*) of the Court-Fees Act, and there cannot be any pretence that the claim is one for a declaration with consequential relief falling under S. 7 (*iv*) (*c*). Merely because the defendants challenge the title of the plaintiff, the suit does not become one for a declaration with consequental relief. (*Courtney Terrell C.J. James and Manohar Lall, JJ.*) RAM KHELAWAN SAHU *v.* BIR SURENDRA SAHI. 18 Pat.L.T. 977= A.I.R. 1938 Pat. 22 (S.B.).

——**S. 7 (v)**—Applicability—Suit for possession—Defendant challenging plaintiff's title, and plaint anticipating possible defence on that ground—Suit, if one for possession or falls under S. 7 (*iv*) (*c*)—Court-fee. *See* COURT-FEES ACT S. 7 (*iv*) (*c*) AND (*v*). 18 Pat.L.T. 977=A.I.R. 1938 Pat. 22 (S.B.).

——**S. 7 (v) and Sch. II, Art. 17 (vi)**—*Applicability—Suit for possession by partition—No joint possession—Property not joint family property—Court-fee.*

If a person is out of possession of property to which he considers he is entitled on the strength of any right, title or interest that he claims in relation thereto, and seeks to obtain possession thereof from the person who is keeping it back from him, there being no jointness of possession or title between the two, his suit is one for possession, bare and simple to which the provisions of S. 7 (*v*) of the Court-Fees Act apply and no occasion arises to invoke Art. 17 (*vi*) of Sch. II to the Court-Fees Act. (*Addison and Din Mahomed, JJ.*) MT. SAT BHAWAN *v.* RAM KISHEN SINGH. 40 P.L.R 27.

——**S. 7 (v)**—*Suit for partition and possession by excluded co-sharer—Court-fee payable.*

Where in a suit for partition and possession among co-sharers the plaintiff alleges his exclusion from possession of the property, the court fee payable is *ad valorem* under S. 7 (*v*) of the Court-Fees Act. (*Venkatasubba Rao and Abdur Rahman, JJ.*) SECRETARY OF STATE *v.* SUBRAMANIAN CHETTIAR. (1938) 1 M.L.J. 29.

——**S. 7 (v) (d) and (e)**—*Suit by under proprietor for possession of land with building and guava grove thereon—Separate court-fees—If payable.*

A person claiming under-proprietary rights in land by virtue of a permanent lease executed in his favour brought a suit for possession of the land and the building and a guava grove thereon. The building was not a

COURT-FEES ACT (1870), S. 12.

tenant's house or any other building necessary for the enjoyment of the land but a substantial structure used as a tenancy. Similarly the trees were not self grown but were planted.

Held, that in such circumstances the building and grove could not be said to be appurtenant to the land and hence a separate court fee under S. 7 (*v*) (*e*) should be paid on the market value of the building and the grove. (*Thomas and Zia-ul-Hasan, JJ.*) JWALA DEVI *v.* AHMAD HASAN. 172 I C. 297=1938 O.W N. 23= A.I.R. 1938 Oudh 40.

——S. 12—Scope—Interference—Appeal requiring *ad valorem* court-fee filed as miscellaneous appeal and allowed—Application by respondent after remand for stay of proceedings until payment of proper court-fee—Order rejecting—Revision—Interference. *See* COURT-FEES ACT (AS AMENDED IN BIHAR AND ORISSA), SCH. I, ART. 1 AND SCH. II, ART. 11.
18 Pat.L.T 864.

——S. 12 (ii)—*Deficit court-fee — Realisation—Powers of appellate Court—Appeal with reference to part only of subject matter of suit.*

Where only a part of the subject-matter of the suit is the subject of appeal and is before the appellate Court, that Court acting under S. 12 (*ii*) of the Court Fees Act can realise the deficit court-fee only in respect of that part and not on the entire subject matter of the suit. (*Venkatasubba Rao and Abdur Rahman, JJ.*) SECRETARY (

R. 12 (
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——S. 17—"*Distinct subjects*"—
alternatively on the same cause
valued separately for purposes of
court-fee—Necessity.

Where two reliefs are claimed in the alternative in respect of the same cause of action, they
sidered to be "distinct subjects" within
S. 17 of the Court-Fees Act. Where in
tlement deed executed by the last male
sioner sues for a declaration that the
binding on him as having been brought about by fraud, coercion and undue influence, also praying for an alternative relief that if the deed is found to be valid,
be given a decree for the amount payable under
the cause of action is only one, namely, the exe
the deed; and though two reliefs are claimed in respect thereof, one on the footing of its validity and the other on the footing of its invalidity, they are not distinct subjects and the plaintiff need not therefore pay separate court-fees on each of the two reliefs. (*Pandrang Rao and Venkataramana Rao, JJ.*) RANGASWAMY REDDIAR *v.* VENKATAPERUMAL REDDIAR.
1937 M.W.N. 1252.

——S. 34 (3)—*Charge of an offence under—Facts to be established.*

Held, that it was not enough to sustain the charge. (*Guha*
PEROR

Judge
Appeal

COURT-FEES ACT (1870), Sch. I, Art. 4.

An appeal from a decree passed by the Special Judge under S. 14 of the U. P. Encumbered Estates Act falls under Art. 1, Sch. I of the Court-Fees Act and *ad valorem* court fee has to be paid. Neither Art 11 nor Art. 17 of the Second Schedule applies to the case (*Allsop, Ganga Nath and Ismail, JJ.*) JAGDISH PRATAP *v.* IDAI PRATAP. 1937 A.L.J. 1373= 1938 A.W.R. 22 (H C.) (F B.).

——(as amended in Bihar and Orissa) Sch. I, Art. 1 and Sch. II, Art. 11—*Applicability—Decree for mesne profits after inquiry under O. 20, R 12 (2)—Appeal—Court-fee*—Ad valorem-*fee on decree amount—Appeal valued as miscellaneous appeal—Appeal allowed and suit remanded without demanding proper court fee—Application by decree holder subsequently for order staying proceedings as remand—Dismissal—Revision—Interference—Ss. 12 and 13, Court Fees Act.*

Petitioner who was the decree-holder in a suit for ejectment applied for ascertainment of mesne profits, and in due course got a decree for mesne profits which were ascertained by a Commissioner. The judgment debtor

for re-hearing. The appellate decree was signed and sealed duly and an application was then put in by the petitioner in the District Court for an order staying

predecessor.
revision and
had come
up in revision, should exercise its powers under S. 12 of the Court Fees Act.

was not
operly to
it of the
ave been
ough the
District Court ought not to have entertained the appeal without requiring the appellant judgment-debtor to pay
mount of the decree ap-
the application for stay
made with jurisdiction;
and (3) that the High Court would not interfere in revision so as to set aside the order which was manifestly correct.

——Sch. I, Arts. 4 and 5, Sch. II, Arts 1 (d)—
printing costs—
application for
P Code.
or non-payment
it, can only be
treated as one for review and not as one under O 41,
mped under Arts. 4 and
Act and not under Art. 1
MOWAR RAN BAHADUR
SINGH.

——Sch. II, Art. 1 (d)—Applicability—Application for restoration of appeal dismissed for non-payment of printing cost. *See* COURT-FEES ACT, SCH. I, ARTS. 4 AND 5 AND SCH. II, ART. 1 (*d*).
19 Pat.L.T. 17.

——(as amended in Bihar and Orissa) Sch. II, Art. 11—Applicability—Appeal from decree under O. 20, R. 12 (2), C. P. Code—Proper court-fee. *See* COURT-FEES ACT (AS AMENDED IN BIHAR AND ORISSA), SCH. I, ART. 1 AND SCH. II, ART. 11.
18 Pat.L.T. 864.

——Sch. II, Art. 11—Applicability—U. P. Encumbered Estates Act, S. 14—Decree under—Appeal—Court-Fee. *See* COURT-FEES ACT, SCH. I, ART. 1.
(1937) A.L.J. 1373= 1938 A.W.R. 22 (H.C.) (F.B.).

——Sch. II, Art. 17—Applicability—U. P. Encumbered Estates Act, S. 14—Decree under—Appeal—Court-fee. *See* COURT-FEES ACT, SCH. I, ART. 1.
1937 A.L.J. 1373= 1938 A.W.R. 22 (H.C.) (F.B.).

——Sch. II, Art. 17 (iii)—Applicability—Suit by party to a decree to declare it illegal and void—Consequential relief, if implied. *See* COURT-FEES ACT, S. 7 (*iv*) (*c*) AND SCH. II, ART. 17 (*iii*).
1937 O.W.N. 1186= A.I.R. 1938 Oudh 1 (F.B.).

——Sch. II, Art. 17 (vi)—Applicability—Suit for possession by partition—No joint possession—Property not joint family property—Court-fee. *See* COURT-FEES ACT, S. 7 (*v*) AND SCH. II, ART. 17 (*vi*).
40 P.L.R. 27.

——Sch. II, Art. 17 (vi)—Suit for partition of joint family property—Plaint alleging joint possession of parties—Court fee. *See* COURT-FEES ACT, SS. 7 (*iv*) (*b*) AND ART. 17 (*vi*). **40 P.L.R. 2.**

CRIMINAL PROCEDURE CODE (V OF 1898), S. 13—Appointment under—What may amount to. *See* CR. P. CODE, S. 529 (*f*). **42 C.W.N. 246.**

——S. 15—*Case of defamation—Trial by Honorary Magistrates—Propriety of.*

Cases of defamation are technical and ordinarily should not be tried by a Bench of Honorary Magistrates. (*Weston.*) GULAB CHAND *v.* GADH MAL.
1937 A.M.L.J. 121.

——S. 80—Warrant of arrest—Showing of—Necessity. *See* PENAL CODE, S. 99. **1937 A.L.J. 1334= 1938 A.W.R. 17 (H.C.).**

——S. 88—*Scope and object of—Property of accused attached and sold—Mortgage executed by accused before such attachment and sale—Suit on—Parties—Non-joinder of Government—If fatal—C. P. Code, O. 34, R. 1.*

The object of S. 88, Cr. P. Code, is to compel an accused person to appear in obedience to a summons or warrant issued by Criminal Courts. The attachment and sale provided for are a penalty sought to be enforced against the accused to coerce him to respond to the orders of the Criminal Courts and take his trial and not avoid the reach of justice. The property which is attached and sold is the property of the accused, and the Government by attaching the property does not get any rights in its favour beyond what the section specifically provides. If the accused has, before such attachment and sale, mortgaged or otherwise transferred any interest in such property, that interest cannot be sold. What the Government can sell is only the equity of redemption which alone was in the mortgagor on that day. Neither the Government nor the purchaser at the sale can acquire any higher rights than the mortgagor himself has on that day. A suit by the mortgagee from

the accused-mortgagor cannot be defeated for no[n-]joinder of the Government, for Government is not [a] necessary party to such suit. The only person who is [a] necessary party to a suit to enforce the mortgage is th[e] purchase at the sale by the Government, besides th[e] mortgagor. (*Manohar Lall, J.*) BINDESHWARI PRA[-]SAD *v.* LAL MUNGARI LAL. **172 I.C. 198 1937 P.W.N. 762=18 Pat.L.T. 814 A.I.R. 1937 Pat. 64**

——S. 132—*Scope—Police officers acting under C[h.] IX—Bar to prosecution of.*

S. 132, Cr. P. Code, is a bar to the prosecution [of] police-officers purporting to act under Ch. IX of th[e] Code without the sanction of the Local Government. [It] is not necessary that the accused (*i.e.*, police-officer[s]) should prove the existence of an unlawful assembl[y]. (*King, J.*) ELAYA PILLAI *v.* ARULANANDAN PILLA[I].
1937 M.W.N. 124

——S. 145—*Successive proceedings—Competency—Jurisdiction of Magistrate.*

A second proceeding under S. 145, Cr. P. Code, i[n] respect of the same land is not without jurisdictio[n] merely because the Magistrate had already declared [a] party to be in possession of the very land in a previou[s] proceeding; if the conditions of the section are satisfie[d] the Magistrate can take proceedings. There is n[o] reason why the actual possession of a person who wa[s] no party to the previous proceeding should be ignore[d] when there is a dispute about the possession, and wh[y] he should not proceed under the section on the groun[d] of there having been a previous proceeding under th[e] section—not necessarily between the same parties. (*Dhavle, J.*) INDERDEO SINGH *v.* KESHO SINGH.
1937 P.W.N. 845=18 Pat.L.T. 886= A.I.R. 1938 Pat. 1.

——S. 145 (1) and (3)—*Defects in procedure—Failure to draw up original order and affix its copy at the spot—If vitiates proceedings.*

Where a Magistrate failed to record an order in writing under S. 145 (1), Cr. P. Code, stating the grounds on which he was satisfied as to the existence of danger of breach of public peace and where he further neglected to place a copy of his order in a conspicuous place near property in question as required by S. 145 (3), the entire proceedings are vitiated and must be set aside. (*Addison, J.*) CHANAN SINGH *v.* EMPEROR.
40 P.L.R. 20

——S. 164—*Confession recorded at 9 p.m. and accused afterwards not remanded to judicial lock-up—Value of confession.*

Where the confession had been recorded by the Magistrate at 9 o'clock in the night and the accused was not remanded to the judicial lock-up after the confession had been recorded.

Held, that the confession was not of much value (*Almond, J.C. and Mir Ahmad, A J.C.*) KISHAN CHAND *v.* EMPEROR. **A.I.R. 1938 Pesh. 5.**

——S 164—*Retracted confession—Value.*

In the absence of any direct evidence, it is not safe to rely upon the retracted confessions which are contradictory to each other in material details and which have been contradicted by the direct testimony. The fact that the confessions were retracted and that when they were made some policemen were interested in the investigation of the case, is a good ground for not relying upon the confessions (*Jai Lal and Bhide, JJ.*) RAMEL SINGH *v.* EMPEROR. **A.I.R. 1938 Lah 101**

——S. 164—*Scope—If controls S. 29, Evidence Act—Confession recorded as dying declaration—Warning not administered—Admissibility—Duty of Magistrate.*

CR. P. CODE (1898), S. 164.

Where a Magistrate proceeds to record a statement of an injured person under S. 164, Cr. P. Code, without knowing at the commencement whether that statement was going to be an accusation against a third person or a

is being voluntarily made. If the Magistrate does not do this but records the statement to the end as if it were merely a dying declaration, there is a contravention of the provisions of S. 164, Cr. P. Code, because the

ut such of the Cr. P.

1937 M.W.N. 1325.

——S. 164 (3)—*Scope—Non-compliance—Failure to put questions as to voluntary character of confession—Effect.*

It is the duty of a Magistrate to r in accordance with the clear prov Code. He must satisfy himself, by questions, that the confession was not the result of any undue influence. Where the Magistrate does not question the accused making the confession as to whether the confession was being made of his own free will, after ascertaining how long he had been in custody of the police, there is a failure to observe an important provision of the Code intended to safeguard the voluntary character of the confession, and the confession cannot be accepted and acted upon. (*Rowland and Madan, JJ.*) RAM BABU JADAV *v.* EMPEROR.

18 Pat.L.T. 964=A.I.R. 1938 Pat. 60.

——S. 192—*Order of transfer—Order in writing—Necessity.*

The terms of S. 192, unlike S. 528 (5) of the Cr. P. Code, does not require that an order of transfer under that section should be in writing (*Guha and Biswas, JJ.*) RAMKRISHNA SINHA *v.* EMPEROR.

42 C.W.N. 246.

——S. 192—Transfer by Magistrate not competent to transfer—If cured by S. 529 (*f*). *See* CR. P. CODE, S. 529 (*f*). 42 C.W.N. 246.

——S. 200—Failure to record plainant—If curable under S. 537. S. 537—EXAMINATION OF COMPL

——S. 202—*Procedure — Dire*

clerk to perform and making the preliminary enquiry under S. 202, Cr. P. Code. He must do them himself. (*Weston.*) LADHU CHAND. 1937 A M

——S. 222—*Charge of conspiracy under Particulars—Necessity.*

There is a distinction between the charge of and a charge of conspiracy to commit such an offence. In the former, particulars as required by the Code are necessary. But it is well settled that in stating the object of a conspiracy, the same certainty is not required as in indictment for the offence conspired to be committed. The Code neither restricts the period over which such a charge may extend nor requires specific

CR. P. CODE (1898), S. 282.

acts to be mentioned. (*Guha and Biswas, JJ.*) RAMKRISHNA SINHA *v.* EMPEROR.

42 C.W.N. 246.

——S. 225—*Scope—Mistake or doubt as to particular ... titles accused to absolute ... offence instead of more*

f doubt is not the same as to the weapons used of doubt as to the particular weapons which the accused carry cannot entitle them to be acquitted altogether of the charge, although they are specifically charged with using particular weapons. An error in the particulars required to be ot mislead the accused or s no ground for setting ed, though they may not offence in the absence of proof of use of particular weapons, may still be convicted of a lesser offence. (*King, J.*) PALANI GOUNDAN *v.* EMPEROR. 1937 M.W.N. 1331.

——S. 235, Ill. (m)—*Scope—Charge of robbery—Separate charge for hurt—Legality.*

Where hurt is caused to the victim of robbery though not at the time of committing the robbery but subsequent to its commission, during the effort of the offender charge in res bery by its de order to com theft, but also in carrying away the property obtained by the theft. (*Khaja Mahammad Noor and Dhavle, JJ.*) EMPEROR *v.* HARIA DHOBI. 18 Pat. L.T. 857= 1937 P.W.N. 868=A.I.R. 1937 Pat. 662.

——S. 253—*Scope—Discharge of some accused after examination of some witness and framing of charge against rest—Reasons for discharge not given then and there—Legality—Power of Magistrate to defer giving reasons till final order in the case—S. 537, Cr. P. Code—If cures defect, if any.*

Under S. 253 (2), Cr. P. Code, a Magistrate has power to discharge an accused at any stage when he comes to the conclusion that the charge is groundless, although it must be for reasons to be recorded by him. Where a Magistrate after the examination of most of the witnesses for the prosecution, thinks that in the interests of justice the case should not be proceeded against some of the accused persons and that it is not necessary to examine the other witness so far as they are concerned, it is perfectly competent to him to dis- harge against not give the , intending to order in the does not act stponing them until the final order in the case. There is nothing in the language of S. 253 which precludes him from doing so. He does not become *functus officio* on pronouncing the order of discharge ... only when he Assuming that it his reasons be- the omission to S. 537, Cr. P. Code, particularly when there is no suggestion that any failure of justice has been occasioned thereby. (*Venkataramana Rao, J.*) GOVINDARAJ *v.* EMPEROR.

1938 M.W.N. 38=(1938) 1 M.L.J. 110.

——S. 282—*Applicability — Assessor trial—One assessor ignorant of English—If incompetent to act as assessor—Court Language Hindi—Trial, evidence and*

CR. P. CODE (1898), S. 284.

arguments in Hindi—Evidence taken down in English—Some documents in English — Effect—Trial—If bad.

Where the language of the Court is Hindi, Hindi knowing jurors and assessors are competent to take part in the trial of cases in which the evidence, argument and summing up are given in Hindi. If evidence is given in Hindi, the fact that it is taken down in English cannot make any difference. The fact that one of the assessors in an assessor trial did not know English, but knew only Hindi, would not therefore render the proceedings or trial illegal. There is no similar provision corresponding to S. 282 (which applies to the case of jurors) in the case of assessors; but assuming that the principle of that section applies to the case of assessors, the fact that an assessor does not understand English does not invalidate a trial unless there had been a failure to interpret in Hindi evidence given in English. Nor does the fact that some of the documents in the case are in English affect the competency of the assessor who does not know English or the lawful constitution of the Court. There is nothing in the statute which would render the trial illegal or render such an assessor incompetent. (*Rowland and Madan, JJ.*) RAM BABU JADAV *v.* EMPEROR. 18 Pat.L.T. 964= A.I.R. 1938 Pat. 60.

——S 284—*"Chosen"—Implies selection from larger umber of persons present than are required for ial.*

S. 284, Cr. P Code, does not prescribe that the ssessors are to be chosen by lot; it does not at all say at they should be chosen in any particular manner. 'he word "chosen" in the section does not imply that ere ought to be a selection from a larger number than quired for the trial and it is not at all necessary that ere should be more present than required, so that the ssessors may be "chosen". (*Rowland and Madan, J.*) RAM BABU JADAV *v.* EMPEROR. 18 Pat.L.T. 964=A.I.R. 1938 Pat. 60.

——S. 307—*Scope—Case tried by Assistant Judge artly by jury and partly with assessors—Latter ppealable to Sessions Judge—Reference to High Court—If to compromise whole case or of only part tried by ury.*

It cannot be laid down as an absolute rule that in a essions case tried partly with the aid of assessors and artly by jury, the reference to the High Court under S. 307, Cr. P. Code, must be confined to that part only which was tried by jury; and a reference of the whole case cannot be regarded as incompetent cases tried by an Assistant Sessions Judge in which the part tried with the aid of assessors is appealable to the Court of session should, if possible, be referred to the High Court in their entirety if an impossible position is to be avoided in dealing with references under S. 307. (*Khaja Mahammad Noor and Dhavle, JJ.*) EMPEROR *v.* HARIA DHOBI. 1937 P.W.N. 857=18 P.L.T. 857= A.I.R. 1937 Pat. 662.

——Ss. 326 and 327—*Scope—Requisite number of assessors summoned not present in Court—Judge summoning person present in Court—Latter's name on list of persons qualified—Choosing of latter and those previously summoned and present as assessors—If illegal or improper.*

S. 326 of the Cr. P. Code, is not mandatory, it only lays down the procedure 'ordinarily' to be followed. S. 327 gives the Court an emergency power to cause jurors or assessors to be summoned when such direction is found to be necessary. Where a case came up for trial it was found that only three of the assessors summoned in accordance with S. 326 were present. There

CR. P CODE (1898), S. 350.

was, however, present in Court another gentleman whose name was on the list of persons qualified to serve as assessors, and the judge caused a summons to be served on him. The judge hen chose as assessors the three persons previously summoned and the fourth gentleman summoned on the date of the trial.

Held, that there was nothing illegal and that since the fourth assessor's name was on the list of assessors, the assessors could not be said to have not properly constituted. (*Rowland and Madan, JJ.*) RAM BABU JADAV *v.* EMPEROR. 18 Pat. L.T. 964= A.I.R. 1938 Pat. 60.

——S. 344—*Costs—Order for—Power of Court—If restricted by S. 526 (8) or (9).*

S. 344 of the Cr. P. Code, does justify an order for costs and nothing contained in Sub-Ss. (8) or (9) of S. 526 of the Code can restrict the power of a Court to pass an order for costs under S. 344. (*Allsop, J.*) RAM RAKSHPAL *v.* RAM NATH. 1937 A.W.R. 1226= 1937 A.L.J. 1356 (1).

——S. 345 (2)—*Duty of Court—Reference to police—Propriety.*

A Magistrate cannot surrender the discretion to give permission to compound an offence, which vests in him, to any other Court or to any outside agency. Allowing a case to be compounded is a judicial act, and any argument whether composition should be allowed or not must be addressed to the Magistrate in open Court either by the prosecuting Counsel or the Prosecuting Inspector on behalf of the Crown or by those who desire the composition. It is improper to refer to police authorities by means of correspondence and to arrive at a decision as the result of that correspondence. (*Grille, J.*) HARPRASHAD HIRA LAL, *In re.* 172 I.C. 352=A.I.R. 1938 Nag. 39.

——S. 350 (1), proviso (a)—*Applicability—Enquiry preliminary to commitment to Sessions.*

Where a Magistrate after examining some witnesses in an enquiry preliminary to commitment to the Court of Sessions ceases to exercise jurisdiction and is succeeded by another Magistrate, the latter Magistrate is not bound to Commence the enquiry *de novo.* As this is an enquiry and not a trial, the case does not come under the proviso (*a*) of Sub-S. (1) of S. 350, Cr. P. Code. The Magistrate has, however, got a discretion to exercise whether he will act on the evidence recorded by his predecessor, or he will resummon any of the witnesses before he frames a charge against the accused. (*Mukherjea, and Biswas, JJ.*) ASHUTOSH SEN *v.* EMPEROR. 42 C.W.N. 224.

——S. 350, Proviso (b)—*Scope—Transfer of Magistrate after recording of prosecution evidence and framing of charge—Subsequent re-transfer—Beginning of case at stage at which he left before—Refusal to re-summon witnesses—If vitiates proceedings.*

The principle underlying S. 350, Cr. P. Code, is that the Magistrate who hears the evidence should decide the case. The refusal to re-summon and re-hear the witnesses examined by the same Magistrate before is only an irregularity which does not vitiate the proceedings in view of proviso (*b*) to S. 350, Cr. P. Code, and the High Court or a superior Court will not interfere unless the accused has been materially prejudiced thereby. Where a Magistrate after wholly recording the prosecution evidence and framing a charge in a case is transferred, but before the succeeding Magistrate begins a *de novo* trial, the former Magistrate is re-transferred to the Court, there is nothing illegal if he proceeds to hear the case from the stage at which he left it at the time of his ceasing to have jurisdiction over the case for a time. His refusal to re-summon and re-hear the

witnesses already examined by him before is only an irregularity. (*Lakshmana Rao, J.*) ... EMPEROR.

——S. 403 (1)—*Applicability— under Ss. 379 and 411, I. P. Code ... on charge under Sandal Wood transit rules under Forest Act—If barred.*

... S. 403 (1) Cr. P. Code, may be success- ... ply, and for ... of two or ... acquittal of a person on a charge under Ss. 379 and 411, I. P. Code, is no bar to his being tried for an offence under the Forest Act sandalwood transit rules, when the offence under the latter Act is established on the facts, and when the only doubt is whether an offence under the Penal Code is established. The fact that at the previous trial the accused might have been tried for both the offences under the Forest Act and under Ss. 379 and 411, I. P. Code, would not bring the case under S. 236, but only under Sec. 235 (1) Cr. P. Code; S. 403 (1) is no bar in such a case. (*King, J.*) GURUNATHA GOUNDAN *v.* EMPEROR. **1937 M.W.N. 1247.**

——S. 421—*Summary dismissal of appeal—Order not showing that records were examined or evidence appreciated—Legality—Interference in revision.*

Where it does not appear from the order of the ...

(*James and Madan, JJ.*) CHHATU GOPE *v.* EMPEROR. **19 Pat.L.T. 28.**

——S. 423—*Appeal against conviction—Duty of Appellate Court to scrutinize evidence.*

In all cases in which the Court sits in criminal appeal, it has to consider the case against the appellant bearing in mind exactly the same principles as must be borne in mind by the Court of trial in the first instance. The appellant does not come here as one who has been convicted and has to satisfy the Court beyond all reasonable doubt that he has been wrongly convicted. If after a conviction before a subordinate Court, the Court of Appeal comes to the conclusion that there may have been a miscarriage of justice, the Appellate Court cannot allow the conviction to stand. The task of the appellant is therefore to bring before the consideration of the Appellate Court such matters as may cast a reasonable doubt of his guilt having regard to all the circumstances of the case. *It is true that a trial Judge* hears and sees the witnesses and in many cases his opinion as to their demeanour or truthfulness may be of the highest value, and an Appellate Co... lightly disregard the conclusion at whi... expressed reasons he arrived. On the otl... not absolve the Appellate Court from ... duty of scrutinizing the evidence with ca... satisfied, not that a reasonable person ... to the conclusion which the trial Judge ... that no reasonable person could have co... conclusion but that the accused was guilty of the offence charged against him. (*Roberts, C. J. and Sharpe, J.*) NGA KYAW HLA *v.* EMPEROR. **A.I.R. 1938 Rang. 45.**

——S. 423—*Retrial—Failure of prosecution—Duty of Court.*

When the prosecution has ... against the ...

P. Code, should not be ordered except where there is a ... n the ... mpri- ... inte- ...

1937 A.M.L J. 126.

——S. 439—Discretion under—Interference with Summary order of dismissal of appeal. *See* CR. P. CODE, S. 421. **19 Pat.L T. 28.**

——S. 439—*Enhancement of sentence—Murder—Sentence of transportation for life—Application for enhancement—Test to be applied—Interference—Grounds.*

Where an application is made to the High Court for enhancement of a sentence of transportation on a conviction for murder, the proper test to be applied is whether the only sentence which could be passed on the evidence is a sentence of death. There are many cases where Sessions Judges are too lenient in the exercise of the discretion vested in them by law, but the High Court will not interfere except when it finds that the sentence of death is the only possible sentence that could be inflicted. The accused who had for years ill-treated his ...

inflicting on her as many as eight wounds of a terrible nature. He immediately left the scene and remained in hiding for over 12 months. The Sessions Judge who tried him convicted him of the offence of murder, but awarded the lesser penalty of transportation for life.

Held, that the only possible sentence which a Court of Law could pass in the circumstances was the sentence of death, and the sentence of transportation for life should consequently be enhanced to a sentence of death. (*Leach, C. J. and Burn, J.*) NARAYANASWAMI GOUNDAN *v.* EMPEROR. **1937 M.W.N. 1241.**

——S. 439—Powers of High Court—Order of release on conviction under S. 411, I. P. Code—Power to alter conviction into one of theft and to maintain order of release. *See* CR. P. CODE, S. 562 (I-A). **18 Pat.L.T. 872.**

——S. 439—*Scope—Discretion—Withdrawal of prosecution under S. 494—Revision—Interference—Prosecution ordered by Civil Court—Withdrawal on the ground of case being weak and the ground of costliness of trial—Propriety.*

The High Court will not ordinarily interfere with the exercise of discretion under S. 494, Cr. P. Code; the High Court has however, power to do so and will do so, in special cases where the withdrawal appears to be manifestly improper. Where a prosecution is directed ...

——Ss. 476 and 476-B—*Complaint by Court—Omission to appeal against order making complaint—Conviction on such complaint confirmed on appeal—Revision—Objection to legality of complaint—Maintainability.*

A person who has not appealed against an order resulting in a complaint under S. 476, Cr. P. Code, being filed against him, is not entitled to question or ... in revision after ... nviction has been ... *and, JJ.*) KUNJO

CR. P. CODE (1898), S. 476.

CHAUDHARY v. EMPEROR. 16 Pat. 650 = 19 Pat.L.T. 21.

——S. 476-B—*Scope—Powers of appellate Court under—Remand for holding preliminary enquiry—Legality.*

The power of the appellate Court, mentioned in S. 476-B, Cr. P. Code, are not exhaustive, and the Court can therefore exercise all the powers contemplated by the Cr. P. Code, except those which are expressly excluded. It has the power to remand a case to the lower Court for holding a preliminary inquiry for finding out if there are sufficient materials to file a complaint under S. 476. A complaint filed by the lower Court after an enquiry after remand is not illegal. (*Varma and Rowland, JJ.*) KUNJO CHAUDHARY v. EMPEROR. 16 Pat. 650 = 19 Pat.L.T. 21.

——S. 488—*Right to maintenance—Offer by husband to maintain wife.*

A husband lived away from his wife as he had frequent quarrels since their married life began. On such desertion by the husband, the wife filed a suit for judicial separation but it failed. Thereupon the wife applied under S. 488 for maintenance. The husband expressed his willingness to maintain his wife. There was an attempt on the part of the neighbours to bring about a compromise but it failed on account of the stubborn attitude of the husband.

Held, that the belated offer of the husband to maintain his wife on condition of her staying with him was not a *bona fide* one, as it was made simply as a defence against the wife's application for the maintenance. Moreover, the failure of the wife's suit for judicial separation did not alter the fact that he deserted her and failed to maintain her. Under the circumstances, the order for maintenance was proper. (*Mackney and Spargo, JJ.*) DE CRUZ v. DE CRUZ. A.I.R. 1938 Rang. 25.

——S. 489—*Change in circumstances—What constitutes.*

Before the original order of maintenance against husband can be altered, it must be shown that there has been, if not a change in the circumstances of the husband, then a change in the circumstances of the wife. The mere fact that the wife is living in a different manner from the manner in which she lived at the time the order of maintenance was passed does not necessarily constitute a change in her circumstances. Husband's keeping a mistress and getting children by her and contracting debts for litigation are not circumstances for reducing the allowance awarded to his legal wife. (*Mackney, J.*) MA MYA KHIN v. N. L. GODENHO. A.I.R. 1938 Rang. 42.

——S. 494—*Grounds for withdrawal—Prosecution launched by order of Civil Court—Opinion of—Prosecution authorities that case was weak and that trial would be expensive—If sufficient grounds for withdrawal.*

Where a Civil Court after a full inquiry and trial on the merits has ordered a prosecution, and the accused has not appealed against the order for prosecution, it would be allowing an undesirable precedent if such a prosecution were to be cut short and withdrawn by the prosecuting authorities unless for very cogent reasons. The opinion of the Civil Court as to the expediency of the prosecution and the probability of a conviction is entitled to respect. It is in the public interest that offenders should be brought to book in spite of the difficulties and expense necessarily involved in trials of offences. A prosecution so launched ought to be allowed to be withdrawn because the prosecuting authorities think that the case is a weak one or that the trial would be very costly to the Government. The Government has got to face and does face the spending of considerable sums of money in maintaining justice. (*Gruer, J.*) SATWARAO v. KANBARAO BHAGORAO. 1938 N.L.J. 12.

——S. 494—*Reasons for withdrawal—Duty of Court to record.*

S. 494, Cr. P. Code, does not prescribe that reasons for the withdrawal of a prosecution should be given in writing by the Magistrate allowing withdrawal. But it is obviously desirable that reasons should be given to enable the High Court to judge whether the withdrawal has been rightly made. (*Gruer, J.*) SATWARAO v. KANBARAO BHAGORAO. 1938 N.L.J. 12.

——S. 517—*Title doubtful—Proper order.*

When title is doubtful, the proper order under S. 517, Cr. P. Code, ordinarily should be an order for return to the person from whom the property was attached. (*Weston.*) GOPI v. EMPEROR. 1937 A.M.L.J. 141.

——S. 520—*'Court of appeal'—Additional Sessions Judge.*

Where an Additional District Magistrate had passed an order of disposal in his judgment of acquittal in appeal, as an appeal from the acquittal would lie only to the High Court and not to the Sessions Court, the latter Court cannot hear an appeal from the order of disposal. (*Weston.*) GOPI v. EMPEROR. 1937 A.M.L.J. 141.

——S. 526 (8)—*Scope — Non-compliance—Refusal to accept application and to adjourn case—If ground for transfer.*

Refusal to accept an application under S. 526 (8), Cr. P. Code, and to stay the case in obedience to the mandatory provisions of the section would justify an apprehension in the mind of the applicant that he would not receive a fair trial, and is a ground for transfer. The fact that the application is defective or not in proper form is no ground for declining to adjourn the the case. (*Bose, J.*) JANKI PRASAD v. MST. SUKHRANI. 1938 N.L.J. 36.

——S. 526 (8) and (9)—Scope—If restrict powers of Courts to pass order for costs under S. 344. *See* CR. P. CODE, S. 344. 1937 A.W.R. 1226.

——S. 529 (f) — *Curability under—Conditions—Second officer transfering to himself case taken cognizance of by the S. D. O. during the latter's absence—Trial by Second Officer—Legality—Cr. P. Code, Ss. 13 (3) and 192.*

Where there was a standing order in a District that when the S. D. O. is away from the headquarters, the Second Officer is to carry on the work of his general file at the headquarters and where in pursuance of it a Second Officer during an absence of the S. D. O. transferred to his own file, a case taken cognizance of by the S. D. O., and tried it himself, on a plea that there has been no proper transfer and as such the proceedings were *ultra vires.*

Held, that the Second Officer must be considered to have been appointed as S. D. O to carry on the work of the permanent incumbent during his absence, as in this case there has been a delegation under S. 13 (3) to the District Magistrate, of the powers of the Local Government under S. 13 (1) of the Cr. P. Code.

Held further, that the transfer and trial was undoubtedly a defect in the jurisdiction and may apparently appear to be outside the curative provisions of Cl. (*f*) of S. 529, Cr. P. Code, but as the decisions of the Calcutta High Court have held Cl. (*f*) of S. 529 to apply to cases where the order of transfer purported to be made under S. 192, Cr. P. Code, by Magistrates who were not competent to do so, as not being Magistrates who had

CR. P. CODE (1898), S. 533.

taken cognizance of them, the defect in this
cured by S. 529 (*f*). (*Guha and Biswas, J*
KRISHNA SINHA *v.* EMPEROR. 42 C.

——Ss. 533 and 164—*Defects in records*
sion—If can be condoned.

Omissions and irregularities in recording
under S. 164 are condoned by S. 533 provided they do not prejudice the accused. (*Almond, J.C. and Mir Ahmad, A.J.C.*) KISHAN CHAND *v.* EMPEROR.
A.I.R. 1938 Pesh. 5.

——S. 537—*Examination of complainant—Failure to make—If curable.*

The omission to record the statement of a complainant could at best be considered to be an irregularity which cannot vitiate the trial. Such an irregularity can be cured under S. 537 of the Cr. P. Code. (*Kichlu and Janki Nath Wazir, JJ.*) ABDUL AZIZ *v.* STATE.
40 P.L.R. J. & K. 1.

——S. 537—Scope—Omission to give reasons for discharge of some accused at time of discharge—Effect—Irregularity—If cured. *See* CR. P. COD[illegible]
1938 M.W.N. 38 = (1938) 1

——S. 537—*Scope of—Transfer by*
who had not himself taken cognizance of a case—If curable under S. 537.

S. 537 as its wording shows, deals only with irregularities committed by Courts of competent jurisdiction. Where a Magistrate transfers a case w
himself taken cognizance of, it is defec
which could not be cured by S. 537.
was, JJ.) RAMKRISHNA SINHA *v.* EMPEROR.
42 C.W.N. 246.

——S. 540-A—*Requirements of—Non-compliance with as regards one of several accused in a joint trial—Effect.*

Normally a trial in the absence of the accused is a nullity and it is only by virtue of S. 540-A, Cr. P. Code, that this consequence of the absence of the accused can be avoided, if the requirements of this section are not fulfilled, the trial remains a null
joint trial of several accused, the preser
is dispensed with under S. 540-A, Cr.
the requirements of that section being
is illegal and a nullity not only as regards that particular accused, but against the rest as well, for a joint trial is a single trial and the whole is
(*Young, C.J. and Monroe, J.*)
EMPEROR.

——S. 562 1(-A) — *Applica*
under S. 411, I. P. Code—Order of
monition—Legality—Revision—Power of High Court to alter conviction to one under S. 379, I. P. Code, and maintain order of release.

A person convicted under S. 411, I. P. Code, cannot be dealt with S. 562 (1-A) Cr. P.
the facts found are equally consistent
session of stolen property, the High C

CRIMINAL RULES OF PRACTICE R. 85—*Scope and interpretation of.*

The whole spirit of R. 85 of the Criminal Rules of

tions with the police. For such a purpose, a magistrate may ask such question as he thinks fit provided he records in writing such questions and answers. R. 85 (2)

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CRIMINAL TRIAL—Benefit of doubt—Meaning of.—Mistake as to weapons used by accused — Right to benefit of doubt. *See* CR. P. CODE, S. 225.
1937 M.W.N. 1331.

——Confession—Voluntary nature of—Question of fact. *See* EVIDENCE ACT, S. 24—SCOPE OF.
1938 M.W.N. 24 (2).

——*Conviction—Basis of—Murder—Grave suspicion—Evidence falling short of proof—If justifies conviction.*

Where it is not safe to infer from the circumstances proved that the accused must have been concerned in a murder, a conviction is not justified although there is undoubtedly cause for grave suspicion. If the evid-

——*Conviction — Circumstantial evidence— Minor discrepancies—Effect of.*

Where the evidence against the accused is entirely
as whole is such
that the accused
ct there are discrepancies in the evidence or minor difficulties in the prosecution evidence, which are not of much importance, will not entitle the accused to an acquittal. The time or hours mentioned by the accused must not be taken as having been given with reference to time-pieces, but must be taken obviously as having been given only approximately. The accused's failure to explain the circumstances against him has also to be taken into account. (*Burn and Lakshmana Rao, JJ.*) EMPEROR

exceptional cases where a man is treated as guilty and convicted even though he had no guilty mind. In each

Sufficiency.

Where the circumstances proved are such that a fair inference and indeed the only reasonable inference from them is that the accused committed the murder of the

al factions—
harge—Subse-
tion witnesses
e—Conviction
—Propriety.

Where rival parties fight over a feud with sticks and stones, and one of the parties is prosecuted, but dis-

because they are statements of persons who were themselves accused of the same offence in the same affray or fight, and because admittedly they have not

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told the whole truth. (*Newsam, J.*) SANNA BASYA *v.* EMPEROR. 1937 M.W.N. 1196.

——*Duty of Court—Examination of witness—Public Prosecutor failing to put necessary question—Duty of Court to put such question.*

If the Public Prosecutor fails to put a witness a question which the trial Court considers necessary, the Court should itself put the question. (*Khaja Mohammad Noor and Dhavle, JJ.*) EMPEROR *v.* HARIA DHOBI. 18 Pat.L.T. 857 = 1937 P.W.N. 868 = A.I.R. 1937 Pat. 662.

——*Duty of Court—Justice to be done to accused and to appear to be done.*

It is the duty of Courts in criminal trials to give a judicial finding, after applying their minds judicially to the facts of the case, with reference to the case of each individual accused, and the evidence adduced on behalf of the accused in support of their case must also be carefully and fully considered. Though the Courts may not be able to come to a conclusion in favour of the accused in every case, justice must not only be done to the accused in fact, but must also appear to be done. (*Manohar Lall, J.*) MEWALAL SINGH *v.* EMPEROR. 18 Pat.L.T. 869 = 1937 P.W.N. 908 = A.I.R. 1938 Pat. 34.

——*Duty of prosecution—Calling of witnesses.*

It is not the duty of the prosecution to call as witnesses every one whose statements have been taken by the police but only to call such people as may be likely to give truthful and reliable evidence with regard to the matter in question. (*Roberts, C. J. and Sharpe, J.*) NGA KYAW HLA *v.* EMPEROR. A.I.R. 1938 Rang. 45.

——*Duty of prosecution—Production of all necessary and available evidence—Default—Effect.*

It is the duty of the prosecution in a criminal case to produce all the relevant and available evidence to bring home the charge to the accused; they cannot be allowed to produce evidence at their pleasure piecemeal. If they fail to adduce the necessary evidence for a conviction, they cannot be given another opportunity to fill in the gaps deliberately left open by them. (*Manohar Lall, J.*) SOGHIRAM *v.* EMPEROR. 18 Pat.L.T. 871 = A.I.R. 1938 Pat. 39.

——*Evidence—Duty of Court in recording—Case turning on evidence of boy of tender age—Duty to record evidence in the form of questions and answers.*

In a case where the guilt or innocence of the accused depends almost wholly upon the evidence of a witness of tender age, *e.g.*, a boy of six years, the trial Court would do well to take down that evidence in the form of questions and answers, so as to enable the High Court, when the case comes on before it on a reference, to decide whether the opinion of the jury or the opinion of the trial Judge is to be preferred. (*Khaja Mohammad Noor and Dhavle, JJ.*) EMPEROR *v.* HARIA DHOBI. 18 Pat.L.T. 857 = 1937 P.W.N. 868 = A.I.R. 1937 Pat. 662.

——*Evidence*—Post-mortem *certificate—If evidence—Value and use of.*

A Criminal Court is not justified in treating the *post mortem* certificate as evidence and in extracting a sentence from it and relying on it as if it were positive evidence in the case. The *post mortem* certificate is not evidence. It can be properly used by the person who granted the certificate, when giving evidence, to refresh his memory, and it can also be used as a record of what he observed at the time to corroborate, or perhaps to contradict, whatever he might say in the witness-box. But it cannot by itself be substantive evidence. It is clear that it would be unsafe to act upon an isolated sentence in a *post mortem* certificate. (*Burn and Mockett, JJ.*) RAMASWAMY *v.* EMPEROR. 1938 M.W.N. 36.

——*Evidence—Sufficiency.*

There is no provision in the Indian law requiring more than one witness to prove any fact. (*Weston.*) MEHTA *v.* EMPEROR. 1937 A.M.L.J. 134.

——Evidence—Suspicion. If can take the place of proof. *See* CRIMINAL TRIAL—PROOF OF GUILT. 40 P.L.R. J. & K. 1.

——*Proof of guilt—Strong suspicion—Sufficiency.*

The conviction of an accused person cannot be maintained unless and until the offence is, without the least doubt brought home to him. Though there may be circumstances which create suspicions against the accused, suspicions however strong certainly cannot take the place of legal proof. (*Kichlu and Janki Nath Wazir, JJ.*) ABDUL AZIZ *v.* STATE. 40 P.L.R., J. & K. 1.

——*Sentence—Accused's privacy invaded—If ground for lesser degree of punishment.*

If the right of privacy of the accused's household was being invaded, the accused, though he may have transgressed the law and found guilty, may be liable to a lesser degree of punishment. (*Manohar Lall, J.*) MEWALAL SINGH *v.* EMPEROR. 18 Pat.L.T. 869 = 1937 P.W.N. 908 = A.I.R. 1938 Pat. 34.

——*Sentence—Mitigation—Accused in custody for several months—If ground for reduction of sentence.*

Where the accused, on the date of the judgment, has been in custody for several months (about ten months), that is a circumstance which the Court is justified in taking into consideration and making an equivalent reduction in the sentence to be awarded on conviction. (*Rowland and Madan, JJ.*) RAM BABU JADAV *v.* EMPEROR. 18 Pat.L.T. 964 = A.I.R. 1938 Pat. 60.

——*Sentence—Murder of child for the sake of jewels worn upon the person—Proper sentence.*

When the accused for the sake of jewels worn upon the person of a young and helpless child who is no other than his own aunt's daughter, murders her, the only possible and proper sentence is a sentence of death and nothing short of it will satisfy the ends of justice. (*Burn and Mockett, JJ.*) MITTAYI AMEER SAB *v.* EMPEROR. 1938 M.W.N. 84.

——*Sentence—Murder of illegitimate child by a young mother—Transportation for life—If appropriate.*

Where a young girl of 15 kills her new born illegitimate child, a sentence of transportation for life is wholly inappropriate. High Court cannot interfere in such a matter. It can only suggest it to the Local Government to reduce the sentence to one for a short period. (*Young, C.J. and Monroe, J.*) MT. TALIAN *v.* EMPEROR. 40 P.L.R. 28.

——*Sentence—Simple and rigorous imprisonments—Order for concurrent running—Legality.*

It is not illegal to order that simple imprisonment and rigorous imprisonment shall run concurrently. A person who is being rigorously imprisoned is also necessarily and *ex-hypothesi* being imprisoned. (*Newsam, J.*) SHEIK BADAI SAHIB *v.* EMPEROR. 1937 M.W.N. 1384.

——*Sentence—Youth of about 16—Murder—Death sentence—Propriety.*

Where the accused, who was convicted of the murder of his cousin, a girl of about 4 years of age—he having murdered her deliberately to procure money for his debauchery which he obtained by pledging the jewels worn by the murdered girl—was only just over 16 years of age when he committed the crime.

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Held, that though the crime was a terrible one, it was not right that he should be sentenced to death, and that a sentence of transportation should be substituted instead of the death sentence. (*Burn and Lakshmana Rao, JJ.*) EMPEROR v. SATYANARAYANAMURTHY.
1937 M.W.N. 1133.

——*Transfer—Case coming for inquiry before Magistrate who held identification parade—Propriety—Transfer—Desirability.*

It is advisable that the Magistrate who has held the identification parade in a case should not hold the

[illegible]

1937 M.W.N. 1200.

CROWN—Prerogative of dismissing servants at pleasure—Applicability to Local Bodies. *See* BOMBAY MUNICIPAL BOROUGHS ACT, S. 33.
39 Bom.L.R. 1269.

CROWN GRANTS ACT (XV OF 1895)—*Applicability—Grants of Sunderbans lands—Discretion to impose conditions—If limited.*

Obiter.—The Crown Grants Act applies to grants by Government of Sunderbans lands. The Crown has unfettered discretion to impose any condition, limitation, or restriction in its grants. (*Mitter and Biswas, JJ.*) AMBUJ BASHINI CHOWDHURANI v. SECRETARY OF STATE.
42 C.W.N. 239.

CUSTOM—*Proof of—Immemorial user—Presumption as to—Limits of rule—Right to exclusive user of public tank.*

Where a declaration was sought that the plaintiffs were entitled to the exclusive user of a public tank, on the ground of an alleged immemorial user,

Held, that in such case it is not always necessary to produce evidence of user going back beyond the memory of living persons. Nor is it necessary to have evidence of positive acts of exclusion of one party by the other.

Held, further, that a custom proved to have existed during the period of living memory can only be presumed to have existed from before the period of legal memory in cases where conditions may be assumed to have been

[illegible]

——(N.W.F.P.)—*Adoption of sister's son—Validity—Rawas.*

The Rawas who claim a Rajput origin can son of a sister. (*Darling, S.M. and Bomfo* GANGA DEI v. MOHAMMAD HABIBUR KHAN.
1937 [illegible]

——(Punjab)—*Adoption—Jhali Jats of village Dehlon, Ludhiana District—Right of adopted son to succeed collaterally.*

Among Jhali Jats of the village Dehlon in the Ludhiana District, an adopted son is entitled to succeed collaterally in the family of his adoptive father. (*Bhide, J.*) JAGTA v. BUGGA. A.I.R. 1938 Lah. 103.

——(Punjab)—Riwaj-i-am—*Entries in—Presumption of correctness—Rebuttal—Judicial decisions to the contrary.*

The presumption of correctness attaching to a in a *riwaj i-am* is only a rebuttable presumption finding arrived at in a Judicial decision exhaustive enquiry, is enough to rebut it. (*Bh* SHER MAHOMED v. JAWAHAR KHATAUN.
40 P.L.R. 29.

DEED.

——(Punjab)—Riwaj-i-am—*Statements in—Value of.*

The statements of customs recorded in the *riwaj-i-am* of a tahsil or district regarding the customary law followed by the various tribes holding land in the tahsil in matters of succession are by themselves strong evidence of the customs followed by members of those tribes even if instances are not cited. (*Coldstream and Jai Lal, JJ.*) NIDH KAUR v. GIAN SINGH.
A.I.R. 1938 Lah. 55.

——(Punjab)—*Succession—Daughter* v. *Collaterals* [illegible] *Phalia tahsil of Gujrat District.*

[illegible] of Phalia tahsil of Gujrat District follow [illegible] ording to which daughter cannot inherit [illegible] perty in presence of her father's collaterals. [illegible] *and Jai Lal, JJ.*) NIDH KAUR v. GIAN SINGH.
A.I.R. 1938 Lah. 55.

——(Punjab)—*Succession—Daughter— Non-ancestral property—Exclusion of collaterals—Awans of Khushab Tahsil in Shahpur District.*

In the case of Awans of Khushab Tahsil in Shahpur District, according to the custom governing them, a collateral is not entitled to succeed to non-ancestral property of a deceased person, in the presence of his daughter. (*Bhide, J.*) SHER MAHOMED v. JAWAHAR KHATUN.
40 P.L.R. 29.

——(Punjab)—*Succession—Daughters—Sansi Jats of Amritsar district.*

Among Sansi Jats of Amritsar district, daughters exclude collaterals of the seventh degree in succession to the self-acquired property of their father. (*Dalip Singh and Skemp, JJ.*) MST. GANGO v. MT. HUKAM KAUR.
A.I.R. 1938 Lah. 111.

——(Punjab)—*Succession—Widow succeeding collaterally—Her heirs after death.*

In a case where a widow has succeeded collaterally, after her death it is the heirs of her husband who have to be sought for and not the heirs of the last male-holder of the property. (*Dalip Singh and Skemp, JJ.*) MST. GANGO v. MT. HUKAM KAUR.
A.I.R. 1938 Lah. 111.

DEED—*Consideration—Stranger's right to impugn.*

Where the parties to the transaction uphold the [illegible] complain of [illegible] (*Bose and* [illegible] DEO RADHA [illegible] 38 Nag. 30.

—— [illegible] *ions construing other documents—Value of.*

The decisions based on the language in one will or [illegible]

before it on the words in that document itself, considered in the light of the surrounding circumstances. (*Wassodew and Thakor, JJ.*) HILALSING v. UDESING.
39 Bom.L.R. 1217.

——*Construction — "Surrounding circumstances"—Power of Court to see—Oral evidence of intention of parties—Admissibility.*

Though surrounding circumstances can be seen or looked at in order to arrive at an interpretation of a [illegible]

to be executed. (*Wassodew and Thakor, JJ.*) HILALSING v. UDESING.
39 Bom.L.R. 1217

DIVORCE ACT (IV OF 1869), S. 37, Proviso—*Construction—Power of Court to pass order discharging, varying or suspending original order of alimony as to arrears accrued due.*

Under the proviso to S. 37 of the Divorce Act the Court has jurisdiction only to discharge, modify or suspend an order for alimony in so far as it concerns future payments, that is, as to payments which are to become due in future. The Court has no power to remit arrears and has no jurisdiction to declare that the husband should not be liable to make good sums of alimony which have already accrued due under the decree in execution proceedings or otherwise. (*Harries, J.*) H. C. D. GOODALL *v.* B. H. A. GOODALL. 1937 A.L.J. 1363.

——**S. 37, Proviso**—*Discretion—Exercise of—Delay in applying for modification or suspension or discharge—Effect.*

The power given to the Court under the proviso to S. 37 of the Divorce Act to discharge, modify or suspend an order for alimony is discretionary, and should not be exercised by the Court in favour of applicant who has unreasonably delayed his application. (*Harries, J.*) H. C. D. GOODALL *v.* B. H. A. GOODALL.

1937 A.L.J. 1363.

——**S. 40**—*Discretion—Application by guilty party—When to be allowed—Duty of Court to preserve* Status quo—*Right of innocent party to retain benefit of settlement.*

The power given to the Court under S. 40 of the Divorce Act is a discretionary one, the discretion must be exercised judicially. It is of course open to a guilty party to make an application under S. 40, but such an application should not be readily acceded to, unless special circumstances exist which make it just and proper to make an order upon the application of a guilty party varying a settlement, the *status quo* should remain undisturbed. The Court should not ordinarily deprive an innocent party of any interest which he or she takes under a settlement, even though it be for the benefit of the children of the marriage. (*Harries, J.*) H. T. WOODWARD *v.* I. M. WOODWARD.

1937 A.L.J. 1368.

EASEMENT—*Natural right—Right of owner of upper land to drain off surplus rain water to lower land—Nature and extent of—If an incident of ownership of land—Acquisition by user—If necessary.*

The right of the owner of a higher land to drain off its surplus rain water through the adjacent owner's ground is an incident of the ownership of land in this country, and need not be acquired by long user; and if the owner of the land at the lower level raises any obstruction to the natural flow of the water, he would be restrained if it causes or tends to cause damage to the owner of the land on the higher level. Although the flow must not be increased by artificial means, it is not necessary that the flow must be a flow permitted to go naturally over the whole surface. The owner of the superior tenement can, on the other hand, in the natural use of his property for draining or otherwise improving it, collect the water into one body and thus discharge it, and the owner of the inferior tenement is, without the positive constitution of any servitude bound to receive that body of water on his property. (*Rowland, J.*) RAJPATI NARAYAN SINGH *v.* KIRIT NARAYAN SINGH. 18 Pat.L.T. 806=1937 P.W.N. 578.

——*Water rights—Public stream—Government putting up dam across public river and using water not for riparian tenement but for filling tank at a distance—Nature of right—Acquisition by prescription—Extent of right—Limit to enjoyment—Right of lower riparian owner to undiminished supply—Accumulation of silt over dam obstructing free flow of water—Suit by lower riparian owner—Limitation—"Continuing wrong.*

Where the Government as upper riparian owner seeks to use the waters of a public stream not for a riparian tenement, but for the purpose of filling a tank situate at a long distance, by putting up a permanent dam across the river, the right to divert water to such a tank in such manner is in the nature of easement and not a riparian right. The lower riparian owner is therefore entitled to insist that there should be no excessive user and that the easement should be enjoyed in a manner consistent with his rights and without increasing the burden of the easement. If the Government claims the easement by prescription, it is for the Government to show the extent of the prescriptive right. The burden is not on the lower riparian owner in an action by him against the Government on the ground of excessive user, to prove that he has suffered damages as a result of any specific act of the Government. The suit cannot be regarded as one between two riparian proprietors. It is proved that silt has accumulated over or near the dam in a way calculated to obstruct the natural flow of water over the dam, the plaintiff (lower riparian owner) is entitled to relief against the defendant (Government) unless the latter can show that the plaintiff's remedy is barred by limitation. The obstruction caused to the free flow of water in the river by such accumulation amounts to a "nuisance," and the riparian owner who is injured thereby may take steps to abate it even by going on the other person's land, if only he can do it peacefully. If this is not permitted, his remedy is to sue for an injunction and damages. The position is the same even when natural causes combine with the existence of the dam to bring about the obstruction. The fact that the Government has acquired a right by prescription to maintain the dam would not give the Government any immunity in respect of all other obstructions that may arise in the natural course of things by reason of the existence of the dam. Nor can a plea of limitation be raised in respect of the removal of such obstruction. The injury caused to the lower riparian owner by such obstructions is in the nature of a "continuing wrong" within the meaning of S. 23, Limitation Act, and the lower riparian owner would have a cause of action accruing *de die in diem* until the opposing party acquires a prescriptive right to maintain the obstruction. It is also very doubtful whether a prescriptive right could be acquired at all in respect of a shifting or changing mass like silt accumulation. The acquisition by the Government of a prescriptive right to maintain the dam will not of itself entitle them to all the waters intercepted by the dam, but only to such water as they have been accustomed to take. If they are entitled to draw water through a channel with certain dimensions, they cannot enlarge the dimensions of that channel. (*Varadachariar and Mockett, JJ.*) SECRETARY OF STATE *v.* ZEMINDAR OF SAPTUR.

46 L.W. 862.

EASEMENTS ACT (V OF 1882), S. 29—Prescriptive right to maintain dam across river for purpose of taking water to tank through channel—Right to enlarge dimensions of channel or to take increased quantity of water. *See* EASEMENT—WATER RIGHTS. 46 L.W. 862.

ELECTRICITY ACT (IX OF 1910), S. 2 (c) and R. 106—*"Consumer"—Meaning of.*

In order to hold that a person is a "consumer" as defined by S. 2 (*c*) of the Electricity Act, it would *prima facie* be enough to prove either that energy was supplied for the use of that person, or that that person was the owner or occupier of premises connected up with the licensee's electric system. If either of these is proved that person is a consumer under R. 106 of the rule. (*Rowland, J.*) BHAGALPUR ELECTRIC SUPPLY CO. LTD. *v.* HARI PRASAD SAHA. 18 Pat.L.T. 986.

ELECTRICITY ACT (1910), S. 12.

——**S. 12 (1) and (2)**—*Powers of licensee—Limits —Placing of works on private and public lands—Consent of persons concerned—Necessity—Right to compensation or rent.*

The Electricity Act of 1913 does not authorise a licensee to place any work on any private lands without the consent of the owner or occupier, except in the case provided for by the first proviso to S. 12 (1). But in the case of lands dedicated to public use, the Legislature has clearly intended that the licensee would be able to place its works without the consent of the authorities in charge of such lands and without paying any compensation for the same. The Local Government might while granting the license insert a term in it regarding rent or compensation for the use of such lands and in such cases undoubtedly a duty to pay rent or compensation will arise. (*Mukherjea, J.*) BARRACKPORE MUNICIPALITY *v.* BARRACKPORE ELECTRIC SUPPLY CORPORATION, LTD. **I.L.R. (1937) 2 Cal. 746.**

——**S. 37 (4)**—*Rules under, R.* 106—*If* ultra vires. *Quaere.*—Whether R. 106 of the rules framed under the Electricity Act is *ultra vires* of the rule making power

A person who is directly in charge of the property of an Electric Supply Company is a "person aggrieved" within the meaning of S. 50 of the Electricity Act and is competent to institute a complaint in respect of an offence against the Company, or by any tampering with its meters, or wrongful appropriation of electric current. A prosecution started on a complaint made by the Resident Engineer who is the principal officer of a company in charge of the management of their business is not illegal and is perfectly sustainable. (*Rowland, J.*) BHAGALPUR ELECTRIC SUPPLY CO., LTD. *v.* HARI PRASAD SAHA. **18 Pat L.T. 986.**

Where certain amount of jade was deposited by *A* with *B* and the nature of the deposit is in dispute, oral evidence is admissible to show whether it was put there for safe custody only or as pledge. (*Roberts, C. J. and Leach J.*) KYAN WIN TA *v.* DAW KHIN **A.I.R. 1938 Rang. 38.**

——*Marriage—Presumption from living together as man and woman.*

A presumption of a marriage arises in a case where it is established that the parties were living together as man and woman and after the death of the man the latter was allowed by his reversioners to retain his property for a period of 41 years. (*Srivastava, C. J. and Smith, J.*) DURGA BUX SINGH *v.* SURESH BUX SINGH. **1937 O.W.N. 1221.**

——*Register of births and deaths—Entries in—Value of.*

Entries of the names of persons in a register of births or deaths or marriages cannot be positive evidence of the birth, death or marriage of such persons unless their identity is fully proved. (*Lort Williams, J.*) HEMANTA KUMAR DAS *v.* ALIANTZ INSURANCE COMPANY. **A.I.R. 1938 Cal. 120.**

——*Value of—Appraisement record—Requisites to be proved.*

Before a record of appraisement can be treated as in itself evidence on which liability may be imputed it should be proved that the appraisement was made with proper formality. In other words unless the *Raiyat* has definitely and formally accepted the *danabandi* by signing the record of appraisement; or unless it is demonstrated that the *danabandi* was carried out in something of the manner of a proceeding in arbitration, the landlord is required to prove not only that the *danabandi* was made but that the estimate of outturn was correct. (*Courtney Terrell, C. J., James and Manohar Lall, JJ.*) PRATAP NARAIN JHA *v.* RAMASRAY PERSHAD CHAUDHURY. **19 Pat.L.T. 4 (S.B.).**

EVIDENCE ACT (I OF 1872), Ss. 8 and 32—*Applicability—Statement of person not proved to be dead—Admissibility—Extent.*

A statement of a person believed but not proved to ... S. 32 of the ... r is admissible ... the conduct of ... of the facts ... ath Wazir, JJ.) ... J. and K. 1.

——**Ss. 13 and 42**—*Decision as to custom—Relevancy —Value.*

A judgment on a question of custom is relevant, not merely as an instance under S. 13 but also under S. 42 of the Evidence Act, as evidence of custom. But its value depends upon the nature of the inquiry and the evidence produced. (*Bhide, J.*) SHER MAHOMED *v.* JAWAHAR KHATUN. **40 P.L.R. 29.**

——**S. 24**—*Scope of—Confession—Voluntary nature —Question of fact.*

The law relating to confessions is embodied in the very clear words of S. 24 of the Evidence Act. There is no room for technicalities in dealing with whether a ... It is a plain question of ... the trial Judge to decide ... differ from the Magis... was voluntary, if he con... ot. If in a criminal trial, ... accused person that ... (whether strongly or ... a confession such a ... and Mockett, JJ.) VENKATA NARAYANA *v.* EMPEROR. **1938 M.W.N. 24 (2).**

——**S. 27**—*Applicability—"Custody of police"—Person in police custody under order of Magistrate—Statement by—Admissibility.*

S. 27 of the Evidence Act is no doubt restricted to persons in custody of policy; but there is no reason why it should not apply also to persons who are in actual police custody although that custody has been ordered by a Magistrate. There is nothing in such a case to offend against the principle of S. 27, namely, that portions of a confession made to the police leading to the actual discovery of facts can safely be proved. (*Rowland and Madan, JJ.*) RAM BABU JADAV *v.* EMPEROR. **18 Pat.L.T. 964 = A.I.R. 1938 Pat. 60.**

——**S. 29**—Scope—If controlled by S. 164, Cr. P. Code—Record of confession as dying declaration without due warning being administered—Admissibility. *See* CR. P. CODE, S. 164.

——S. 30—*Retracted confession— Admissibility against co accused—Corroboration—Rule as to.*

A retracted confession of a co-accused is admissible in evidence against his co-accused; but the rule of prudence is to seek corroboration before a conviction is based on it. What the nature of the corroboration should be will depend on the facts of each particular case. (*Varma and Rowland, JJ.*) EMPEROR v. MANGRU KISAN. 16 Pat. 612.

——S. 31—*Admissions—Value*—Bona fide *mistake—Correction—Permissibility.*

Admissions are not conclusive proof, and though they may operate as estoppel, it is open to a party to correct an admission made by him if it is shown to have been made under a *bona fide* mistake and has not caused any prejudice to the other side. (*Weston.*) MOTI LAL v. LACHHMI NARAIN. 1937 A.M.L.J. 86.

——S. 32—Applicability—Statement of person not proved to be dead—Admissibility. *See* EVIDENCE ACT, SS. 8 AND 32. 40 P.L.R. J., and K. 1.

——S. 35—*Birth and Death Register—Entry of birth or death signed by father or his servant or relation—Value of—Inference of legitimacy of child—If justified—Acknowledgment of legitimacy.*

When a man speaks of a child born to him what he means ordinarily is that the child was born legitimately and not illegitimately. Entries in the register of births and deaths about the birth of children to a person or the death of his child, signed by himself or by his servants or relations, justify the conclusion that children must have been legitimate and born in lawful wedlock. An acknowledgment made under the father's signature in a public register like the birth register shows that his intention was not merely to acknowledge the paternity of the child but also the legitimacy of the child. (*Pandrang Row and Venkataramana Rao, JJ.*) MUHAMMAD EBRAHIM v. SAFIA BAI. 1937 M.W.N. 1282

——S. 42—Decision as to custom—Relevancy—Value. *See* EVIDENCE ACT, SS. 13 AND 42. 40 P.L.R. 29.

——Ss. 74 and 77—*Certified copy of entry of registration of deed—Admissibility.*

A certified copy of the entry of registration of a deed is admissible in evidence under Ss. 74 and 77 as proof of the entry, but not of the contents of the deed. (*Lort Williams, J.*) HEMANTA KUMAR DAS v. ALIANTS INSURANCE COMPANY. A.I.R. 1938 Cal. 120.

——S. 89—*Presumption under—When can be drawn.*

In a suit for redemption, the question was whether the plaintiff was the mortgagor and the defendant the mortgagee. The plaintiff alleged that the mortgage was executed 50 years ago and that the entry as regards mortgage was made in the mortgagee's bahi and called upon the defendant to produce it. The defendant denied that he possessed any such bahi. The plaintiff's evidence showed that the entry was made in ordinary bahi and not on stamped paper though required by law as such. Moreover there was no evidence by plaintiff to show that the defendant was in possession of the bahi and was withholding it though called upon to produce it.

Held, that no presumption under S.89 could be drawn under the circumstances and as the entry was made in the ordinary bahi and not on stamped paper, no question of presumption arose in such case. (*Bhide, J.*) LADHA RAM v. HARI CHAND. A.I.R. 1938 Lah. 90.

——S. 91—*Scope—Suit for possession—Unregistered patta and rent receipts—Admissibility to prove title—General circumstances of the case—Admissibility—Registration Act, S. 49.*

An unregistered patta cannot be admitted in evidence in a suit for possession of land for the purpose of proving

the plaintiff's title. Nor can the plaintiff be allowed to prove his title by the production of rent receipts or by the general circumstances of the case. S. 49 of the Registration Act and S. 91 of the Evidence Act are a bar to such proof, and the plaintiff is not entitled to prove his title and his right to recover possession in that way. (*Wort and Manohar Lall, JJ.*) RAMAUTAR SINGH v. JUTHI TATMA. 18 P.L.T. 1012.

——Ss. 91 and 92—*Scope and effect of—Oral evidence that document not intended to be acted upon—Admissibility.*

S. 91 of the Evidence Act only excludes oral evidence as to the terms of a written contract. S. 92 only excludes oral evidence to vary the terms of the written contract, and has no reference to the question whether the parties had agreed to contract on the terms set forth in the document. There is nothing in either section to exclude oral evidence to show that there was no agreement between the parties and therefore no contract. Oral evidence is therefore, admissible to show that a document executed by a party was never intended to operate as an agreement, but was a sham or fictitious document brought into existence solely for the purpose of creating evidence about some other matter. (*Ganga Nath, J.*) BISHAMBAR DAS v. RAM CHANDRA. 1937 A.L.J. 1352=1938 A.W.R. 8 (H.C.).

——S. 115—*Acquiescence—Outlay of money on another person's land—Acquiescence of true owner—Essentials to estop true owner.*

In the case of an outlay of money by a person on another's land the following essentials must co-exist in order to constitute acquiescence which would estop the true owner. In the first place the person incurring expenditure must have made a mistake as to his legal rights. *Secondly* he must have spent some money or must have done some act on the faith of his mistaken belief. *Thirdly* the true owner must know the existence of his legal right which is inconsistent with the right claimed by person incurring expenditure. *Fourthly* the true owner must know of the mistaken belief of the person incurring expenditure. *Lastly* the true owner must have encouraged the person incurring expenditure in his expenditure or in other acts which he has done, either directly or by abstaining from asserting his legal right. (*Skemp, J.*) MAPAL v. RANA. A.I.R. 1938 Lah. 88.

——S. 115—*Applicability—Representation not as to existing fact but one* de futuro—*If gives rise to estoppel.*

In order that there may be an estoppel within the scope of S. 115 of the Evidence Act, there must be some representation as to existing fact. There cannot be any estoppel in respect of a representation not as to an existing fact but one *de futuro.* (*Broomfield and Wassoodew, JJ.*) PARSHOTTAM v. SECRETARY OF STATE. 39 Bom.L.R. 1257.

——S. 116—*Scope and effect of—Expiry of period fixed in lease—Estoppel against tenant if continues thereafter—Tenant neither paying rent nor accepting title of landlord since—Absence of evidence of landlords assent to tenant's possession—Suit for possession more than 12 years after expiry of lease—Maintainability—Limitation Act, Art. 139.*

S. 116 of the Evidence Act only estops a tenant from disputing his landlord's title during the continuance of the tenancy. Where the tenancy originated in a lease, the estoppel continues even after the expiration of the period of the lease, unless the tenant has openly surrendered possession or as at least given notice to his landlord that he claims under his own title. But in the absence of evidence to prove that the tenant paid rent to the landlord after the expiry of the lease, or that the

landlord assented to the possession of the tenant after the determination of the lease, or that the tenant accepted the title of the landlord after that, it cannot be inferred that the relationship of landlord and tenant continued after such determination, and Art. 139 of the Limitation Act bars any suit to recover possession from the tenant after the expiry of twelve years from the date when the tenancy was determined. When the tenant has proved that the tenancy has been determined by efflux of time, it is for the landlord to prove that any tenancy was created or arose after such date. (*Horwill, J.*) SITHARAMIAH *v.* RAMASWAMY.

46 L.W. 848=A.I.R. 1938 Mad. 73.

——S. 133—*Approver—Corroboration—Nature of evidence necessary.*

An approver's statement must be regarded with suspicion and cannot be accepted without material corroboration. The prosecution has not only to produce substantial evidence to corroborate the statement of the approver that he took part in the commission of the offence, but also that the other accused took part with him. (*Weston.*) GANESH *v.* EMPEROR.

1937 A.M.L.J. 123.

EXECUTION—*Executing Court— Duty to record compromise.*

The executing Court is bound to record a compromise between the parties and the question [illegible] promise extinguishes the decree or intend to extinguish the decree, is question as to whether or not the Court has jurisdiction to record it. (*Dalip Singh and Skemp, JJ.*) AMIR [illegible]

[illegible]

and which deals with specific kinds of factories. A building constructed for the purpose of being used as a factory does not become a factory under S. 9 (3) of the latter Act until it is actually so used. (*King, J.*) THE COMMISSIONER OF LABOUR GOVERNMENT OF MADRAS *v.* RANGANNA GOWD.

1937 M.W.N. 1285

FAMILY ARRANGEMENT—*Settlement of disputes and restora[illegible] harmony in family—Sufficiency—S[illegible]—Necessity for.*

The settlement of disputes and the restoration of peace and harmony in the family would be sufficient consideration for a family arrangement. The mere fact that the claim of one of the parties to the dispute might have had greater legal foundation than that of the other does not necessarily show that the dispute was not *bona fide* or that the arrangement was not a proper family arrangement. The *bona fide* settlement of a family dispute does not require any specific consideration to support it. (*Pandrang Row and Venkataramana Rao, JJ.*) RAMASWAMI CHETTIAR *v.* MANIKKAM CHETTIAR.

1937 M.W.N. 1219=(1938) [illegible]

——*Requisites of validity—Settlement [illegible] settlement of disputes with strangers—Such disputes connected with members of family—If ceases to be family settlement.*

An arrangement, before it can be called a family arrangement or settlement, should have as its principal aim the settlement of the disputes of the family or the preservation of family property or the peace or security of the family or the honour of the family; but it does not necessarily follow that, because over and over these objects, the arrangement also settles other disputes with strangers, which are intimately connected with the members of the family, it goes out of the domain of a family settlement. (*Bajpai and Hamilton, JJ.*) SULTAN AHMAD KHAN *v.* SIRAJUL HAQUE.

1938 A.L.J. 23.

FOREIGN JURISDICTION ACT (1890)—Extension of C. P. Code under—Effect. *See* C. P. CODE, S. 17—APPLICABILITY. 39 Bom.L.R. 1287.

GENERAL CLAUSES ACT (X OF 1897), S. 3 (7)—'British India'—Berars, if included in. *See* C. P. CODE, S. 17—APPLICABILITY. 39 Bom L R. 1287.

GOVERNMENT OF INDIA ACT (1935), S. 226 (1)—*Construction—Matter 'Concering the revenue or an act done in the collection thereof'—Declaration by the Court of Wards that a person is a disqualified proprietor—If affected by S. 226 (1).*

[illegible] justification for saying that an order of the Court of Wards declaring a female, a disqualified proprietor under S. 6 (*a*) is a matter 'concering revenue or an act done in the collection thereof' within the meaning of [illegible] of the Government of India Act. [illegible] *J.*) INDUMATI DEBI *v.* BENGAL COURT [illegible]

42 C.W.N. 230.

GRANT—Ancient transaction—Validity—Presumption [illegible] ent lease of waste lands —Grant for justifiable [illegible] TRUST—TRUSTEE.

1937 M.W.N. 1188.

—— [illegible] *d—Grant of land to duffadar by* [illegible] *Officer—Cancellation by Collector—*

Where a Revenue Divisional Officer made a grant of valuable Crown lands to the daffadar of his office, who was not a member of depressed classes, and the grant was set aside by the Collector under his revisional powers, that existed in 1925.

Held, the original grant must be considered to have been absolutely devoid of authority. The grant being [illegible]

VENKATARATNAM *v.* SECRETARY OF STATE FOR INDIA. 1938 M.W.N. 65.

——*Inam—Alienability— Construction of sanad—Jat inam permanent—To grantee, 'his sons, grandsons and great grandsons and so on from generation to generation'—Confirmation by Inam Commissioner—Limitation to lineal male descendants of grantee—Effect of.*

Where a sanad of 1779 granted certain lands as jat inam permanent to the grantee 'his sons, grandsons and great grandsons and so on from generation to genera[illegible] the grantee,' on a question whether such land was inalienable.

Held, that there was nothing in the tenure of the village to indicate that alienation was forbidden, and that the terms of the Inam Commissioner's renewal order, do not lay down any restriction as to the grantees's power of alienation but merely state the period during which the village would be allowed

GROVE.

to be enjoyed as Inam. (*Broomfield and Wadia, JJ.*) GAJANAN *v.* JANKIBAI. **39 Bom.L.R. 1304.**

GROVE—*Miscellaneous trees—If self sown—Presumption.*

Miscellaneous trees like the jamun, neem, babul and khajoor trees must be presumed to be self-sown, unless there is evidence that they were planted by the groveholder. It is impossible for a landlord to prove a negative, that is to prove that such trees were not planted; as a rule they are of spontaneous growth, and it is for the groveholder, who asserts that they were planted, to prove his assertion. (*Drake Brockman, S.M. and Knox, J.M.*) KAILASH BIHARI LAL *v.* MUKTA PRASAD. **1937 R.D. 599.**

GUARDIANS AND WARDS ACT (VIII OF 1890), Ss. 25, 4 (5) (b) (ii) and 12—*Application by mother for custody of minor daughter—Minor removed from Court's jurisdiction—Application, if can be granted.*

Where the mother's application of 14th May, 1935, for being appointed guardian of her minor daughter, who was removed from the Court's jurisdiction only a few weeks before the application, was granted on 7th January, 1937, on the ground that the child ordinarily resided in the Court's jurisdiction and on 2nd February, 1937, the mother applied to the same Court for the custody of her daughter.

Held, that minor was not for the time being residing within the jurisdiction of the Court and hence the application could not be granted.

Held also, that S. 12 was not applicable, as it applied to proceedings before the appointment of a guardian. (*Coldstream, J.*) MT. NAZIR BEGAM *v.* GHULAM QADIR KHAN. **A.I.R. 1938 Lah. 84.**

———**S. 29** — *Applicability — "Transfer" — Family settlement not conferring any title but only relinquishing rights in property assigned by one party to another—Recognition of antecedent rights of assignee—Sanction of Court—Necessity.*

A deed of family arrangement entered into by a certificated guardian in which no distinct title is conferred on any body and all that is done is a relinquishment of claim by some person in respect of property assigned to another and a recognition of the antecedent right of that other person to the property does not amount to a transfer falling within S. 29 of the Guardians and Wards Act, requiring sanction of the Court. (*Bajpai and Hamilton, JJ.*) SULTAN AHMAD KHAN *v.* SIRAJ-UL-HAQUE. **1938 A.L.J. 23.**

———**S. 29**—*Scope—Compliance—Permission obtained by guardian for mortgage for specified amount on certain terms—Subsequent change of circumstances—Mortgage executed for less amount on different terms—Validity—Fresh sanction—Necessity for.*

S. 29 of the Guardians and Wards Act is imperative, and absence of permission for a particular alienation renders it void. Where a permission is applied for a particular mortgage of the Ward's property for a specified amount on certain terms and granted by the Court, and circumstances change subsequently and part of the money is not required, the guardian is bound to obtain a new permission from the District Judge for a mortgage under the changed circumstances. If the guardian executes a mortgage for an amount less than that specified in the original sanction application, or on different terms without fresh permission, the mortgage so executed is invalid and unenforceable against the minor, because the former permission cannot cover the mortgage which is different from the contemplated one and executed under different circumstances. The provisions of S. 29 cannot be said to be complied with. (*Bennet, J.*) UDAI PAL SINGH *v.* PYARE.
1937 A.L.J. 1351 = 1938 A.W.R. 6 (H.C.).

HIGHWAY— *Dedication— Intention— Presumption from long user.*

Where the roofs of a shop have been used by pedestrians for access to the neighbouring public streets for a long time, such user does not necessarily raise a presumption as to dedication in every case. There must be an intention to dedicate, of which the user by the public is mere evidence and no more. A single act of interruption is of much more weight on the question of intention to dedicate than many acts of enjoyment. (*Bhide, J.*) CHUNI SHAH *v.* AMAR SINGH.
A.I.R. 1938 Lah. 97.

HINDU LAW—*Adoption—Sudras— Adoption of sister's son—Validity.*

It must be taken to be the rule among Sudras that the adoption of a sister's son is valid unless in the particular case with reference to the particular community there is evidence that it is prohibited. (*Broomfield and Macklin, JJ.*) KALAPPA *v.* SHIVAPPA.
39 Bom.L.R. 1282.

———*Alienation—Antecedent debt— Meaning of—Mortgage for money borrowed for taking* zarpeshgi—*Mortgage contemplated at time of taking* zarpeshgi *but executed later—If antecedent.*

Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached. The two transactions may be entirely dissociated from one another and where that is so, the liability incurred at the former date will be an antecedent debt on the date of entering into the second document, but the question whether this is so or not is primarily a question of fact. Where therefore a mortgage of the joint family property is contemplated at the very time of taking a *zarpeshgi*, but is executed some weeks later, it is not an independent transaction. (*Wort and Rowland, JJ.*) RAMKARAN THAKUR *v.* BALDEO THAKUR. **A.I.R. 1938 Pat. 44.**

———*Alienation—Benefit to family—Mortgage of joint family property for purchasing another property—If justified.*

Per *Wort, J.*; *Rowland, J., dissenting.*—It is impossible to give a definition of what is a benefit to the estate but, the jeopardising a joint Hindu family property for the purpose of purchasing another property can never under any circumstance be considered a benefit to the estate. (*Wort and Rowland, JJ.*) RAMKARAN THAKUR *v.* BALDEO THAKUR. **A.I.R. 1938 Pat. 44.**

———*Alienation—Coparcener—Mortgage of joint family property to secure private debts—Mortgagee taking mortgage with knowledge of private character of debt and of property being joint family property—Subsequent partition—Allotment of mortgaged property to member not mortgagor—Remedy of mortgagee—Substituted security.*

Where a creditor lends money to a Hindu coparcener for his private purposes and takes a mortgage from him of joint family property by way of security for such private debts of the mortgagor, he takes the same subject to the right of the other members of the family to enforce a partition and subject to any decree that may be passed in such partition suit. When subsequently there is a partition effected in which the mortgaged property is allotted to another member not the mortgagor, free from all encumbrances, the creditor has no right to challenge such allotment or alienation in the absence of proof that the allotment is unfair. The mortgagee creditor must seek his security in the properties allotted to his mortgagor in the partition in substi-

HINDU LAW.

tution of his undivided share which alone he could mortgage before such partition. (*Leach, C. J and Varadachariar, J.*) MANICKAVELU CHETTY *v.* SATEEDAN SOWCAR. 1937 M.W.N. 1340.

——*Alienation—Father's alienation—Right to set aside—After-born son—Right to sue to challenge.*

Where the only other coparcener in existence besides the father at the time of an alienation of family property by the father is a minor, that son alone is entitled to sue to avoid the alienation of his share of the

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——*Alienation—Father—Mortgage by—Decree for sale on—Sale in execution—Suit by sons impeaching—Burden of proof—Illegality or immorality of mortgage debt—Duty of sons to establish.*

Where joint family property has been sold in execution of a decree for sale on a mortgage executed by the father and passed out of the possession of the joint family, the sons of the mortgagor cannot succeed in a suit to declare the decree and sale not binding on them or obtain possession of the property unless they prove that the mortgage debt was incurred by their father for purposes illegal or immoral. The fact that the sons, who were minors at the time of the mortgage suit, were impleaded as parties defendants to that suit represented by their father as guardian *ad litem* cannot make any difference as regards the application of this principle of law. (*Niamatullah, Ag. C. J. and Allsop, J.*) GAYA DEEN MISIR *v.* TIRBHUWAN SINGH.

1937 A L.J. 1252=1937 A.W.R. 1183.

——*Alienation —Father — Necessity— Daughter's marriage expenses—How far justifies alienation—Father spending large amount on marriage—Sons, if bound—Extent of liability—Reasonable amount of expenditure for marriage—Limit of.*

ance of the members of the family and is not enough to provide for exceptional expenses such as the expenses of the daughters' marriages. Such expenses would be

reasonable amount of money; if he chooses to raise more, the excess should fall upon his own

family property and not upon that of his

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which could reasonably be spent on the marriage of a daughter. Anything in excess of that amount cannot be

HINDU LAW.

debt—Duty to inquire into necessity for prior mortgage debt.

A creditor who advances money to a Hindu father or manager on the security of joint family property must make reasonable enquiries about the immediate necessity for the loan, even though he advances the money for the purpose of paying off a previous loan or mortgage. The fact that there is a previous debt or mortgage does not absolve him from making enquiry; he must, if he wants to bind the joint family property,

——*Alienation—Manager—Sale by—Legal necessity Sale by one of the sons to discharge debts due by father tainted with immorality—If justified—Other sons—If bound.*

The karta of a joint Hindu family is entitled to sell family property for a debt really due by the family, and even a debt barred by limitation may validly form part of the consideration for the sale of family property. Hindu Law does not recognise technical pleas as that of limitation, and in any case does not insist on evasion of payment of just debts. The payment of the debts contracted by a father not tainted with immorality or illegality which could not be paid without the sale of family property constitutes legal necessity which would justify a sale of family property by his son. Such a sale would bind not only his share but also his brothers' shares, they too being bound equally with their brother to pay their father's debts. The fact that the debt is barred by limitation or that the creditor could not have obtained a decree against the sons owing to insufficiency of stamp in the instrument evidencing the debt would not invalidate the alienation, so long as the debt is really due from the family. (*Niamatullah and Verma, JJ.*) RAM SINGH *v.* SRI CHARAN.

1938 A.L.J. 12.

——*Alienation—Widow— Authority of—Alienation to discharge debts of father-in law—Validity.*

to pay off the debts

ther in-law; and it is

husband's estate to

eased father-in law.

(*Ismail, J.*) RAM ADHAR MISIR *v.* JAGNOO MISIR.

1937 A.W.R. 1223=1937 A L.J. 1311.

——*Alienation—Widow— Necessity—Alienation for*

main in possession of the property during her lifetime.

——*Alienation — Widow—Pilgrimage expenses—If justifying necessity for alienation—Expenses for performing religious and charitable acts.*

A Hindu widow may incur reasonable expenditure

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RAM ADHAR

HINDU LAW.

MISIR *v.* JAGNOO MISIR. 1937 A.W.R. 1223 = 1937 A.L.J. 1311.

——*Applicability—Claim to belong to regenerate class—Tests to be applied—Panchals, if belong to regenerate class.*

The criteria to be applied in determining a question whether a particular caste or community belongs to the twice-born classes are (1) the consciousness of the caste, (2) its customs, and (3) the acceptance of that consciousness by the other castes. Applying the above criteria it was held that the community of goldsmiths known as Panchals or Panchal Vishwa Brahmins do not belong to the twice-born classes but are Sudras. (*Broomfield and Macklin, JJ.*) KALAPPA *v.* SHIVAPPA, 39 Bom.L.R. 1282.

——*Applicability — Jains — Succession—Stridhan property of mother—Married daughter—Right of in presence of unmarried daughter.*

The ordinary rules of Hindu Law as to succession and inheritance must be applied to Jains in the absence of any special custom or usage varying the Hindu Law; the onus of proving such a custom or usage lies heavily on the party setting up the same. There is no rule or custom among the Jains under which a married daughter has an equal right to succeed to the *stridhan* property of her mother with an unmarried daughter. (*Collister and Bajpai, JJ.*) JAIWANTI *v.* ANANDI DEVI. 1937 A.W.R. 1184 = 1937 A.L.J. 1295.

——*Debts—Father — Decree against — Executability against sons' shares—Pious obligation.*

A debt, secured or unsecured, contracted by the father, neither for illegal nor for immoral purpose, imposes a pious obligation upon the undivided sons and if a decree is obtained against the father alone, it may be enforced by attachment and sale of entire coparcenary property. In such a case the decree-holder can proceed in execution against the sons' shares and need not proceed by a separate suit. (*Stone, C.J. and Bose, J.*) JAINARAYAN *v.* SONAJI. A.I.R. 1938 Nag. 24.

——*Debts — Father — Immoral debts—Exemption from payment—Connection between debt and alleged immorality—Necessity.*

The rule of exemption from payment of illegal or immoral debts of a father, engrafted on the substantive pious obligation doctrine, contains in itself the necessary safeguard, that direct connection should be shown between the debt and the immorality set up. Such a rule while protecting the son's right, as far as possible, is designed to prevent ill-advised and reckless attacks. (*Venkatasubba Rao and Abdur Rahman, JJ.*) VENKAYYA *v.* NARASIMHA CHARYULU. (1938) 1 M.L.J 33.

——*Debts—Father—Pre-partition debt—Renewal of debt by father alone after partition—Suit by creditor—Liability of sons—Pious obligation.*

A Hindu father has no authority after partition to renew a promissory note debt borrowed before partition so as to make it binding on his divided sons. Such renewal entirely wipes out the original debt, and by the renewal a new liability is undertaken, and undertaken by the father alone and not by the sons who have previously become divided. The sons cannot therefore be made liable in a suit on the renewed promissory note. The pious obligation of the sons cannot extend the period of limitation in favour of the creditor, when the claim against the sons is clearly barred by limitation. (*Beasley, C.J.*) RAMACHARYULU *v.* DORAYYA. 1937 M.W.N. 1306.

——*Debts—Widow—Money borrowed on hand-note—Suit on against reversioners after widow's death—Legal necessity—Burden of proof—Duty of creditor—Necessity not set up in pleadings—If can be allowed to be set up afterwards—Money borrowed for finishing of temple under construction—If for legal necessity.*

In a suit upon a hand-note executed by a Hindu widow against the reversioners succeeding to the estate, on the ground that it was executed for necessity, to prove the mere nature of the purpose for which the money is borrowed is hardly sufficient; the borrowing must have been necessary for the particular purpose. A lady in possession of an income of about Rs. 10,000 a year is under no necessity to borrow such a small sum as Rs. 272, for finishing of a temple under construction. In the absence of any evidence by the creditor-plaintiff or of any finding of fact as to the necessity for the borrowing, no decree can be passed against the estate in the hands of the reversioners. Further when there is no statement in the plaint as to any particular necessity which might throw liability on the reversioners succeeding to the estate on the death of the widow, the creditor cannot be allowed to set up a particular purpose afterwards. The finishing of the construction of a temple is not in the nature of a legal necessity which would be binding on the reversioners to the estate. (*Courtney-Terrell, C.J. and Madan, J.*) RAMESWAR MISRA *v.* JAMUNA PRASAD SINGH. 172 I.C. 24 = 1937 P.W.N. 835 = 18 Pat.L.T. 810 = A.I.R. 1937 Pat. 667.

——*Gift—Construction—Gift in favour of Hindu widow—Estate taken—Life-estate or absolute estate—Presumption—If any—*Bakshis patra*—Provision that donee should enjoy the property perpetually and as she liked — Effect of—Words* उप भोगघ्यावा*—If import limited estate for maintenance—Law in Bombay—Power to dispose of by will.*

No presumption should be drawn in the case of a gift in favour of a Hindu widow or other female that the donor does not intend to confer an absolute estate. In Bombay, sisters and daughters do take absolute interests even by inheritance, and it would not be reasonable, merely because the donee happens to be a female, to start with a presumption in favour of the gift or transfer being limited. Merely because the purpose of a document of gift is the provision for maintenance, it need not be necessarily construed as conferring a limited estate, provided the document can be reasonably read or construed as giving an absolute estate. A person who was taken in adoption by the senior widow of a deceased Hindu with the concurrence of the junior widow executed in favour of the junior widow a deed of gift, which was described at the top as *bakshis patra* without any qualification whatever, which began by saying that the donor, who had been taken in adoption, remembering the said obligation or favour of the donee, gave her the deed of gift in writing, that he gave his ancestral immovable property and that he gave her in her possession by way of gift the lands—"in recognition of your obligation in having adopted me. You should perpetually enjoy the same happily. You should enjoy the same as you like. . . उपभोगघ्यावा. This gift deed is executed by me when I am not drunk and with my full knowledge and of my free will."

Held, (1) that the intention of the donor was to give an absolute estate to the donee; (2) that the name given to the document the absence of words of limitation, the absence of any further provision as to the devolution of the property in the event of the death of the lady, and the words themselves, *bakshis patra*, read with the clauses were sufficient to entitle the Court to hold that an absolute estate was intended to be an l was conferred, (3) that the words "उपभोग घ्यावा" in the vernacular

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... were not found in the gift of ... have

——Guardianship—Alienation by ... duty of—Discharge of binding debts— ... the estate.

Where the guardian of a minor alienated some of his properties to discharge the debts binding on him but ... from the creditors.

mortgagor.

A father of a joint Hindu family purchased property A and as he had not sufficient money to pay for the whole of the consideration, he mortgaged certain other ... purchased pro- ... The vendor had ... e mortgagee had ... he knew that the ... the vendor of A,

Held, that the mortgage and sale do not amo ... one transaction, the mortgage-money was rais ... pay off an antecedent debt, and the mortgage is b ... on the sons of the mortgagor. (*Horwill, J.*)

YAPPA NADAR *v.* RAMANUJA NAICK. 1938 M.W.N. 60.

——Joint family—Father—Insolvency of— sons—Receiver's power to seize—Pious obliga ...

——*Maintenance—Widow—Right of—Will by* ... *band—Liability of donee.*

The right to maintenance possessed by a Hindu widow cannot be taken away by any dispos ... husband and a donee under a will is ... for her maintenance. (*Venkataramana* ...

... KRISHNAMMAL ...

... *property bequeath-* ... *to the mother—* ... *If precluded from claiming maintenance—Rate of maintenance—Determination of.*

Where a person bequeathed a portion of his property to his wife absolutely and the remainder to his mother ... in the will that the gift to ... of maintenance, the question ... the widow's right to main- ... at the income she would ... bequeathed to her under the ... stator in the ... de for main- ... by the widow will be taken ... at the rate of maintenance ... widow is not precluded from ... claiming also additional ... by the other ... AMMAL ... W.N. 64.

——*Marriage—Contract of betrothal by father of minor son with father of bride—Validity—If opposed to public policy—If marriage brocage contract.*

... Modern Hindu Law for ... er of a bride-groom, when he ... t to enter into an agreement ... hat if he does enter into it, ... from it. Nor is a contract ... by a Hindu parent against ... void. Such a contract is not ... riage brocage contract. Such ...

SIMHA *v.* GOVINDA KRISHNA. 1937 M.W.N. 1274.

——*Mitakshara — Schools — Applicability— Maharashtra Brahmin family settled in Central Provinces—Origin of family not traceable—Law applicable—Bombay or Benares school—Presumption.*

A Maharashtra Brahmin, resident in the Central Provinces is governed by the Bombay School of the Mitakshara ... is not proved in the sense that ... Where ... Maharas ... iden- ... a land ... people, ... n that it ... it must be presumed unt... group of people known as Maha ... hailed from the race or group of people known as Maha ... and carried the law of Maharashtra with ... is no warrant for holding that the Benares ... applies. (*Stone, C. J. and Bose, J.*)

... *v.* SADASHEORAO. 1938 N.L.J. 24

... *of intention to sepa-* ... *notice by the other* ... *ce of status—Separat-* ... *parcener making a will after sending notice—* ... *will.*

... deceased member of an undivided Hindu ... le a will disposing of his share in the joint ... perty and for that purpose a registered notice ... his desire to get separated from his son, the ... ber of the co parcenery, was relied upon, the ... mere ... vali- ... letter ... date the will executed on the next day ... letter ... though it was delivered to the son a few ... rities lay down ... intention to become divided ... necessary, but none of them lays down that the severance of status does not take place till after such communication has been received by the other co-parceners. It would be unfortunate indeed if the validity of a will should depend upon the accident as to whether a postman was able to find an addressee on a particular date or at a particular

place or not; and it will sometimes be a very difficult task for the Court to decide how far the addressee had with some knowledge of what is coming evaded receipt of the notice. It may be that if the law is authoritatively settled, it is not open for any Court to refuse to give effect to it, merely on the ground that it may lead to anomalous consequences, but when the law has not been so stated in any decision of authority and such view is not necessitated or justified by reason of the rule, there will be no reason to interpret the reference to 'communication', as implying that the severance does not arise until notice has actually been received by the addressee or addressees. The issue of the notice prevents the operation of the principle of survivorship and the will takes effect. 33 L.W. 384, Rel on. (*Varadachariar and King, JJ.*) NARAYANA RAO *v.* PURUSHOTHAMA RAO. **(1938) 1 M.L.J. 45.**

——*Religious Endowment—Conversion of debutter into secular properties with consensus of family members —Validity.*

The theory of conversion of debutter properties to secular properties by consensus of the family members has no warrant in Hindu Law and is against Hindu conceptions. (*M. C. Ghose and R. C. Mitter, JJ.*) PANNA SUNDARI *v.* BENARES BANK, LTD. **A.I.R. 1938 Cal. 81.**

——*Religious endowment — Dedication—Proof—Property given to idol by pious rich Hindu widow.*

A pious Hindu widow of a Brahmin family of affluent means, and the daughter of a pious man, established some deities in the house on the bank of a holy river and executed a formal deed by which she made permanent provision for the worship of the deities. Some years later, she made the said house the property of the idols. She had no debts and no motive to create a fictitious debutter. The money allowance reserved for the personal benefit of a relative, who was not a shebait, was very small and comparatively an insignificant amount.

Held, that in the absence of evidence to the contrary, the debutter created was a genuine and absolute one. (*M. C. Ghose and R. C. Mitter, JJ.*) PANNA SUNDARI *v.* BENARES BANK, LTD. **A.I.R. 1938 Cal. 81.**

——Reversioner—Suit by nearest reversioners—Act II of 1929 altering succession and making plaintiffs remote reversioners—Amendment of plaint and joinder of persons becoming nearest reversioners under Act—Powers and duty of Court—Refusal of amendment and dismissal of suit—Propriety. *See* PRACTICE—PLEADINGS—AMENDMENT. **1937 M.W.N. 1175.**

——*Widow—Debts—Money borrowed under hand-note—Suit after widows death against reversioners—Liability of reversioners.*

In a suit based on a hand-note, the persons liable on the hand-note are only the parties to the note and the heirs of those parties. The reversioners to the estate of a last male owner cannot be made liable on a hand-note executed by the widow of the last male owner merely as the persons who have succeeded to the interest of the maker of the hand-note when that interest has ceased altogether. (*Courtney-Terrell, C.J. and Madan, J.*) RAMESWAR MISRA *v.* JAMUNA PRASAD SINGH.
172 I.C. 24=1937 P.W.N. 835= 18 Pat.L.T. 810=A.I.R. 1937 Pat. 667.

——*Widow — Powers of — Compromise or family settlement with reversioners—Validity and binding character as against actual reversioners—Principles.*

It is undoubted that it is competent to a Hindu female holding a limited interest in the estate she holds as the heir of the last male owner to enter into a family arrangement or settlement with the reversioners to the estate. A widow or other limited owner is the owner of the

estate for the time being and fully represents it whether in litigation or otherwise. So long as the arrangement entered into by the widow with the reversioners is not a device to divide the estate between her and the reversioners to defraud the actual reversioners when the succession opens, a family settlement *bona fide* entered into by the widow will be valid and binding on the reversion. The question of *bona fides* must be considered with reference to the date of the transaction. It is not necessary that the matter must be really doubtful; it is enough if the parties consider it so. Once it is found that there was a real dispute as to title to the property between the widow and the reversioners, and it required settlement and the settlement arrived at is proved to be *bona fide*, it cannot be contended that it is a device to divide the estate. The mode in which the arrangement or compromise is carried into effect is immaterial, if it is reasonable and prudent. When it is found that the claims of all persons who had any interest, actual or possible, in the property, were taken into and adjusted, the arrangement must be upheld. (*Pandrang Row and Venkataramana Rao, JJ.*) ANGAMUTHU MUTHIRIAN *v.* SINNAPENNAMMAL. **1938 M.W.N. 44.**

——Will — Validity of—Member of joint family sending notice of separation to the other co-parcener—Will executed by the member on the next day—Death of the testator before delivery of the notice to the co-parcener. *See* HINDU LAW— PARTITION. **(1938) 1 M.L.J. 45**

HINDU LAW OF INHERITANCE AMENDMENT ACT (II OF 1929), S. 2—*"Sister"—If includes half-sister.*

"Sister" in the Hindu Law of Inheritance Amendment Act does not include a half-sister. (*Pandrang Row and Venkataramana Rao, JJ.*) ANGAMUTHU MUTHIRIAN *v.* SINNAPENNAMMAL. **1938 M.W.N. 44.**

HINDU WIDOWS RE-MARRIAGE ACT (XV OF 1856), Ss. 6 and 7—*Re-marriage of widow—Validity—Performance of ceremonies—If essential.*

There can be no valid marriage in any form without a substantial performance of the requisite religious ceremonies. The performance therefore of the necessary religious rites is necessary for the completion of a marriage even in a gandharv form, of which re-marriage of a widow is an instance. So, neither the consent of a widow to re-marry herself under last paragraph of S. 7 nor mere talk by a person in the presence of visitors of his intention to take her as his wife is sufficient to constitute a valid marriage in the absence of the performance of some religious or secular rites. 12 Mad. 72, Rel. on. (*Baguley and Spargo, JJ.*) N. PADAYACHI *v.* A. AMMAL. **A.I.R. 1938 Rang. 59.**

INCOME-TAX ACT (XI OF 1922), Ss. 4 (3) (vii), 10 and 66 (5)—*Profits from investment of client's deposits—If taxable—Exemption—Onus—Finding of fact —High Court, if can interfere.*

Where an assessee doing business as a produce agent, receives large sums of money from his clients as deposits and invests them in Government securities and realises a profit by the sale of such securities on the questions whether such an investment was in the nature of fixed capital or of stock-in-trade, and whether such profits were exempt from payment of income-tax under S. 4 (3) (*vii*) of the Act.

Held, that if an investment is made with the object of permanenently excluding a certain sum from the floating capital of a concern, it might be held to be fixed capital. But if the investment is part of the business and the sum is intended to serve as stock-in-trade, the

INCOME-TAX ACT (1922), S. 10.

profits arising therefrom will form part of the income of the concern.

Held, further on the facts that the business of the assessee was a *quasi* banking business and it received moneys from clients for the purposes of the business, and that the investments had been made as part of the same business, and hence the receipts therefrom were to all intends and purposes receipts from business. Even if they were of a casual or non-recurring nature they will not be covered by S. 4 (3) (*vii*). An exemption under S. 4 (3) (*vii*) if claimed for any item of income, it is for the assessee to show that the receipt does not arise from business and is of a casual and non-recurring nature. In matters where the intention of the assessee is the factor to be considered, where the Department has found such an intention as a matter of fact, it is doubtful whether the High Court could go behind such a finding. (*Addison and Din Mohammad, JJ.*) AMRITSAR PRODUCE EXCHANGE, LTD. (INCOME TAX), *In the matter of.* 18 Lah. 706 = A.I.R. 1938 Lah. 44.

——S. 10 (2) (iii) and Expl.—*"Mutual Benefit Society"—Fund granting loans to persons becoming nominal members on payment of rupee one for share—Such members entitled to withdraw share subscription at the end of two years—Profits made out of loans granted to such members—Taxability—Dividends paid to members from profits so made—If interest on borrowed capital—Right to deduct.*

A fund which was a company registered under the

its memorandum and articles of association Under the altered articles, a person who wanted a loan had to become a member, but he could become a m... ing a sum of one rupee for a share which draw at the end of two years. The many cases was merely nominal; the large the company (fund) made by way of interest on loans granted to those taking one rupee shares were distributed to its real shareholders and the nominal members who had taken one rupee shares invested practically nothing and consequently nothing was paid to them out of the profits either by way of dividend or in reduction of interest. These members by borrowing from the company made for it large profits in which they were not allowed to share.

Held, (1) that the company was not a Mutual Benefit Society in spite of the altered memorandum and articles of association but was a banking concern and its income was therefore taxable; (2) that as there was no payment of interest to shareholders or subscribers on the capital subscribed by them, and as the company only paid dividends to its members, which were dependent on the earning of profits, the company was not entitled to claim a deduction in respect of these sums under S 10 (2) (iii) of the Income-tax Act, the sums so paid not being in the nature of interest on bor... (*Leach, C.J., Varadachariar and King, J...*) TENNORE H.P. FUND, LTD. *v.* COMM... INCOME TAX, MADRAS. 47 L...

——S. 10 (2) and (3) Expl.—*Mutual ... —'Fund' floated with capital subscribed ... Chief income derived from loans to s... Taxability.*

A company was floated with members subscribing its capital by way of share. The main source of income was the interest on the loans advanced to the shareholder members. It also derived interest on its securi-

INCOME-TAX ACT (1922), S. 26-A.

ties, etc. In giving the return, the fund did not show the interest derived from the loans to the share holders as its income. Question was if that income was assessable.

Held the fund though a registered company was in fact a Mutual Benefit Fund Society and that income was not assessable, in enacting the Explanation to S. 10 (2) and (3) of the Income-tax Act, the Legislature must have intended to recognise the existence of such Mutual Benefit Societies like one in question. (*Madhavan Nair, Stone and King, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* TANJORE PERMANENT FUND LTD. 47 L W. 28 = A I R 1938 Mad. 57 (F.B.).

——S. 13—*Method of accounting regularly employed by assessee—When a compulsory basis of computation—Undervaluation in profit and loss account—Duty of Income tax Officer to exercise judgment.*

S. 13 of the Income-tax Act relates to a method of accounting regularly employed by the assessee for his own purposes and does not relate to a method of making up the statutory return for assessment to income-tax. The section clearly makes such a method of accounting a compulsory basis of computation, unless, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom. It is not a correct view of the section to say that the Income tax Officer is *prima facie* entitled to accept the profits shown by the accounts where there is a method of accounting regularly employed by the assessee, it is the duty of that officer, where there is such a method of accounting, to

explaining the adjustment of the figure in the profit and loss account so as to arrive at the figure of the income ... method regularly fol... under-valuation of the ... fficer should in such a case have regard not only to the profit and loss account submitted by the company but should exercise his judgment to ascertain the true profits of the Company. (*Lord Thankerton.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* SARANGPUR COTTON MANUFACTURING CO. LTD. 42 C W.N. 194 = 172 I.C. 1 = 1937 O.W.N. 1225 = 1938 A.W R. (P. C) 2 = 47 L W. 9 = 1938 A L.J. 46 = A I R. 1938 P C. 1 = (1938) 1 M.L.J. 1 (P C.)

——Ss. 26 A and 2 (14)—*Registration of firm—Power of income-tax authorities to go into evidence*

It is open to the income tax authorities to go into evidence, both circumstantial and direct, to determine whether the instrument of partnership is a genuine document or whether it merely embodies a bogus transaction for the purpose of evading the tax. The onus rests on the person who applies for the registration of ... partner- ... named ... A firm, ... ation of ... of one ... rship as ... financial ... between different partners. The sons lived in the houses belonging to their father and all their household expenses continued to be paid by the father. Neither was there any evidence that any of the sons contributed anything towards the capital of the firm, nor was it proved that

they possessed any separate property from which the losses could have been recovered.

Held, that the firm consisted only of two original partners. (*Tek Chand and Abdul Rashid, JJ.*) GHULAM RASUL KHUDA BAKHSH *v.* COMMISSIONER OF INCOME-TAX, LAHORE. **A.I.R. 1938 Lah 105.**

——**Ss. 43 and 22**—*Notice served on assessee as agent of non resident—Question of agency—When must be determined.*

It is open to the Income-tax Officer under the Income-tax Act to postpone any final determination of the question of agency until the time comes to make an assessment under S. 23, as the Act imposes no technical requirement in this connexion. It may be reasonable that an assessee, who is served with a notice under S. 22 (2) as an agent of a non-resident under S. 43, should not be required to render a return of the non-resident's income until it has first been decided that he is his agent; on the other hand, having regard to the circumstances which for this purpose constitute agency, it may well be thought advisable that the information afforded by a return and by books of account produced in support thereof would be available for the purpose of deciding as to agency. The avoidance of delay may also be a consideration. Thus, if the notice under S. 22 is served before the expiry of one year from the financial year, it is a valid initiation of proceedings of the assessee as an agent under S. 43. Proceedings if begun in time are not by the Income tax Act required to be completed within any time limit (*Sir George Rankin.*) COMMISSIONER OF INCOME TAX, PUNJAB *v.* NAWAL KISHORE KHARAITI LAL. **172 I.C. 332= 1938 O.W.N. 1=47 L.W 16=1938 A.L.J. 41= 1938 A.L.R. 1=1938 O.L.R. 1= 1938 M.W.N. 41= A.I.R. 1938 P.C. 8 (P.C.).**

——**S. 43**—*Notice under, not mentioning year for which assessee was to be treated as agent—Notice under S. 22 (2) specifying year—Assessment, if illegal.*

The notice is by S. 43 made part of the series of facts which results in the resident being deemed agent by force of the section. The extent of his responsibility if he be agent is another matter. If by notice given in due course under S. 22 (2) the year or years be specified, he has no grievance in point of procedure, and he can make his case upon the merits. Thus the assessment made on an assessee as agent under S. 43 is not rendered illegal by the fact that the notice which the Income-tax Officer served on the assessee under the Proviso to S. 43 did not mention any particular year for which the Income-tax Officer proposed to treat assessee as an agent. (*Sir George Rankin.*) COMMISSIONER OF INCOME-TAX, PUNJAB *v.* NAWAL KIHSORE KHARAITI LAL. **172 I.C. 332=1938 O.W.N. 1= 47 L.W. 16=1938 A.L J. 41=1938 A.L.R. 1= 1938 O.L.R 1=1938 M.W.N. 41= A.I.R. 1938 P.C. 8 (P.C.).**

——**S. 48-A**—*Applicability.*

S. 48-A of the Income-tax Act comes into play only when the income-tax has been actually paid in excess and not earlier. (*Addison and Din Mohammad, JJ.*) AMRITSAR PRODUCE EXCHANGE, LTD. (INCOME-TAX), *In the matter of.* **18 Lah. 706= A.I.R. 1938 Lah. 44.**

——**S 59**—*Rules framed under R. 25—'Last preceding valuation'—Meaning of—Insurance Company—Actuarial reports in 1930 and 1934, December—Return of income for 1933—Basis of assessment, the 1930 or 1934 report.*

The expression 'last preceding valuation' in R. 25 framed under S. 59 of the Income-tax Act, does not mean the valuation covering the last valuation period terminating before the 1st of April of the year of assessment, but the last preceding valuation at the time of the return. R. 25 is of a mandatory character and provides the only manner in which the income, profits and gains of Life Assurance Companies can be ascertained. Where a Life Insurance Company whose profits are periodically ascertained by actuarial valuation furnished in June 1934 a return of income based on the actuarial valuation made in December 1930, but the Income-tax Commissioner claimed that the return of income ought to be on foot of the actuarial valuation made in December 1934.

Held, that the return as made by the company was proper and in accordance with R. 25, as the last preceding valuation when the return was submitted was only the valuation made in December 1930. (*Leach, C.J., Varadachariar and King, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* ANDHRA INSURANCE CO., LTD., MASULIPATAM. **47 L.W. 21= (1938) 1 M.L.J. 11 (F.B.).**

——**(as amended in 1933), S. 66**—*Scope—Retrospective effect.*

All cases pending at the time the Act was amended in 1933 will be governed by the Act as amended. (*Puranik, J.*) TRIMBAK *v.* COMMISSIONER OF INCOME TAX. **A.I.R. 1938 Nag 16.**

——**(as amended in 1933), S. 66 (2) and (3)**—*Order of Commissioner confirming that of Assistant Commissioner—Reference—Competency.*

Under S. 66 (as amended) no reference lies against an order of the Income tax Commissioner under S. 33 unless the order is one which involves an enhancement of the assessment or is otherwise such as is prejudicial to the assessee; if the Income-tax Commissioner simply maintains the decision of the Assistant Commissioner and the assessment made by him, it cannot be said that the order of the Commissioner of Income-tax is such as is prejudicial to the assessee. (*Puranik, J.*) TRIMBAK *v.* COMMISSIONER OF INCOME-TAX. **A.I.R. 1938 Nag. 16.**

——**S. 66 (5)—Finding of fact—High Court, if can interfere.** *See* INCOME TAX ACT, SS. 4 (3) (*vii*) 10 AND 66 (5). **18 Lah. 706=A.I.R. 1938 Lah. 44.**

INLAND STEAM VESSELS ACT (I OF 1917), S. 58—*Applicability—Carrying of passengers in excess of number entered in last issued certificate—Offence—Certificate not in force but under renewal at the time—If bar to conviction.*

The fact that the certificate of survey in respect of a steamer is under renewal at the time of the offence does not render S. 58 of the Inland Steam Vessels Act inapplicable. For the purposes of S. 58, the certificate intended is the certificate last issued for the steamer and it is immaterial that that certificate was under renewal at the time. If passengers are carried in excess of the certified number, *i.e.*, of the number entered in the certificate as being in the judgment of the official surveyor the number which the vessel is fit to carry, there is a contravention of the section, and the owner and master of the vessel as liable to conviction. S. 58 does not require that the certificate must be in force; it requires that the steamer must not carry more than the number of passengers which according to the judgment of the surveyor, as entered in the last issued certificate of survey, it is fit to carry. The fact that the certificate is under renewal and not in force at the time is no bar to conviction. (*Madan, J.*) RIVER STEAM NAVIGATION CO., LTD. *v.* EMPEROR. **16 Pat 668= 1937 P.W.N. 813=18 Pat L.T. 941.**

——**S. 58**—*Certificate—Schedule applicable—Test—Voyage of steamer or voyage of passengers.*

INLAND STEAM VESSELS ACT (1917), S. 58.

For the purpose of ascertaining which schedule in the certificate applies in respect of a voyage, what has to be ... the

——S. 58—*Conviction*—Mens rea—*Necessity*—*Liability of owner*—*Proof of direct responsibility for overloading*—*If required.*

In a prosecution of the owner of a steamer under S. 58 of the Inland Steam Vessels Act for carrying passengers in excess of the certificated number, the question of *mens rea* does not arise. The owner of the vessels must be held liable although it is not shown that the owner has been directly responsible for the overloading. It is not necessary for the prosecution to establish the element of *mens rea* as pre-requisite of conviction. The section as worded, gives no option to the Magistrate but to hold the owner and master liable, if the section is contravened. It is not at all unjust to hold the owner liable since it may be presumed that the owner has profited by reason of the passengers carried in excess. (*Madan, J.*) RIVER STEAM NAVIGATION CO., LTD. *v.* EMPEROR. 16 Pat. 668 = 1937 P.W.N. 813 = 18 Pat L.T. 941.

INSURANCE—*Life insurance*—*Question to assured about 'any other health complaints'*—*Interpretation.*

The question to the assured by the medical officer of an insurance company about 'any other health complaints' is not intended to refer to simple headaches, cold or slight fever, or similar minor illness. Such a question must be read in a fair and commonsense way, ...

A decree based on equitable grounds is always one at the discretion of the Court. A claim for the award of interest on equitable interest should not be allowed when there has been great delay on the part of the plaintiff in instituting the suit, the delay being solely due to the negligence of the plaintiff's agents. (*Bennet and Ismail, JJ.*) RADHE KISHUN *v.* ADITYA NARAIN SINGH. 1938 A.L.J. 1

INTERPRETATION OF STATUTES—*Duty of Court to give effect to plain wording of Act.*

If the provisions of law made by the Legislature, under their plain wording, apply to a particular case, Courts cannot avoid giving effect to them merely because the Legislature did not contemplate or have in mind such a case when it drew up the Act in question. (*Horwill, J.*) KRISHNAN NAYAR *v.* MOIDEEN. 1937 M.W.N. 1268.

——*Duty of Court*—*Reference to definitions in other statutes*—*Permissibility.*

It is most dangerous to attempt to interpret a statute by using definitions of words given in other statutes. The duty of the Court is to interpret the ... the statute and apply them as exactl... (*Reilly, C.J. and Abdul Ghani, J.*) ... DENT, NANDYDRUG MINESS, LTD. *v.* I... 16 M... L.J. 5..

JURISDICTION.

it is clearly so stated. (*Roughton, F.C.*) KRISHNARAO *v.* BHANU. 1938 N.L.J. 15.

JURISDICTION—*Civil Court*—*Acts of special tribunal created by special Act for special purpose*—*Power to question.*

The Civil Court has power to inquire into the question whether a special tribunal created for a special purpose by a special Act has acted within the limits prescribed and defined by the Act creating that tribunal. The powers of the Civil Court are comprehensive enough to extend to all matters of a civil nature except those that are expressly excluded by the statute. A special tribunal on the other hand has its jurisdiction strictly limited by the express terms of the enactment creating it. Consequently any matter that falls outside the limits defined by the special Act would not cognizable by the special tribunal. The latter while exercising its powers under the statute of its creation must be vigilant, to see that it does not exceed its jurisdiction and thus encroach on the province of the Civil Court's jurisdiction. The only authority that is competent to decide whether a special tribunal has acted strictly within the limits of its authority or not is the Civil Court. (*Niyogi, J.*) TIKA RAM *v.* GANPAT SAHAI. 1938 N.L.J. 17.

——Civil Court—Infringement of statutory right—Cause of action disclosed—Duty to entertain claim—Suit for damages by servant of Municipality dismissed in violation of rules—Maintainability. *See* BOMBAY MUNICIPAL BOROUGHS ACT, S. 33. 39 Bom L.R. 1269.

——*Civil Court*—*Municipal Board*—*Exercise of powers by*—*Suit in Civil Court*—*Competency.*

Where a local authority, such as a Municipal Board, is invested with discretionary powers by the statute ... a Civil Court can interfere in cases where ... are exercised in a capricious, wanton and ... manner or in an unreasonable manner. (... ...th, J.) GOVIND DEOJI *v.* MUNICIPAL BOARD OF BINDRABAN. 1937 A.W.R. 1203 = 1937 A.L.J. 1358.

——*Civil Court*—*Order of Collector within his revisional jurisdiction*—*Revisional powers of Civil Court.*

Civil Courts cannot exercise revisional jurisdiction in respect of any order of the Collector which is within his revisional jurisdiction and cannot consider whether such order is right or wrong on the merits. (*Pandrang Row and Abdur Rahman, JJ.*) VENKATARATNAM *v.* SECRETARY OF STATE FOR INDIA. 1938 M.W.N. 65.

——Civil and Revenue Courts—Collectorate partition—Power of Civil Court to re-open or alter at the instance of co-sharer who was party to such partition. *See* BENGAL ESTATES PARTITION ACT, SS. 22 AND 25. 18 Pat.L.T. 843.

——*Civil or Revenue Court*—*Suit for damages for cutting of tree from grove*—*Plea that property was acquired by defendant's father on behalf of joint Hindu family of himself and father*—*Defendant not recorded as co-sharer*—*Jurisdiction of Civil Court*—*Cutting of* ...

... for dispossession, that the property had been ...

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Held, (1) that the defendant who was not personally a landholder could not claim that the suit should lie in the Revenue Court unless he could show that the tree had been cut down not by him individually but by the joint Hindu family; (2) that even if the property had in fact been acquired by his father on behalf of the joint family, that fact would not oust the Civil Court's jurisdiction; and (3) that there was no dispossession which would give rise to a cause of action in the Revenue Court as the mere cutting down of the tree would not amount to a dispossession of the plaintiff from the grove. (*Niamatullah, Ag. C. J. and Allsop, J.*) KALI CHARAN *v.* HARI SHANKAR SINGH.

1937 A.L.J. 1313 = 1937 A.W.R. 1180.

——Revenue Court—Tenant illegally ejected—Subsequent introduction of new lessees by landlord—Remedy of ejected tenant—Suit for possession in Revenue Court against landlord alone—Competency—Necessity for civil suit. *See* OUDH RENT ACT, S. 108 (10). **1937 A.W.R. 1211 = 1937 R.D. 564.**

KUMAUN TENURES—*Gaon Sanjait Parat Bahak land—Nature of.*

Gaon Sanjait Parat Bahak land is uncultivated waste land which is measured but on which no revenue is assessed. (*Collister and Bajpai, JJ.*) JAINT SINGH *v.* NAND RAM. **1938 A.L.J. 4.**

——*Khaekari village—Pucca and kachcha khaekars—Origin, status and rights of.*

There are two distinct tenures called by the same name "Khaekari" in Kumaun Division. One class of tenure is the under-proprietary khaekari, that is, pucca kheakari, and the other the occupancy khaekari or kachcha khaekari. The first class consists of ex-proprietors who have still got under-proprietary interests in the land and are superior to ordinary occupancy tenants, while the second class consists of mere occupancy tenants. The pucca khaekars are really representatives of old proprietors who hold the entire area of the village in virtue of having first reclaimed it from waste. They are in all respects equal to proprietors with the exception that they cannot sell their holdings and they pay a small sum in addition to the quota of revenue due from the land recorded in their names. This small sum is paid as malikana to the hissedar or proprietor, who was, however, no power to interfere with the pucca khaekar or his land, waste or cultivated. Where the land granted was already held in propriety by others, those occupant proprietors, if they continued on the estate, sank into tenants of the new grantee, who by the custom of the country, was permitted to take one-third of the estate into his own immediate cultivation or *sir*. Of the remainder of the estate the right of cultivation rested with the original occupants, who were now termed khaekars or occupants in distinction from thatwan or proprietor. If the grantee did not at once exercise to take part of the village into his own immediate possession, he was subsequently debarred from getting a footing there at all, and remained entitled to his normal dues. Where the grantee or sayana or hissedar took a portion of the estate into his immediate cultivation, the village became a kachcha khaekari village, and where the grantee did not at once so exercise his right, the village became a pucca khaekari village. (*Collister and Bajpai, JJ.*) JAINT SINGH *v.* NAND RAM.

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——*Malguzar or Padhan—Status and functions of—Land held by—Nature and incidents of—If khudkasht—Hissedari rights.*

There is usually in the villages of Kumaun a padhan or malguzar who is the head of the village community, collects the revenue and is also a police-officer; he manages the village common land and its affairs generally subject to the approval of the hissedars, and provides coolies for carriage, etc., according to custom. His remuneration commonly takes the form of padhanchari land, which is held by him rent and revenue free, as sirtan of the state as hissedar. The holding by a padhan-hissedar of padhanchari or malguzari land in a khaekari village is not a holding of khudkasht. He holds it as a sirtan and not with hissedari right in it. (*Collister and Bajpai, JJ.*) JAINT SINGH *v.* NAND RAM. **1938 A.L.J. 4.**

——*Pucca Khaekari—Absence of ghar-padhan village—Village being hamlet of kachcha khaekari—If conclusive of kachcha khaekari nature.*

Although usually there is a ghar-padhan in pucca khaekari villages, it does not necessarily follow that because there is no ghar-padhan in a village, that village is a kachcha khaekari village. Nor does the fact that a village is a hamlet of a kachcha khaekari village conclusive that the former is also a kachcha khaekari. When the two are separate entities, and have continued to be separately assessed, the incidents of the one should not be made necessarily to apply to the other. (*Collister and Bajpai, JJ.*) JAINT SINGH *v.* NAND RAM. **1938 A.L.J. 4.**

——*Pucca khaekari village—Death of khaekar without direct heirs—Right to holding of deceased—Hissedar making entry and getting khudkasht possession or buying out one khaekar—Effect on status of village—If reduced to kachcha Khaekari village.*

A principle well-settled in the case of pucca khaekari villages is that on the death of a khaekar without direct heirs, the lapsed holding reverts to the whole community of khaekars and not to the hissedars. The mere fact that a hissedar has effected an entry into the village and got some khudkasht possession should nor on principle affect the status of the village or of the remaining khaekars so far as the remaining lands are concerned. There is no equity in holding that the whole body of under-proprietary cultivators should be reduced to an inferior position merely by a hissedar getting possession of one holding, and if a zamindar has bought out one of his under-proprieters, there is no justification for the conclusion that all the other under proprietors should be reduced to the status of occupancy tenants. The status of the village cannot thereby be reduced to that of a kachcha khaekari village. (*Collister and Bajpai, JJ.*) JAINT SINGH *v.* NAND RAM. **1938 A.L.J. 4.**

LAND ACQUISITION ACT (I OF 1894), Ss. 4 and 6—*Notifications under—Lapse of some years between notifications under S. 6 and those under S. 6—Effect—Proceedings—If illegal and void.*

Acquisition proceedings cannot be held to be illegal and void by reason of the lapse of some years between the notification under S. 4 and the notification under S 6. In the case of an elaborate and complicated scheme for which the acquisition is made, the detailed revision of which necessarily takes much time, there is bound to be delay and lapse of time; and in such a case it is not open to the Court to treat the notifications and proceedings as illegal and void. (*Broomfield and Wassoodew, JJ.*) PARSHOTTAM *v.* SECRETARY OF STATE. **39 Bom L.R. 1257.**

——**Ss. 4 and 6**—*Scope—Acquisition—Conditions of Validity—Acquisition for scheme—Notifications issued under Ss. 4 and 6—Effect of—Change in method of carrying out and financing scheme—If renders fresh notification necessary.*

LAND ACQUISITION ACT (1894), S. 4.

... purpose, ... Judge, ... eme by ... ted out. ... hich it is ... be noti- ... he Act. When that has been done the requirements of the Act are satisfied. Where the object of the scheme for which the acquisition is made is unchanged, the fact that there has been a change in the method of carrying out the scheme and financing it would not make it a new scheme so as to necessitate a fresh notification under S. 4 of the Act. (*Broomfield and Wassoodew, JJ.*) PARSHOTTAM *v.* SECRETARY OF STATE. **39 Bom.L.R. 1257.**

——— **Ss. 4 and 6**—*Scope—Acquisitions for Municipality for carrying out scheme—Alteration in scheme between first and final notifications—Effect—If deprives Government of power to go on with acquisition—Proceedings—If illegal or* ultra vires—*Test—Opinion of Local Government.*

Under the Land Acquisition Act, it is the Local Government that has to be satisfied as to the existence of a public purpose. In the case of an acquisition for a Municipality to enable it to carry out a scheme, Government is not deprived of the power to go on with the acquisition proceedings merely because in the interval between the issue of the first notifications and the final ... as to the ... time, that ... he Munici- ... noved the ... of it, the fact that at some time between the dates of the two notifications it was of a different opinion is irrelevant. The proceedings are not on that ground illegal or *ultra vires*. (*Broomfield and Wassoodew, JJ.*) PARSHOTTAM *v.* SECRETARY OF STATE. **39 Bom.L.R. 1257.**

——— **S. 6**—*Notification under—Legality of—Conditions—Acquisition for purpose of recouping cost of scheme—If illegal.*

The validity of the acquisition proceedings under the Land Acquisition Act depends upon the existence of a public purpose and not upon the question whether the whole cost of the scheme could legally be debited to the Municipality or public body on whose behalf the acquisitions are made. A notification under S. 6 does not therefore become illegal because it seeks to acquire lands for the purpose of recouping the cost of the scheme. Where the Municipality or public body has power conferred upon it under the statute creating it, to acquire adjacent land for a particular purpose and do dispose of that land, the fact that the scheme is to be financed or partly financed out of the proceeds ... make the acquisition illegal. (*Broomfield and ...dew, JJ.*) PARSHOTTAM *v.* SECRETARY OF ST... **39 Bom.L.R. 1257.**

——— **S. 23**—*Premises abutting in common passage with interest therein—Acquisition of both—Valuation.*

Certain premises abutting in a common passage with an interest in the common passage were acquired by the Calcutta Improvement Trust. The owners of the premises were awarded compensation at a higher rate as the existence of the common passage was taken into consideration in valuing the premises. The passage land was owned by the same owners. Subsequently by the same notification the passage land was acquired but no compensation was awarded to the owners of the premises and the common passage in respect of the acquisition. A reference was made by the owners under S. 18,

LEASE.

Land Acquisition Act. The tribunal made an award in favour of the claimant determining the value of the passage land at one-fourth the rate of the surrounding land.

Held, that by the acquisition of the premises with interest in the common passage, it was not intended that ... that the land covered by the passage had lost its value to the owners.

Held, further, that as the passage was a private passage appertaining to the premises providing access to all parts of it, there was no justification for two separate acquisitions as were done in this case and the passage could very well be included in the acquisition of the whole site.

Held also, that the passage land was bound to receive a lesser valuation by reason of the principle of valuation of land subject to restriction as to user and that the ... surrounding ... *Guha and* ... DULALI BALA DEBI. **8 Cal. 75.**

LANDLORD AND TENANT—*Admission to tenancy—Sons of ejected tenant continued to be recorded in Khataunı—If proves re admission.*

The mere fact that after the ejectment of a tenant through Court his sons continued to be recorded in the *Khataunı*, does not prove their re-admission to the tenancy. (*Darling S. M. and Bomford, J M.*) BANSIDHAR *v.* BHOLI. **1937 R.D. 585.**

——— Grove land—Cutting of tree from grove—If dispossession of grove holder. *See* JURISDICTION—CIVIL OR REVENUE COURT. **1937 A.W.R. 1180.**

——— *Rent—Suit for arrears of product rent—Burden of proof.*

In a suit for arrears of produce rent, the burden of proof is initially on the plaintiff and not on the defendant, to show what was the produce during the years in dispute. (*Courtney-Terrell, C. J., James and Manohar Lall, JJ.*) PRATAP NARAIN JHA *v.* RAMASRAY PERSHAD CHAUDHURY. **19 Pat.L.T. 4 (S.B.).**

LAND TENURE—Gairmazrua am—*Incidents of—Right of Zamindar to settle—Tenancy rights—If acquired by person taking settlement.*

Land recorded as *Gairmazrua am* in possession of the residents of a locality for use as a graveyard is not under the control of the Zamindar or landord, who has therefore no right to settle it. If the landlord settles it with any one, the person taking such settlement cannot ...

LEASE—*Forfeiture—Covenant against assignment—Breach—What amounts to—Condition against assignment, transfer of right or interest, or under-letting without sanction of lessor—Unregistered agreement of sale by lessee subject to sanction—Agreement constituting vendee as agent of lessee in the meantime and entitling him to remain in possession—If breach of covenant—Forfeiture—If entailed.*

A quarrying lease for a term of 20 years granted by Government on 1-4-1928, contained a covenant against assignment which provided that neither the lessee nor any person claiming through or under the lessee should assign the lease or transfer any right or interest there-

under, or under-let the whole or any portion of the premises comprised in such lease without the assent of the Board of Revenue of Bihar and Orissa first being obtained, and that the penalty for infraction of this covenant should be forfeiture of the lease. In January 1933, the lessee, which was a company went into liquidation and on 30-9-1933, the lessee-company through its liquidators contracted with one *B* for sale of the leasehold rights under the lease subject to the sanction of the Board of Revenue; if sanction was not obtained the agreement was to stand cancelled *B* was, however, in the meantime to act as agent of the lessee in respect of the leasehold rights in the quarries, to pay to the lessee the royalties and any other sums payable by it to Government and to work the quarries for his own profit. The contract though in writing was not registered. *B* entered into possession and worked the quarries upon the terms of the agreement of sale, but the Board of Revenue refused sanction to the sale, and on 18-7 1934 the Government declared the lease to be forfeited on the ground of breach of the covenant against assignment. On 24-9-34 the lessee-company instituted a suit for a declaration that the lease had not been validly forfeited, for an injunction and for damages.

Held, (1) that there was no sub-letting by the lessee-company to *B*, there being nothing in the agreement pointing to a relationship of landlord and tenant between the company and *B*; (2) that the effect of the agreement was to give *B* an agency coupled with an interest—and it was not unusual to have an agency coupled with interest—though *B* was not to the lessee's agent in working the quarries; (3) that the agreement though it purported to invest *B* with a definite interest in the quarries and to that extent was a transfer of an interest, was not an effective transfer as it was inoperative for want of registration; and (4) that consequently there was no breach of the covenant which would entail a forfeiture of the lease. (*Sir George Lowndes.*) SECRETARY OF STATE *v.* KUCHIWAR LIME AND STONE CO., LTD. 172 I.C. 443 = 47 L.W. 3 = 18 Pat.L.T. 1001 = A.I.R. 1938 P.C. 20 (P.C.).

LEGAL PRACTITIONER—*Authority—Offer to be bound by special oath on behalf of his client—Propriety of—Special authority—Necessity.*

Pleaders should be careful not to make any offer on behalf of their clients to be bound by any special oath except in the presence of the party or on express written authority to that effect. (*Pollock, J.*) LAXMIBAI *v.* BAJIRAO. 172 I.C. 421.

——*Fees—Right to sue for fee and* munshiana.

Where there is an agreement to pay a Counsel a certain sum for his fee, and a certain sum as his *munshi's* remuneration, the Counsel is clearly entitled to sue for his fee and also for the *munshiana.* (*Tek Chand, J.*) GOPI NATH *v.* KANCHI RAM. 40 P.L.R. 12 (1).

LEGAL PRACTITIONERS ACT (XVII OF 1879), S. 13—*Unprofessional conduct—Pleader working for party in respect of property—Allowing own father to purchase same property and appearing for father against client—Propriety—Client consenting and not objecting—Effect—Disciplinary action.*

The position of the members of the legal profession is very high, but at the same time delicate. They must take scrupulous care that nothing is done by them which leaves room for any accusation being made against them. When a pleader finds that he or any member of his family living jointly with him is likely to be mixed up in an affair which is adverse to the claim of his client which he has been advocating in a Court of justice, or when a pleader intends appearing against a man in a case which is directly against the case which he was advocating for him before, it is desirable that he should give a formal notice to his late client and bring the matter to the notice of the Court, if for no other reason, at least to save himself from being charged by the client in future. A Hindu pleader allowed his father to purchase the very property in respect of which he was working for his client. The transaction took place with the knowledge and consent of his client. But in spite of this knowledge the client allowed the same pleader to continue to work for him. Further, when the pleader appeared for his father against him in a case arising out of the sale transaction, he did not raise any objection against the conduct of the pleader for more than 18 months.

Held, that though the pleader did not act up to the standard of propriety which was expected of a member of the legal profession, who must enjoy the complete confidence of the litigant public and the Court, and though technically his appearing subsequently against him was improper, yet no disciplinary action was justified. (*Courtney Terrell, C. J. James and Mahomed Noor, JJ.*) QURBAN ALI KHAN *v.* G. A., PLEADER. A.I.R. 1938 Pat. 28 (S.B.).

——S. 14—*Duty of High Court—Unprofessional conduct—Practitioner betraying trust and confidence reposed by client—Disciplinary action.*

Where a legal practitioner commits a serious brach of trust in violation of the confidence reposed in him by his clients, and fails to carry out the trust thereby depriving the litigant of his valuable rights, it is incumbent on the High Court to protect the unfortunate litigant whose trust has been betrayed by the practition er; and if it is established that the lawyer, instead of discharging his duties faithfully like persons of trust and honour, has betrayed the trust, such conduct must be severely dealt with. (*Courtney-Terrell, C.J., James and Manohar Lall, JJ.*) A. B. A MUKHTEAR, *In the matter of.* 18 Pat.L.T. 961 = A.I.R. 1938 Pat. 17 (S.B.).

——S. 14—*Jurisdiction—Unprofessional conduct—Charge of—Jurisdiction to initiate and draw up proceedings in respect of act committed in matter before another Court.*

If a pleader or a mukhtear practising in a Court commits an offence of professional misconduct in connection with any instructions which he has received from his client generally or in connection with any particular case, then it is within the jurisdiction of any Court before whom such pleader or mukhtear is practising, if brought to its notice that the practitioner has committed any unprofessional conduct, to take action against him, and those proceedings would be entirely within jurisdiction. The presiding officer of the Court in which the pleader or mukhtear practises has ample jurisdiction to initiate proceedings, though the particular matter in reference to which he commits the act complained of might not be before that Court. (*Courtney-Terrell, C. J., James and Manohar Lall, JJ.*) A. B. A MUKHTEAR, *In the matter of.* 18 Pat.L.T. 961 = A.I.R. 1938 Pat 17 (S.B.).

LETTERS PATENT (Rangoon), Cl. 13—*'Judgment'—Order rejecting petition to sue as pauper.*

The right to sue as pauper under certain circumstances is not a substantive right but is merely a matter of procedure. When a petition to sue *in forma pauperis* is rejected, the plaint is not rejected but only the petition praying to be allowed to prosecute the suit as a pauper without paying court-fee. The plaint can be filed in the ordinary way by paying proper court-fee on the same. This is a mere matter of procedure, and the rejection of

the petition does not involve any decision on any substantive right. Therefore no appeal lies from an order rejecting a petition to sue as pauper as it is not a judg- [illegible]

[illegible]

pendency—If deductible. *See* PRESIDENCY TOWNS INSOLVENCY ACT, S. 17. 1937 M W.N. 1182.

——Computation—Order of sanction for scheme suit—Condition that suit to be filed within two months—Starting point—Date of order or date of receipt of order by plaintiff. *See* C. P. CODE, S. 93. 1937 M.W.N. 1319.

LIMITATION ACT (IX OF 1908), S. 3—*Presentation—Validity of—Execution application—Presentation to proper officer beyond Court hours on last day of limitation—If valid presentation.*

It is in the discretion of the Judge or the officer appointed in that behalf to accept an application beyond office hours, or refuse to do so, and if the discretion is [illegible]

[illegible] sented to [illegible] on the [illegible] presenta- [illegible] necessary for such presentation. (*Puranik, J.*) KISANLAL RAM NIWAZ *v.* NARAIN. [illegible]

——S. 5—"Sufficient cause" [illegible] aside abatement under O. 21, R. [illegible]

[illegible]

the question but persisted in cont[illegible] was then presented to the High [illegible] time barred. No reasonable exp[illegible] the counsel as to why he thought [illegible] the District Judge.

Held, that the counsel had not [illegible] no extension could be granted un[illegible] AMRIT LAL *v.* PHOOL CHAND.

——S. 6—[illegible]

S. 6 of the Limitation Act applies to every minor, whether he has a guardian or not, and the existence of a guardian competent to sue or to apply is immaterial. A minor under S. 6 (1) is entitled to sue or to apply for execution of a decree within the statutory period of three years after attaining majority, and the protection given

to a minor in the matter of making an application for execution cannot be restricted by the acts of his guardian. A decree was obtained by certain minors through [illegible]

Held, that the application was not barred by limitation, by reason of S. 6 of the Limitation Act, and the fact that the guardian applied once and failed did not bar the applicability of S. 6 of the Limitation Act. (*Varma J.*) SATYENDRA NARAIN SINHA *v.* PITAMBER SINGH. 18 Pat L.T. 989.

——S 10—*Applicability—Conditions—Suit against legal representative of trustee.*

It is not necessary that the property followed should be identical property in respect of which a breach of trust has been committed. It can be anything into which the original property has been converted, whatever from the conversion may have taken, provided of course the one can be clearly and definitely connected with the [illegible] But under S. 10, whatever the form the original [illegible] may have taken, it is essential that it should be [illegible]ands of the person sued. (*Bose and Puranik,* [illegible]AHAUDRA BAI *v.* SHRI DEO RADHA BAL- [illegible] A. I R. 1938 Nag. 30.

——S. 12—Applicability—Suit against insolvent after annulment—Time taken in obtaining copy of the order of annulment—If can be excluded. *See* PROVINCIAL INSOLVENCY ACT, S. 78. 1937 A. M L J. 101.

——S 12 (2)—*Applicability—Judgment pronounced on last day before vacation—Application for copy made* [illegible]*ter—Right to extension of* [illegible]

[illegible] suit is pronounced on the [illegible] before the vacation, the application for copy of the judgment-debt must be made [illegible]

[illegible] declines office—[illegible]XECUTOR. [illegible] 46 L W. 880.

——S. 17—*Scope and effect—Deceased leaving will—Executor declining office—Estate—If vests in heir at law.*

All that S. 17 of the Limitation Act contemplates is that if there is no legal representative who is capable of suing, the statute of limitation would not run. The

heir-at-law may be a minor on which case limitation would not run by virtue of S. 6, but as soon as an administrator of the estate is constituted, limitation would begin to run against him, and the fact that there is an heir-at-law who is a minor would not prevent the operation of the law of limitatian. The section does not have the effect of preventing the estate from vesting in the heir-at-law where the executor leaves a will, though the executor under the will declines to accept office. "Legal representative" would also include an heir. (*Pandrang Row and Venkataramuna Rao, JJ.*) SIVASANKARA MUDALIAR *v.* AMARAVATHI AMMAL.

1937 M.W.N. 1153=46 L.W. 880.

——**S. 19**—*Acknowledgment of interest—Sufficiency as regards principal.*

An acknowledgment of interest due implies that there is some principal due upon which the interest is assessed, and therefore such an acknowledgment can be taken not only as an acknowledgment that interests was due, but also as an acknowledgment of the principal. (*Beasley, C.J.*) NARAYANA IYER *v.* NARAYANA IYER.

1937 M.W.N. 1312.

——**S. 19, Expl. II**—*Agent only authorised—Hindu trading family—Separation of members—Acknowledgment signed by some members only—If binds other members.*

Where the members of a Hindu trading family which has incurred a debt have separated, an acknowledgment signed by some members of that firm only cannot save limitation as regards the other members in the absence of proof by the plaintiff creditor that the acknowledgment was made on behalf of and with the authority of those other members as well. In the absence of such proof, the acknowledge cannot bind the other members. It would bind only the persons making it. (*Beasley, C.J.*) NARAYANA IYER *v.* NARAYANA IYER.

1937 M.W.N. 1312.

——**S. 20**—*Applicability—Requirements—Payment if to be as part payment.*

A payment to renew limitation under S. 20, must be a payment as part payment. If it is not so, there exists no element of acknowledgment of a balance to justify the extension of limitation. That a payment was in fact a part payment may be inferred from circumstances. (*Weston.*) HAMIR SINGH *v.* AMAR CHAND.

1937 A. M.L.J. 118.

——**S. 20**—*Payment by Official Receiver—If can revive limitation.*

The Official Receiver is not an agent of the insolvent and cannot acknowledge debt on behalf of insolvent. The words 'duly authorised' in S. 20 of the Limitation Act means authorised by the debtor. (*Norman.*) ALLAH DIN *v.* CHISU LAL.

1937 A. M.L.J. 101.

——**S. 21**—*Partnership—Acknowledgment or payment by one partner—Authority—If can be inferred.*

Direct evidence that one of several partners had authority to acknowledge liability or make payment so as to save limitation as against the other partners is not necessary, but such authority can be inferred from circumstances. (*Weston.*) POONAM CHAND *v.* AMAR CHAND. **1937 A.M.L.J. 115.**

——**S. 23**—"Continuing right" — Dam constructed across river to divert water to tank of riparian owners—Accumulation of silt over dam obstructing flow of water—Suit by lower owner—Limitation. *See* EASEMENT—WATER RIGHTS. **46 L.W. 862.**

——**Art. 60**—*Applicability—Money deposited in bank—Agreement between depositor and another dividing the amount between the two—Character of deposit—If altered—Suit for recovery—Limitation—Starting point—Art.* 115.

The character of a deposit with a banker is not altered by the fact that the person in whose name the money is deposited agrees in writing with another person that a part of it should belong to that other from the date of the agreement. The money still remains as a deposit, and suit to recover it by the respective parties is governed by Art. 60 of the Limitation Act. The right to sue does not accrue until there is a demand and refusal. Art. 115 cannot apply to such a case, as the claim can in no sense be one for compensation for breach of a contract. (*Pandrang Row and Venkataramana Rao, JJ.*) RAMASWAMI CHETTIAR *v.* MANIKKAM CHETTIAR. **1937 M.W.N. 1249=(1938) 1 M.L.J. 56.**

——**Art. 91**—Applicability—Suit to avoid gift deed as having been executed under undue influence—Limitation—Starting point. *See* CONTRACT ACT, S. 16.

39 Bom.L.R. 1233.

——**Art. 98**—*Applicability—Suit against daughter in respect of breach of trust committed by father—No defalcated money in her possession—Limitation.*

A suit was brought against a daughter in respect of a breach of trust committed by her father. She herself was not a trustee, and she had not committed any wrong act : also the defalcated money was not in her possession ; nor was there anything else in her hands which could be said to represent it.

Held, that the suit against her was clearly one to make good the loss occasioned by her father's breach of trust out of his general estate. To such a suit Art. 98 would apply. (*Bose and Puranik, JJ.*) SAHANDRA BAI *v.* SHRI DEO RADHA BALLABJI.

A.I.R. 1938 Nag. 30.

——**Art. 98**—*Cause of action.*

Article 98 does no more than carry a deceased trustee's liability for breach on to his estate after his death. It does not contemplate any different cause of action. (*Bose and Puranik, JJ.*) SAHANDRA BAI *v.* SHRI DEO RADHA BALLABHJI. **A.I.R. 1938 Nag. 30.**

——**Art. 115**—Applicability—Money deposited in bank—Suit for recovery of—Agreement between depositor and another dividing the amount between them—If alters character of deposit. *See* LIMITATION ACT, ART. 60. **1937 M.W.N. 1249=(1938) 1 M.L.J. 56.**

——**Arts. 120 and 132**—*Applicability—Mortgage of entire mukarrari rent payable to landlord by tenant under kabuliyat in respect of lakhraj jagir, naqdi kasht land and manhunda rice—Suit to enforce—Limitation—If transfer of actionable claim.*

A mortgage of "the entire mukarrari rent of Rs. 100 per year payable....under a kabuliyat of June 1913 in respect of 11·34 acres of lakhraj jagir, naqdi kasht land and manhunda rice," is a mortgage of the landlord's right together with the landlord's charge, and therefore a mortgage of an interest in immovable property, and a suit to enforce such a mortgage falls under Art. 132 of the Limitation Act. The mortgaged property cannot be said to be merely an actionable claim, and the suit cannot therefore be subject to the six years' rule of limitation under Art. 120. (*Courtney-Terrell, C.J. and Manohar Lall, J.*) RAMZAN ALI *v.* LAL SINGH.

18 Pat.L.T. 801=1937 P.W.N. 826=
A.I.R. 1938 Pat. 16.

——**Art. 132**—Applicability—"Immovable property"—Mortgage of entire mukarrari rent of landlord payable by tenant in respect of lakhraj jagir, naqdi kasht land and manhunda rice—Suit to enforce—Period of limitation. *See* LIMITATION ACT, ARTS. 120 AND 132.

18 Pat.L.T. 801=A.I.R. 1938 Pat. 16.

LIMITATION ACT (1908), Art. 139.

after expiry of period—Landlord's assent to tenant's continuance in possession not proved—Effect—Suit—If barred—Estoppel against tenant—If continues after expiry of lease. *See* EVIDENCE ACT, S. 116.

46 L.W. 848 = A.I.R. 1938 Mad. 73.

——Art. 144—*Adverse possession—Commencement of —Alienation by trustee of trust property as own property—Possession of alienee—If adverse from start.*

A trustee of a choultry alienated property belonging to the choultry as his own. He did not purport to pass title as manager of the choultry.

Held, that the alienation was void, *ab initio* and possession of the alienee became adverse from the date of the alienation and not from the death of the trustee. (*Ramesam and Stone, JJ.*) VENKATASUBRAMANIA AYYAR *v.* SIVAGURUNATHA CHETTIAR.

A.I.R. 1938 Mad. 60.

——Art. 144—*Computation — Trustee alienating property honestly believing it to be his own—Property found to belong to* cestui que trust—
—*Time allowed by trustee to pass*
If can be excluded.

If a person could extend the time
ing that he had mistaken the meanin
a most serious inroad would be m
limitation and that quieting of title which is t
for and the policy behind the statutes of
would be gravely disturbed. Hence, if
alienates property which he honestly believes
own but which on a true construction of the deed of
ch the
when
posses-
UBRA-
MANIA AYYAR *v.* SIVAGURUNATHA CHETTIAR.

A.I.R. 1938 Mad. 60

——Art. 144—*Starting point—Void and voidable transfers—Distinction.*

Adverse possession of an alienee dates from the moment the alienee is without lawful title. That time is, in the case of a void transfer, the date of the transfer; in the case of a voidable transfer, the date of the avoidance and in the case of the transfer effective for a period (whether because of estoppel or otherwise), the date of the termination of the period. (*Ramesam and Stone, JJ.*) VENKATASUBRAMANIA AYYAR *v.* SIVAGURUNATHA CHETTIAR. A.I.R. 1938 Mad. 60.

——Art. 166—*Starting point—Collector's sale.*

An application to set aside an execution sale by the Collector must be presented within 30 days of the date on which the Collector accepts the bid. (*Greenfield, F.C.*) RAMCHANDRA

——Art. 182 (5)—
cation not containing
R. 12, C. P. Code—If
Determination—Tests—Order dimissing application for not supplying inventory within time limited—If conclusive as to application being not in accordance with law.

An execution application can be held to be not in accordance with law or if the defects or omissions to be found therein were such as to make it impossible for the Court to issue execution upon it, and not merely because it was defective in some minor particulars. An omission to comply with O. 21, R. 12, C. P. Code, *viz.*, failure to annex a *talika* or inventory of the pro perty to be attached, cannot *per se* be held to render

MAD. COURT OF WARDS ACT (1902), S. 49.

in the
ee-holder
belong-
or whe-
ther any inventory of the properties is necessary at all, and when it is not known in what mode the assistance of the Court is required in the application of the decree holder. The question cannot be decided merely with reference to an order dismissing such an application on the ground that no inventory was supplied within the time given, without having the application itself before the Court. (*Fazl Ali, J.*) LACHMI PRASAD *v.* KAPIL DEO OJHA. 18 Pat L.T. 954.

——Art. 182 (5)—*Step-in aid — Application for transfer of decree—Batta not paid—Effect.*

An application for transfer of a decree is a step-in-aid of execution. The fact that the decree-holder did not pay batta for notice is not material. It is not necessary to satisfy the Court that the step was taken with a genuine intention of obtaining execution (*Weston.*) JASRAJ RIKHRAJ *v.* GHISOO LAL.

1937 A M.L.J. 118.

——Art 182 (5)—*Step in-aid—Execution application*

or tenant to benefit of Act.

The Madras City Tenants' Protection Act cannot apply to a tenancy created after the passing of the Act to take effect from a date which also is after the passing of the Act, although the tenancy is in renewal of a prior lease which had expired. When the Act, by reason of S. 1 (*iii*) of the Act does not apply at all, the tenant cannot claim the benefit of the Act by reason of S. 12, because the Act, which cannot apply by reason of S. 1 (*iii*) is wholly inapplicable and not merely partly. (*Beasley, C.J. and Cornish, J.*) RANGANATHAM CHETTY *v.* ETHIRAJULU NAIDU.

1937 M.W.N. 1315.

MADRAS COURT OF WARDS ACT (I OF 1902)

S. 49—*Construction and scope—Notice of suit served—Subsequent death of intending plaintiff or transfer by him of subject matter—Suit by successor or transferor—Fresh notice—If essential.*

Where an intending plaintiff has given due notice as required by S. 49 of the Madras Court of Wards Act, the fact that subsequent to such notice he dies or transfers his interest in the subject-matter to another does

given.

Abdur Rahman, J.—There is nothing in S. 49 of the Act which would make another notice essential so long as the suit is based substantially on the same cause of action which was stated in the notice. If the assignee or successor chooses to file a suit on the cause of action stated by the assignor or predecessor in the notice served by him on the Court of Wards, no legitimate objection can be raised against him on that score. (*Pandrang Row and Abdur Rahman, JJ.*) ZAMINDAR OF SIVAGANGA *v.* MUTHIAH CHETTIAR.

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rights are claimed. In such a case it would be the rent at which the land has been let out to the under-proprietor. (*Thomas and Zia ul-Hasan, JJ.*) JWALA DEVI *v.* AHMAD HASAN. 172 I.C 297 = 1938 O.W N. 23 = A.I.R. 1938 Oudh 40.

——R. 269-A—*Cls.* (d) *and* (e) *can be applied together.*

Clause (*d*) of R. 269-A is not exclusive of Cl. (*e*) and hence Cls. (*d*) and (*e*) can be applied together. (*Thomas and Zia ul-Hasan, JJ.*) JWALA DEVI *v.* AHMAD HASAN. 172 I.C. 297 = 1938 O.W.N. 23 = A.I.R. 1938 Oudh 40.

OUDH RENT ACT (XXII OF 1886), S. 5—*Occupancy rights—Muqaddam recorded as occupancy tenant—Transferee of rights of under foreclosure of mortgage—If becomes occupancy tenant—Status—Entry as occupancy tenant in papers—Effect.*

A transferee of the rights of a muqaddam—the rights being transferred as a result of foreclosure of a mortgage—who is admitted as a tenant by the landlord is only a statutory tenant and not an occupancy tenant. The fact that the transferee is recorded in the papers as occupancy tenant, as his transferor had been so recorded before the transfer, does not make him an occupancy tenant, when there is no evidence that the landlord ever recognised him as occupancy tenant. (*Bomford, J.M.*) DULARA *v.* NARAIN SINGH.

1938 O.W.N. 27 = 1937 A.W.R. 1213.

——S. 60 (2-a)—Scope—Mandatory—Non-compliance—Effect—Illegality. *See* OUDH RENT ACT, S. 108 (10). 1937 A.W.R. 1211 = 1937 R.D. 564.

——S. 108 (10)—*Applicability—Illegal ejectment—Ejectment under decree not in conformity with S.* 60 (2-a)—*Tenant's right to sue under S.*108 (10).

Illegal ejectment does include ejectment by a process of law if the process used is wrong. Under the mandatory provisions of S. 60 (2-a) of the Oudh Rent Act, it is for the landlord to see that the decree is properly prepared and that the tenant is not left in doubt as to the exact amount which he has to pay in order to escape ejectment. If the decree does not show the exact amount of interest due, the ejectment of the tenant under such a decree is technically an illegal ejectment which gives the tenant a right to sue under S. 108 (10) of the Act. (*Darling, S.M. and Bomford, J.M.*) KHURSHEDUNNISA BEGAM *v.* HEMRAJ.

1937 R.D. 564 = 1937 A.W.R. 1211.

——S. 108 (10)—*Scope—Tenant illegally ejected—Subsequent introduction of new tenants by landlord—Suit by tenant for possession in Revenue Court—Maintainability—Rival tenants—If necessary parties.*

A tenant who has been illegally ejected by his landlord by a wrong process of law has a right to recover possession by way of a suit in the Revenue Court under Cl. (10) of S. 108 of the Oudh Rent Act against the landlord. He is not bound to implead as parties to the suit subsequent lessees introduced by the landlord after the illegal ejectment, which is the cause of action. Nor is the tenant bound to go to the Civil Court for redress merely because a new set of rival tenants have been introduced subsequent to the ejectment complained of (*Darling, S.M. and Bomford, J.M.*) KHURSHEDUN NISA BEGAM *v.* HEMRAJ. 1937 A.W.R 1211 = 1937 R D. 564.

OUDH SUB SETTLEMENT ACT (XXVI OF 1866), R. 10—*Claim for under proprietary title—Proof required.*

Under R. 10 of the Oudh Sub-Settlement Act the three elements necessary to be established to make out a claim for under proprietary title are (1) that he had formerly been a proprietor, (2) that the land in suit had been held by him or some person from whom he inherited at some time since the 13th February, 1844, and (3) that this had beed held by such persons as *sir* or *nankar* when they were in proprietary possession. Where all that has been made out is that the plaintiff has been in possession of the bulk of the land in suit at a uniform rent from the time of the first settlement and that his ancestors had been old proprietors of the village, the Court can not presume that the plaintiff is an under-proprietor under the provisions of the above rule. (*Srivastava, C.J. and Hamilton, J.*) BABU RAM *v.* TRIBHAWAN BAHADUR SINGH. 172 I.C. 107 = 10 R.O. 154 = 1937 O.W.N. 1208.

PARTITION ACT (IV OF 1893), S. 4—*Applicability—"Undivided family"—Meaning of.*

S. 4 of the Partition Act applies to all subjects of British India, whether Hindus, Mahomedans or Christians; the term "undivided family" means a family which is undivided in respect of the house or dwelling-house; in other words, a family which owns the house but has not divided it. (*Manohar Lall, J.*) BABU LALL TIWARI *v.* HULLA MALLAH.

18 Pat.L.T. 866 = 1937 P.W.N. 902 = A.I.R. 1938 Pat. 13.

——S. 4—"*Court*"—*Appellate Court—Power to act under.*

The word "Court" in S. 4 of the Partition Act means not merely the trial Court, but also includes an appellate Court; an appellate Court has therefore power to act under the section though no such application has been made in the trial Court. An application may be made either in the trial Court or in the appellate Court; and on such application the appellate Court also is bound to make an appropriate order. (*Manohar Lall, J.*) BABU LALL TIWARI *v.* HULLA MALLAH.

18 Pat.L.T. 866 = 1937 P.W N. 902 = A.I.R. 1938 Pat. 13.

——S. 4—"*Dwelling-house*"—*Meaning of.*

A "dwelling-house in S. 4 of the Partition Act means not only the house itself but also the land and appurtenances which are ordinarily and reasonably necessary for its enjoyment. The Court must therefore make a valuation of such land and appurtenances also, if any. (*Manohar Lall, J.*) BABU LALL TIWARI *v.* HULLA MALLAH. 18 Pat.L.T. 866 = 1937 P.W.N. 902 = A.I.R. 1938 Pat. 13.

PARTNERSHIP—*Hindu joint family a partner with strangers—Suit by a coparcener for his share on the basis of dissolution before suit—Denial of dissolution—Maintainability of suit—Procedure.*

Where the subject matter of the suit was the family share in a partnership with strangers, and it was alleged that the partnership had been dissolved prior to date of suit, but was denied by the other side.

Held, that such a suit could not be dismissed as being unsustainable without deciding the question as to whether the partnership was dissolved or not.

Held, further, that when family assets are in the hands of strangers any member of the family has a right to recover his share of the assets, and if it is necessary for such a purpose to take an account, such account has to be taken by the Court at the instance of the plaintiff. (*Pandrang Row and Venkataramana Rao, JJ.*) SAMBASIVA IYER *v.* NATESA IYER.

1938 M.W.N. 22 = (1938) 1 M.L J. 106.

PARTNERSHIP ACT (IX OF 1932), S. 69—*Applicability—Contract of lease between partners—Partnership not registered—Suit by one partner against others for rent under lease—Maintainability.*

A suit by a person alleged to be a partner to recover the rent due to him by the other partner or partners

PARTNERSHIP ACT (1932), S. 69.

——**S. 69**—*Suit by firm—Plaint not noting that firm is registered—Neither defendant denying registration—Suit, if can be dismissed on ground that registration was not proved.*

& SONS *v.* BEHARI LAL BENI PERSHAD.
A.I.R. 1938 Lah. 96.

PENAL CODE, (XLV OF 1860), S. 84—*Applicability—Accused shown by evidence to have been well aware of his acts—If entitled to exemption.*

When the evidence in a case clearly shows that an accused person knew quite well what he was doing, S. 84, I. P. Code, cannot apply. Where the accused person charged with the offence of the murder of his wife, first removes his child from the arms of his wife and puts it out of the way, and stabs her with the door shut, keeps it shut and does not surrender until compelled by force by the police, and where the accused further produces the weapons with which he has committed the murder, the case cannot be brought under S. 84, I. P. Code. (*Mockett and Horwill, JJ.*) SUBBAI GOUNDAN *v.* EMPEROR.
1937 M.W.N. 1329.

——**Ss. 86 and 299**—*Applicability—Accused getting drunk in the normal course of conduct—Intention to kill—If negatived—Knowledge of death being caused—Plea of drunkenness—If available as defence to charge of murder.*

Drinking might negative intention in appropriate cases, but will not negative knowledge. S. 299, I. P. Code, speaks of intention or knowledge that

his normal course of conduct in getting drunk, the burden is on him to establish if it is a defence, that he was so drunk that he did not know what he was doing.

Quaere.—Whether knowledge and intention are to be treated as one and the same thing under Ss. 86 and 299. (*Mockett and Horwill, JJ.*) SUBBAI GOUNDAN *v.* EMPEROR.

——**S. 99**—*Resistance to public ... of warrant of arrest—Right of ... exists—Cr. P. Code, S. 80.*

arrest.

PENAL CODE (1860), S. 299.

... of private defence
... Code, the warrant
... aired. (*Bennet, J.*)
1937 A.L.J. 1334 = A.W.R. 17 (H.C.)

unlawful possession —Co-sharer trying ... fence.

... joint possession of ... and his brothers ... of such land and remains in possession thereof only for a couple of hours and the persons already in possession try to eject the accused, the possession of the accused is no better than that of a mere trespasser and cannot give him the right of private defence. On the other hand, the persons ... any neces- ... se of right of ... 04 and have a ... the accused. ... *v.* EMPEROR. ... 938 Lah. 60.

——... *ge under*—

Where the accused were in fact charged with specific

the prosecution to prove the other offences. (*Guha and Biswas, JJ.*) RAMKRISHNA SINHA *v.* EMPEROR.
42 C.W.N. 246

——**S. 141**—*'Common object'—Proof of—Duty of prosecution.*

An assembly which is lawful may at any time become an unlawful assembly. But this has to be proved. Though common intention may be a matter which can only be inferred from circumstances, yet it is not enough for the prosecution to prove circumstances consistent with a common intention. The prosecution must show that the existence of a common intention is the only conclusion consistent with the circumstances of the case. (*Weston.*) SANGA *v.* EMPEROR. **1937 A.M.L.J. 128.**

——**S. 141 (4)**—*Unlawful assembly—Going in a body to drive trespassing cattle to the pound—Armed with sticks in anticipation of interference.*

Where the villagers went in a body to a place where the trespassing cattle were, in order to drive them to the pound, their common intention would not be an intention which would make their assembly unlawful within

EMPEROR. **1937 A.M.L.J. 128.**

——**S. 186**—*Obstruction—Threats, when can amount to.*

The word 'obstruction' in S. 186 of the Penal Code is not confined to physical obstruction only. Threats of violence made in such a way as to prevent the public ... amount ... *nnet, J.*) ... 1179 =
1937 A.L.J. 1344.

1937 M.W.N. 1329

——S. 300, thirdly, and Excep. 4—*Applicability—Blow on head causing fissured fracture of—Death ensuing—Clot of blood found on brain underneath skull—No fight—Offence.*

The accused struck the deceased on the head with a bamboo stick about 5 feet long and about 1⅝ inches in diameter at the thickest end. The deceased fell down, and then the accused struck him another blow; the deceased died almost at once. The accused had beaten the son of the deceased in a quarrel, and to scold him the deceased came; it was then that the appellant struck him. It was clear that the second blow did not strike the head; but it was found that the first blow was dealt with sufficient force to produce a fissured fracture of the skull, and the medical examination revealed that a clot of blood was found present on the brain underneath the skull.

Held, that it must be inferred that the accused intended to cause such bodily injury as is sufficient in the ordinary course of nature to cause death, and the case fell under S. 300, thirdly, and the accused was liable to conviction under S. 302, I. P. Code.

Held, further, that the act of the accused did not fall under Excep. 4 of S. 300, which covered only acts done in a sudden fight, there having been no fight in the present case. (*Burn and Lakshmana Rao, JJ.*) CHINA NAGADU *v.* EMPEROR. **1937 M.W.N. 1129.**

——S. 300, Excep. 4—*Applicability—Accused using weapon against unarmed person in sudden fight.*

The using of a weapon by one person against an unarmed person in a sudden fight is not within the limits of Excep. 4 to S. 300, because it is expressly provided that no unfair or undue advantage must be taken by one of the combatants if the plea of sudden fight is to be raised by way of exception. (*Roberts, C.J. and Sharpe, J.*) SYED AHMED *v.* EMPEROR.

A.I.R. 1938 Rang. 15.

——S. 302—*Offence under—Accused eighteen years old, bit excited and somewhat drunk striking heavily on head of man lying prostrate—Proper sentence.*

The accused who was eighteen years of age and who on his wedding day was a bit excited and somewhat drunk struck a heavy blow with a stick on the top of the head of a man who was already lying prostrate because of an attack on that person by another man and the person died.

Held, that although the case came near the border line between culpable homicide and murder, yet it fell on the side of murder.

Held further that under the circumstances a sentence of transportation should be passed with recommendation for commuting sentence to detention for four years in Borstal School which would be sufficient. (*Roberts, C. J. and Spargo, J.*) NGA PAW *v.* THE KING.

A.I.R. 1938 Rang. 62.

——Ss. 302 and 304—*Offence under—Accused inflicting injury in sudden fight on deceased.*

Where in a course of sudden quarrel between the accused and the deceased, the deceased expressed his intention of attacking and kicking the accused and went towards him and in the sudden fight that ensued between them the accused used a clasp knife and inflicted a wound in the chest of the deceased causing his death.

Held, that as there was grave and sudden provocation from the deceased when he proceeded towards the accused with the intention of kicking him and as the accused had used a clasp knife when he had so far lost his self-control during the struggle that he did not inflict the injury with the intention of causing such bodily injury as was likely to cause the death, he could therefore be convicted under S. 304 and not under S. 302. (*Roberts, C.J. and Sharpe, J.*) SYED AHMED *v.* EMPEROR. **A.I.R. 1938 Rang. 15.**

——S. 302—*Offence under—Injuries caused by accused resulting in gangrene and causing death.*

Where a person was seriously injured by the accused and died subsequently, but in *post mortem* examination, it was found that the immediate cause of death was gangrene which had set in in the right foot and leg as a result of injury.

Held, that the accused were guilty of an offence under S. 302. (*Addison and Din Mohammad, JJ.*) LAL SINGH *v.* EMPEROR. **A.I.R. 1938 Lah. 31.**

——S. 302—*Offence under—Injury sufficient to cause death—Death due to infection.*

Where an injury was sufficient in the ordinary course of nature to cause death but was not necessarily fatal and the death took place because infection set in, the fact however would make no difference to the criminal responsibility of the person charged. (*Roberts, C.J. and Spargo, J.*) NGA MYAUK NYO *v.* EMPEROR.

A.I.R. 1938 Rang. 56.

——S. 302—Sentence—Death or transportation of life—Test—Accused killing wife brutally after making preparations—Wife ill-treated for several years previously—Accused absconding immediately after murder and hiding for over a year—Proper sentence. *See* CR. P. CODE, S. 439. **1937 M.W.N. 1241.**

——S. 304—*Conviction—Basis of—Burden of proof.*

Every death by violence is not culpable homicide. Some at least can be justified; and the burden is always on the prosecution to prove by evidence that the homicide was culpable. In the absence of a finding or evidence to justify a finding that the killing was a culpable act, a conviction cannot be sustained. (*Newsam, J.*) SANNA BASYA *v.* EMPEROR. **1937 M.W.N. 1196.**

——S. 304 A—*Sentence—Death by rash and negligent driving of motor bus—Driver guilty of reckless disregard of passengers' lives—Proper sentence—Sentence of one month's simple imprisonment—Sufficiency.*

The driver of a motor bus was so careless and rash that certain passengers protested and one of them even insisted on the bus being stopped and alighted with his family. As soon as he was induced to re-enter the bus on an undertaking to drive at a low speed, the rash driving again continued with the result that an accident occurred and death caused to a person. The accused driver was convicted under S. 304-A, I. P. Code, and sentenced to one month's simple imprisonment.

Held, (1) that the conviction was correct and must be confirmed; (2) that the sentence was far too lenient even for a first offence, in view of the fact that the accused was guilty of reckless disregard of the safety of his passengers' lives to such an extent that he should never again be licensed to drive a motor bus, and that the sentence should therefore be enhanced to one year's rigorous imprisonment which was the proper sentence. (*Newsam, J.*) MOHAMED USMAN *v.* EMPEROR.

1937 M.W.N. 1328.

——S. 342—*Offence—Ingredients—Actual force—If must be used—Show or threat of force—Sufficiency.*

To constitute the offence of abduction, actual force is required and not mere show or threat of force. (*King, J.*) KOYA MOIDIN *v.* EMPEROR

1937 M.W.N. 1198 (1).

——S. 375 — *Offence under — Corroboration of woman's evidence—Necessity.*

In complaints of rape it is a sound rule of prudence to look for corroboration of the evidence of the woman. But the amount of corroboration necessary to justify a finding that the evidence is true must vary with each

PENAL CODE (1860), S.500.

particular case and must depend largely upon the demeanour of the woman when giving evidence. (*Weston.*) MEHTA *v.* EMPEROR. **1937 A M.L.J. 134.**

——S. 500—*Privilege—Question by advocate during cross examination of witness—Imputation of theft—If privileged—Liability of advocate to prosecution.*

PETROLEUM ACT (1899), S. 15 (c)—*Master, if liable under, for acts of servant.*

Where the servant in breach of the conditions of the license of his master, delivered petrol to another not having a license to transport petrol, the master is liable for the action of his servant in breach of the conditions of the license. (*Weston.*) EMPEROR *v.* AMBA LAL. **1937 A.M.L.J 138.**

PRACTICE—*Appeal — Appellate Court—Powers of interference—Appeal from final decree in partition suit —Nature and scope of—Grounds of interference—Principles—If same as second appeal—Findings of fact—Finality.*

A trial Court which makes a final decree in a partition suit considers the report submitted by the Commissioner—who has gone to the spot, heard the parties and their evidence and has effected the partition having regard to the nature of the land and other circumstances —and reviews the facts and corrects the award of the Commissioner. The power to review the decision of the Commissioner on the facts is a matter for that Court and

decision has gone wrong on some question of principle in making the final allotment and in drawing up the decree. (*Courtney Terrell, C.J. and S. C. Chatterji, J.*) JUGESHWAR SINGH *v.* RIJHAN SINGH. **18 Pat.L T. 992.**

——*Appeal—Findings of fact—Decisions of Township Judges—Interference.*

Per *Baguley, J.*—Findings of fact by the High Court in England, or by the County Courts Cou
presided over by members of the Bar of
who have had years of experience bef
appointed, have got to be dealt with on
from findings of fact arrived at perhaps by the Township Judges in Burma who may be appointed almost direct from the University. These Judges have not always the experience no perhaps the
Court Judges or High Court Judges.
on points of fact or the credibility
never be regarded as having the same
of the County Court Judges or High Court Judges. A.I. R. 1936 Rang 5, Expl. (*Baguley and Sharpe, JJ.*) MOHAMMAD HAJEE *v.* VEDNATH SINGH. **A I.R 1938 Rang. 26.**

——*Appeal—New case, inconsistent with pleadings—Permissibility.*

A plaintiff cannot be allowed to make out a new case in appeal entirely different from and inconsistent with that of his own case in the plaint. Nor could he be allowed to adopt the case of the defendants, partly or wholly, and on that basis ask for reliefs different from those claimed in the plaint. Such a course would be

PRACTICE.

unfair to the opposite party as well as against law. (*Wassoodew and Thakor, JJ.*) KRISHNAJI *v.* KESHAV. **39 Bom.L.R. 1318.**

——*Appeal—New plea of marz-ul-maut—If open.*

The plea of *marz-ul maut* involves a question of fact and when taken for the first time in appeal, the other side is sure to be prejudiced ... ght not to be
matulla, Ag.C.
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938 A.L J. 16.
maintainability
n appeal that
maintain suit—If can be raised.

A plea that a suit for injunction is not maintainable on the ground that the plaintiff was out of possession on the date of filing the plaint, which was not raised in the trial Court and which obviously depends on facts for which evidence would be necessary cannot be raised for the first time in appeal. (*Sir George Lowndes.*) SECRETARY OF STATE *v.* KUCHIWAR LIME AND STONE CO , LTD. **172 I.C. 443=47 L.W. 3= 18 Pat L T. 1001=A.I R. 1938 P.C. 20 (P.C.).**

——Appeal—New plea—Pleadings— Variation from —Right of party. *See* C. P. CODE, O. 41, R. 27. **1937 A.W.R. 1183.**

——*Conversion of revision into appeal.*

A right of appeal is not an inherent right, and the circumstance that the statute by which a case is governed does not allow an appeal is no justification for allowing a revision application to be converted into an appeal. (*Weston.*) MANGI LAL *v.* GOPI NATH **1937 A M.L.J. 107.**

——*Duty of Court—Grant of relief on proof of facts stated—Rejection of application ...*

specific or that the application is made to harass and coerce the opposite party. (*Courtney Terrell, C.J. and Manohar Lall, J.*) MAHABIR PROSAD PODDAR *v.* RAM TAHAL MANDAR. **18 Pat L T. 839= 1937 P.W.N. 865=A I.R 1937 Pat. 665.**

——*Full Bench—Motion for reference—If can come from counsel.*

The motion to refer a matter to a Full Bench should

proposition of law are plain and straightforward, it is not for counsel to argue, what is in effect an appeal against an authoritatively decided case, by asking the

——*New plea—Letters Patent appeal—Trial Court issuing second commission for local investigation—Plea that first Commissioner's report should be wiped off the record—If open for 1st time in Letters Patent appeal.*

A contention that the Court issuing a second commission for a local investigation, should wipe out the first commissioner's report off the record and treat it as not evidence, is really not open and should not be raised for the first time in Letters Patent Appeal, as a matter of practice, when it was not raised in the Courts below. (*Courtney-Terrell, C.J. and Manohar Lall, J.*)

PRACTICE.

SHIB CHARAN SAHU *v.* SARDA PRASAD.
18 Pat. L.T. 837=1937 P.W.N. 862= A.I.R. 1937 Pat. 670.

——*New plea—Objection of misjoinder raised for the first time at argument stage after adducing evidence on merits—Sustainability— Redemption suit—Defendants setting up plea of paramount title and adducing evidence—New plea that they are not necessary parties at stage of arguments—Permissibility.*

Where a party to a suit does not raise the objection that he is not a necessary party to the suit at the earliest possible stage of the suit, he cannot be allowed to turn round, at a late stage of the suit after the evidence has been recorded and findings given, and get over the effects of the decision by pleading that he was not a necessary party to the suit. Nor the trial Court nor an appellate Court is justified in upholding such a plea. In a suit for redemption on a mortgage some defendants who were made parties as being in possession of some items of mortgaged property set up in their written statement paramount title to the property claiming by adverse possession, but they never raised the plea that they were not necessary parties to the suit. They adduced evidence to prove their title and possession. At the time of arguments they contended for the first time that they were not necessary parties to the suit. The trial Court refused to consider the point at that stage, and held against them on the evidence on the question of title. In appeal the appellate Court without considering the merits of the case held that they were not necessary parties to the suit and dismissed the suit as against them.

Held, in second appeal, that the objection raised at such a late stage could not be entertained or considered and that the lower appellate Court erred in giving effect to the same. (*Nageswara Iyer and Singaravelu Mudaliar, JJ.*) GURUSANTHAPPA *v.* YELLAPPA.
16 Mys.L.J. 1.

——*Parties—Partnership—Suit for dissolution and accounts —Necessary parties — Non-joinder of all partners—Effect—Objection to maintainability of suit on ground of non-joinder raised in written statement —Plaintiff not taking steps to implead all partners but contesting suit on issue of non joinder—Dismissal of suit—Propriety.*

A plaintiff suing for dissolution and accounts of a partnership must implead all the partners as defendants. It may be that he is not aware of the number of partners at the time of filing the suit, if additional partners had been taken in without his knowledge, but when the defendants impleaded by him raise the plea of non-maintainability of the suit on the ground of non-joinder of all the partners he can ascertain the correct number, and can implead the parties left out. But if he takes no such trouble, but contests the suit on that issue, he has only to thank himself if the suit is dismissed on that ground. It may not be necessary to implead all the partners in a case where the liability of the defendants is joint as well as several. But where the liability is the liability of the individual partners and of the partnership, and not jointly of the various members constituting the partnership, no suit is maintainable without impleading all the partners. (*Horwill, J.*) PARASURAMA IYER *v.* SUBBURAMACHARI.
1937 M.W.N. 1189.

——*Pleadings—Amendment—Addition of parties—Powers of Court—Suit by nearest Hindu reversioners —Legislation pending suit making plaintiffs remote reversioners—Application for amendment by impleading nearest reversioners under new legislation—Dismissal of application and of suit—Propriety—Proper procedure.*

There can be no doubt that in the interests of justice Courts have ample power to allow amendments of plaints and to allow fresh parties to be joined when that becomes necessary. Where a suit instituted properly by the nearest reversioners to the estate of a last Hindu male owner becomes, by virtue of legislation during the pendency of the suit, namely, the Hindu Law of Inheritance Amendment Act (II of 1929), a suit by remote reversioners, the Court has ample powers to allow the continuance of the suit by the plaintiffs by making the necessary amendments and impleading the necessary parties who have in virtue of the new legislation become the nearest reversioners. It is improper in such cases to dismiss the suit altogether without going into the merits. Having regard to the purpose and object of such suits, namely the perpetuation of testimony which, owing to lapse of time, might not be available for the heir when the succession actually opens, the ends of justice would be best served by permitting the plaintiffs to amend their plaint and make the persons who have become the nearest reversioners party defendants and to prosecute the suit. (*Pandrang Row and Venkataramana Rao, JJ.*) VEERAVYA *v.* SUBBAMMA. 1937 M.W.N. 1175.

——*Pleadings—Assertion made in pleadings about caste of parties not traversed — Effect—Right to challenge assertion in second appeal at late stage.*

Where an assertion is made in the pleadings by a party to the effect that the parties are members of a family of Maharashtra Brahmins, and the opposite party does not traverse or challenge that assertion, it must be taken that the assertion is admitted as correct. It is too late to challenge that assertion at the stage of argument in second appeal. (*Stone, C.J. and Bose, J.*) KESHAORAO *v.* SADASHEORAO. 1938 N.L.J. 24.

——Pleadings—New case not set up in pleadings—If can be considered. *See* HINDU LAW—DEBTS.
18 Pat.L.T. 810.

——Procedure—Execution application—Presentation to proper officer beyond Court hours on last day of limitation —If proper and valid presentation. *See* LIMITATION ACT, S. 3. A.I.R. 1938 Nag. 46.

——Procedure—Question of jurisdiction—Decision as preliminary issue by Judge—Finality—Right of successor-in-office to re-open at later stage of suit—Proper stage for re-consideration. *See* C. P. CODE, O. 14, R. 2. 1937 A.W.R. 1188.

——*Relief—Abandonment of claim —Inference—Claim to damages made in plaint and issue raised—Plaintiff adducing no evidence on question—Absence of material suggesting postponement of trial of such issue or agreement between parties to that effect—Inference—Power of appellate Court to award damages.*

Where a plaintiff claims damages in his plaint and an issue is raised on the point, but the plaintiff adduces no evidence on the question of damage, and there is nothing in the record to suggest that the trial of the issue was postponed or that there was any agreement between the parties to that effect, the proper inference to be drawn is that the claim for damages has been abandoned. An appellate Court cannot in such a case award any damage. (*Sir George Lowndes.*) SECRETARY OF STATE *v.* KUCHIWAR LIME AND STONE CO., LTD. 172 I.C. 443=47 L.W. 3= 18 Pat.L.T. 1001 =A.I.R. 1938 P.C. 20 (P.C.).

——*Relief—Suit on forged accounts—Decree for admitted amount—Power to pass.*

Where a suit is brought on the basis of a forged bahikhata, no decree can be passed even on the admitted sum due by the defendant. (*Manohar Lall, J.*)

PRACTICE.

NAGINA RAI *v.* RAGHUBAR SINGH.

A.I.R. 1938 Pat. 42.

——*Subsequent events—When can be taken notice by the Court.*

Ordinarily a Court should deal with the rights of the parties as they stood at the institution of the suit but where the continued existence of a certain rights is an

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PRE-EMPTION—*Waiver of*
—Waiver by manager of joi
operates as a waiver by all.

When property is offered to a pre-emptor for sale before a definite contract of sale with any other person has come into existence, a
purchase the property or
purchasing the property,
of pre emption. Such a
joint Hindu family operat
members of the family.
JJ.) KANSHI RAM SHARMA *v.* LAHORI RAM.

40 P.L.R. 10

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 17—*Scope and Effect—If absolute bar to execution of decree—Period of pe*
insolvency proceedings—If deductible in
limitation for execution—Provincial Insol
S. 78 (2)—*Application of.*

S. 17 of the Presidency Towns Insolvency Act is not an absolute bar to execution of a decree. Leave to execute can be obtained. Where a judgment-debtor is adjudged an insolvent and the adjudication is subsequently cancelled, the time during which the insolvency proceedings were pending cannot be deducted in com-

under the Presidency Towns Insolvency Act. (*Newsam,*

should not be extended so as to enable the Court to punish for contempt an agent of the insolvent who at the instigation of the insolvent obstructs the realization of the insolvent's property. The Court, no doubt, can treat the insolvent as in contempt when he instigates an agent to do that which the law prohibits him from doing himself. But it would be an undesirable and unwarranted extension of the powers given to the Court to take against the alleged agent contempt proceedings which the law only expressly warrants against the insolvent himself. (*Wadsworth, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* SURYAKANTHAMMAL.

46 L.W. 900 = 1937 M.W.N. 1251.

——**S. 58 (5)**—*Scope—Agent of insolvent obstructing delivery of immovable property of insolvent sold by Official Assignee - Contempt proceedings—Maintainability*

PRINCIPAL AND AGENT.

S. 58 (5) of the Presidency Towns Insolvency Act is restricted to a refusal of an agent to hand over money and securities belonging to the insolvent. This does not cover the persistence of an agent of the insolvent in obstructing the delivery of the immovable property of the insolvent which has been sold by the Official Assignee There is no provision in the Act enabling
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J.) OFFICIAL
THAMMAL.

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XXIII
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ice does not
confine itself to matters of historical interest only, but also contains information and comments on definite events of topical interest or importance, it must be re-

secretary of Bank outside its premises—Bank paying interest thereon—Ratification — Apparent and express authority—Bank's liability.

Every act done by an agent in the course of his employment on behalf of his principal and within the
principal, un-
that particu-
ealing is aware
that the agent in doing as he does is exceeding the authority given by the principal. Where the secretary of a Bank was in the habit of receiving deposits, at the house of the depositor, and the Bank subsequently used to pay the interest thereon on the due dates and also used to repay the principal sums on the expiry of the periods fixed, on a question whether the Bank could
deposits on the
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accepted by the secretary by paying interests and repay-

——*Rights of principal—Agent fraudulently disposing security deposited by principal—Principal not knowing of conversion receiving the very goods converted or equivalent—Effect*

Agents, who engage in a fraudulent scheme to defraud their principal, forfeit their right to an indemnity in respect of transactions which form part of the fraud. Where an agent fraudulently disposes security deposited with him by the principal, his disposal of the security amounts to nothing short of conversion and the principal has vested in him a right to damages for conversion which would be measured by the value of the security at the date of conversion. If, not knowing of the con version the principal has received from
has retained the very goods their
lent, the only effect is
for the value of what he

received it, and the damages are reduced by this amount. (*Lord Atkin*) W. C. SOLLOWAY *v.* J. P. MCLAUGHLIN. **A.I.R. 1938 P.C. 23.**

PRIVY COUNCIL — *Practice — Appeal—New plea not raised in High Court or in application for leave or in grounds of appeal to Board—Plea depending on proof of facts—If open.*

A new point obviously dependant on proof of facts and not merely a question of law, which has not been raised in the High Court. Where it could have been raised or in the application for leave to appeal or in the printed case before the Privy Council, cannot be raised for the first time before His Majesty in Council. (*Sir George Lowndes.*) SECRETARY OF STATE *v.* KUCHIWAR LIME AND STONE CO., LTD. **172 I.C. 443 = 47 L.W. 3 = 18 Pat. L.T. 1001 = A.I.R. 1938 P.C. 20 (P.C.).**

PROHIBITION—*Writ of—Duty of applicant—Absence of candour in statement of facts—Suppression of material facts—Forfeiture of right to invoke the powers of Court.*

The requirements of *uberrima fides* on the part of an applicant for an *ex parte* injunction, apply equally to the case of an application for a rule *nisi* for a writ of prohibition. Where it is suspected that there has been a suppression of material facts, the Court will refuse the writ without going into the merits of the case. (*Panckridge, J.*) INDUMATI DEBI *v.* BENGAL COURT OF WARDS. **42 C.W.N. 230.**

——Writ of—Power of High Court to issue. *See* CERTIORARI—WRIT OF—POWER OF HIGH COURT TO ISSUE. **42 C.W.N. 230.**

PROVINCIAL INSOLVENCY ACT (V OF 1920), Ss. 4 and 53—*Powers of insolvency Court—Transfer by insolvent more than two years before his adjudication—Enquiry into—Principles applicable.*

S. 4 only empowers the Insolvency Court for the sake of convenience to decide any questions of title, priority, etc., which arise in the course of insolvency proceedings. It is open to the Insolvency Court to try such questions or leave them to be decided by an ordinary Civil Court, if it chooses to do so. Where a transfer is made by a person more than two years before his adjudication as insolvent, it can be set aside under S. 4 of the Act and not under S. 53 and the Insolvency Court can deal with the question according to the same principles which would have governed a suit for avoidance of the transfer under the ordinary law. (*Bhide, J.*) BASHARAT ALI SHAH *v.* RAM RATTAN (OFFICIAL RECEIVER). **A.I.R. 1938 Lah. 73.**

——**Ss. 6 and 7**—*Acts of insolvency—Nature of—Act of insolvency by father or manager of joint Hindu family—Joint family as such—If can be adjudicated—Rule as to—Coparceners incurring joint debt or obligation—Adjudication on single petition—Permissibility.*

Acts of insolvency as defined in S. 6 of the Provincial Insolvency Act are acts or things done or suffered to be done creating personal liability. Although the father or manager in a joint Hindu family can act on behalf of the family, the recognised restrictions on his power so to act in his representative capacity as to impose any personal liability on other members of the family render it impossible to treat any act of insolvency committed by him in relation to the affairs of the family generally as an act of insolvency committed by the other members of the family also. Consequently the joint Hindu family cannot as such be adjudicated insolvent; but two or more members of the family who have incurred a joint personal liability may present a joint petition in insolvency or may be proceeded against on one creditor's

petition in case the joint act of insolvency can be brought home to them. Minor members must, however be excluded in any case from insolvency proceedings started at the instance whether of debtors or creditors. (*Courtney-Terrell, C.J. and Manohar Lall, J.*) MAHABIR PROSAD PODDAR *v.* RAM TAHAL MANDAR. **18 Pat. L.T. 839 = 1937 P.W.N. 865 = A.I.R. 1937 Pat. 665.**

——**S. 28 (2) and (3)**—*Insolvency of Hindu father—Power of receiver to seize and sell shares of sons.*

Where the karta of a joint Hindu family who is also the father is adjudicated insolvent, the Official Receiver has power to seize and sell the shares of the sons on the ground of the sons' pious obligation to pay the debts of their father. (*Courtney-Terrell, C.J. and Manohar Lall, J.*) MAHABIR PROSAD PODDAR *v.* RAM TAHAL MANDAR. **18 Pat. L.T. 839 = 1937 P.W.N. 865 = A.I.R. 1937 Pat. 665.**

——**Ss. 37 (2) and 75**—*Absence of notice of order of annulment—Questioning in other independent proceedings—If permissible.*

Any complaint as to absence of notice of order of annulment under S. 37 (2) can only be agitated by way of an appeal under S. 75 against the order of annulment and cannot be challenged in other proceedings. (*Norman.*) ALLAH DIN *v.* GHISU LAL. **(1937) A.M.L.J. 101.**

——**Ss. 63, 64 and 74**—*Scope—Summary administration—Duty of Court—Transfer of petition for disposal to Official Receiver—Latter framing schedule for one single dividend—Application by creditor for inclusion of debt—Rejection—Legality—Notice not sent to creditor under S. 64—Effect—Claim—If barred under S. 63.*

In the case of a summary administration under S. 74 of the Provincial Insolvency Act, a creditor is entitled to come before the Court at any time before the single dividend is distributed and proving his claim to a share in the amounts realised. Where a creditor makes an application to have his claim included before the distribution of the dividend, the Court is bound to entertain it and deal with it on the merits. The Court has under S. 74 (3) to inquire into the debts and assets at the hearing of the petition and cannot transfer the petition itself to the official for disposal, as the Act does not provide for any such delegation to the official of the power of disposing of insolvency petitions summarily under S. 74. If such a petition is tranferred to the receiver and he frames a schedule, which is not required under S. 74, that cannot make the ordinary procedure applicable to the case, and when the dividend for which the Official Receiver prepares a schedule is the one and only dividend that can be possibly declared in the insolvency, it is still a dividend under S. 64 of the Act, and not an *interim* dividend under S. 63, so as to bar the right of a creditor to prove her claim before the distribution of such dividend, when that creditor has not had any notice under S. 64. (*Burn and Lakshmana Rao, JJ.*) GOPALAKRISHNAYYA *v.* VENKATASWAMY. **1937 M.W.N. 1160.**

——**S. 64**—Applicability—Order for summary administration—Insolvency petition transferred to Official Receiver for disposal—Latter framing schedule—Creditor applying for inclusion of debt before distribution of single dividend—Order rejecting application—Legality—Absence of notice to creditor—Effect—Creditor's right—If barred under S. 63. *See* PROVINCIAL INSOLVENCY ACT, Ss. 63, 64 AND 74. **1937 M.W.N. 1160.**

——**S. 74**—Duty of Court under—Insolvency petition—Power of Judge to transfer to Official Receiver for disposal—Enquiry into debts and assets—Duty of Court to

PROV. INSOLV. ACT (1920), S. 75,

RAMAKRISHNA REDDI *v.* OFFICIAL RECEIVER,

ency.

An appeal to the High Court under S. 75 (3) of the

Lall, J.)
MANDAR

——S. 78—*Period from date of application for adjudication—If can be excluded—Suit against insolvent after annulment—Time taken in obtaining copy of order of annulment—If can be excluded—Limitation Act* (1908), *S.* 12.

S. 78 of the Provincial insolvency Act lays down that the period from date of adjudication to date of annulment is to be excluded. It is wrong, to substitute in this section 'the date of application' for 'the date of adjudication' on the ground that under S. 28 (7) an order of adjudication relates back to the date of the application. With reference to a suit against an insolvent after annulment, the time taken to obtain copies of the order of annulment cannot be excluded under S. 12 of the Limitation Act, for the suit is not an appeal from the annulment order. (*Norman.*) ALI
LAL. 1

PUNJAB REGULATION OF
(I OF 1930)—*'Trader'—Money-lender, if a trader.*

A money-lender, cannot be said to come under the definition of the word 'trader' as given in the Punjab Regulation of Accounts Act, 1930. (*Bhide, J.*) BADRI PERSHAD *v.* RAM SUKH DASS BANWARI LAL.
40 P.L.R. 32.

PUNJAB RELIEF OF INDEBTEDNESS ACT (VII OF 1934), S. 36—*Repeal of O. 21, R. 2, Sub-R.* (3) *—Effect of—Uncertified payment—Court, if bound to go into and decide.*

S. 36 of the Punjab Relief of Indebtedness
repealed O. 21, R. 2, Sub R. (3) so far as th
was concerned. The result is that it is now th
the executing Courts in Punjab, whenever ar
fied payment is pleaded in bar of execution,
the question and decide it, even though the

——S. 36—*Scope of—If retrospective.*

S. 36 of the Punjab Relief of Indebtedness Act, merely altered the existing procedure and hence is retrospective in its operation. (*Addison and Din Mahomed, JJ.*) MURLI DHAR *v.* BASHESHAR LAL MOTI LAL. **40 P.L.R. 14.**

RAILWAYS ACT (1890), S. 55.

PUNJAB SIKH GURDWARAS ACT (VIII OF

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DHARMSALA
DASS. **A.I.R. 1938 Lah. 85.**

NCY ACT (XVI OF 1887), Ss. 50
ejected under S. 45—Suit by him for possession on ground of title by adverse possession—If cognizable by Revenue Court.

S. 50 or S. 50-A does not restrict the grounds on which the liability to ejectment may be contested. Where therefore a tenant ejected under S. 45 institutes a suit for possession on the ground that he had acquired title by adverse possession, such suit is cognizable by a Revenue Court and not by a Civil Court. (*Bhide, J.*)
1938 Lah. 82.

55 and 56—
—Sufficiency—
Essentials.

A notice of an intention to sell at a public auction cannot be sufficient or effective, unless it specifies the time and place of the proposed public auction, the
other
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for sale at the public auction. (*Sir Lancelot Sanderson.*) SECRETARY OF STATE *v.* SUNDERJI SHIVJI & CO. **172 I.C. 439 = 42 C.W.N. 225 = 1938 O.W.N 15 = A.I.R. 1938 P.C. 12 = (1938) 1 M.L.J. 83 (P.C.).**

——Ss. 55 and 56—*"Public auction"—Meaning.*

The words "public auction" in Ss. 55 and 56 must bear the meaning which is ordinarily given to them in the English language. The words mean a public sale at which each bidder offers an increase upon the price

not only to the Railway Company but also to the owner of the goods, the competition being calculated to produce the highest price. Where notice of the intended sale of coal was given by Railway Company by proclamation and notice on the board at the station and some offers were sent to the station master by
him to the superior officer who
the offer which was in fact the

Held, there was no
meaning of the words: there

was no opportunity for competitive bidding: in fact, what was done bore no resemblance to a "public auction". The Railway Company did not sell the coal in the manner prescribed by the sections, and therefore could not rely on the protection given by the Railways Act. (*Sir Lancelot Sanderson.*) SECRETARY OF STATE *v.* SUNDERJI SHIVJI AND CO. **172 I.C. 439= 1938 O.W.N. 15=42 C.W.N. 225= A.I.R. 1938 P.C. 12=(1938) 1 M.L.J. 83 (P.C.).**

RANGOON CITY MUNICIPAL ACT (VI OF 1922), S. 13 (2)—*Applicability to Mayor—Notice of censure motion against Mayor—Mayor disallowing resolution—Suit by mover under S. 45, Specific Relief Act—If lies.*

Section 13 (2), Rangoon City Municipal Act, can be applied in the case of a Mayor as in the case of any other councillor. A member of the Rangoon Corporation wanted to move a certain resolution which the Mayor said was against the policy of the Corporation. The member objected to the remark of the Mayor and gave notice of a resolution of non-confidence against him. This resolution was ruled out of order by the Mayor. Hence, the member filed a suit under S. 45, Specific Relief Act, making it incumbent upon the Mayor to allow the moving of the censure resolution.

Held, that as the member had another adequate remedy under S. 13 (2), Rangoon City Municipal Act, the remedy under S. 45, Specific Relief Act, was not available. (*Mosely and Shaw, JJ.*) ALAN MURRAY *v.* L. H. WELLINGTON. **A.I.R. 1938 Rang. 18.**

——**Sch. I, R. 6**—*"Substantive proposition"—Vote of non-confidence.*

Obiter.—The words "substantive proposition" connote the idea of something put forward on which the council can, if it desires, take subsequent action. A vote of non-confidence is a mere resolution of protest, which by itself, admittedly, need not necessarily be effective. Therefore a vote of non-confidence is not a substantive proposition. (*Mosely and Shaw, JJ.*) ALAN MURRAY *v.* L. H. WELLINGTON. **A.I.R. 1938 Rang. 18.**

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (b)—Applicability—Award in arbitration without intervention of Court—Registration—Necessity. *See* C. P. CODE, SCH. II, PARAS. 20 AND 21. **1937 A.W.R. 1218=1937 A.L.J. 1303.**

——**S. 17 (1) (b)**—*Applicability—"Declare"—Arbitration without intervention of Court—Dispute as to title to immovable property—Award declaring rights of parties—Registration—Necessity.*

An award made in an arbitration without the intervention of the Court, which decides the question of ownership of immovable property is a document which falls under S. 17 (1) (b) of the Registration Act, as it declares who are the owners of the property concerned; and when the value of such property is Rs. 100 and upwards, it must be registered The award in question not merely recites, but in itself declares or creates a title inasmuch as it declares the rights of the respective parties to the arbitration in the property. (*Leach, C. J.*) VARISAIMUTHU CHETTIAR *v.* SAMI MUTHU CHETTIAR. **1937 M.W.N. 1183= A.I.R. 1938 Mad. 55.**

——**S. 17 (2) (vi)**—*Unregistered compromise decree—Validity before 1929—Admissibility in evidence.*

An unregistered compromise decree could under the provisions of S. 17 (2) (*vi*) of the old Registration Act, before its amendment in 1929, be valid and be received in evidence of its contents. (*Venkatasubba Rao and Newsam, JJ.*) AMBU NAIR *v.* UTHA AMMA. **1937 M.W.N. 1254.**

——**S. 25**—*Document already four months old registered by Sub-Registrar—Registration, if valid.*

A Sub-Registrar has no power to extend the time beyond the standard four months for the registration of document and he has no jurisdiction to proceed with the registration of a document which is already four months old. Where therefore a document already four months old is registered by a Sub-Registrar, the registration is bad. (*Baguley and Sharpe, JJ.*) DAW NYI MA *v.* MA E TIN. **A.I.R. 1938 Rang. 53.**

——**S. 28**—*Fraud on registration law—Burden of proof.*

The question whether the parties to a document intended to commit a fraud on the law of registration is a question of fact, and like every other question of fact, must be pleaded and proved. The party alleging such fraud must prove that the parties intended to include an item of property fraudulently in the document in order to give jurisdiction to the particular registering officer before whom it was presented, and that there was no intention in fact that the document should have any binding effect on that item of property. (*Bajpai and Hamilton, JJ.*) SULTAN AHMAD KHAN *v.* SIRAJUL HAQUE. **1938 A.L.J. 23.**

——**S. 28**—*Fraud on registration law—What amounts to—Jurisdiction of Sub-Registrar—Determination - Material time—Inclusion of property really existing and intended to be transferred and situate within jurisdiction—If sufficient compliance with section—Document subsequently becoming inoperative as regards that property by act of Sub-Registrar—If invalidates original presentation.*

Where a property included in a document has an existence in fact, and the document relates to that property, transferring it from the exclusive ownership of one party to the joint ownership of the family, and the property is also capable of effective enjoyment, it cannot be said that the inclusion of the property is a fraud on the law of registration. There is no flaw in the act of presentation of the document to the Sub-Registrar within whose jurisdiction that property is situate. An inquiry as to whether the Sub-Registror had jurisdiction to register a document should relate to the time when the document was presented before him under S. 28 of the Registration Act. If the parties intended that the document should relate to a property lying within the territorial jurisdiction of the particular Sub-Registrar, S. 28 is complied with; and if later on, by operation of law, a fact contrary to the intention of parties is obtained because of non-registration, for any reason whatever, that matter is foreign and should not affect the original enquiry. The fact that because of the Sub-Registrar's refusal, the deed does not perhaps operate on the particular item of property has no effect on the original question of his jurisdiction. It is only the act of the parties that has to be considered, and if the parties themselves intended to perpetrate a fraud on the law of registration, the matter then assumes a different complexion; but if on account of any action of the Sub-Registrar certain consequences flow, the act of presentation itself would not become invalid. (*Bajpai and Hamilton, JJ.*) SULTAN AHMAD KHAN *v.* SIRAJUL HAQUE. **1938 A.L.J. 23.**

——**S. 32**—*Minor claiming under document—Right to present it for registration.*

S. 32 provides that a document may be presented for registration by a person claiming under it. A minor so claiming is entitled to present it for registration. (*Lort Williams, J.*) HEMANTA KUMAR DAS ALIANTZ INSURANCE COMPANY. **A.I.R. 1938 Cal. 120**

——S. 33—*Power-of-attorney—Validity—Conditions—Execution and authentication.*

resides. (*Bajpai and Hamilton, JJ.*) AHMAD KHAN v. SIRAJUL HAQUE. 1938 A.L.J. 23.

——S. 35—*Partial registration of document—Permissibility.*

A document may, under S be registered as against pe about whom no defect appea be refused as against persons about whom there is some defect. (*Bajpai and Hamilton, JJ.*) SULTAN AHMAD KHAN v. SIRAJUL HAQUE. 1938 A.L.J. 23.

——S. 35—*Scope—Conditions for registration—Refusal of registration—Grounds for—Wrong refusal—If can be ignored—Document executed by A for himself and as general attorney of B—Admission of execution of by A—Sufficiency—Registrar refusing registration on behalf of B owing to defective power-of-attorney—Effect—Deed—If deemed registered on behalf of B also.*

S. 35 of the Registration Act only requires that the document should be admitted to have bee the person by whom it purports to be exe registration of it can be refused as only if he denies the execution. Where executed by *A* on his own behalf and attorney of *B*, *A*'s admission of its exec enough so far as he is himself concerned is concerned. It is not necessary for him to produce any power-of-attorney on behalf of *B*, nor, is it necessary for the registering officer to look at any power-of-attorney for registering that document. But if the registering officer for any reason refuses registration as against *B* on the ground of invalidity of a power of attorney, and the endorsement also says that the document was not registered as against *B*, the document cannot be regarded of *B* as well on the tion was wrong. registered only on and not in his (*Bajpai and Ham* v. SIRAJUL HAQU

——S. 49—Scop to prove title in ACT, S. 91. 18 Pat.L.T. 1012.

RELIGIOUS ENDOWMENT—*Temple—Public or private—Tests to determine—Proof of user by public and of separate endowment in trust for deity—Presumption—User by public—If to be presumed to be as of right—Instances of exclusion due to personal ill-will—Effect of.*

The situation of a temple and the facilities for

want of a regular access to the temple cannot be taken to be of much use in arriving at a conclusion as to the

for user by the public (unless the contrary is established)—particularly when the character of the temple, its various parts of the installed there are lly public temple.

stances suggesting clearly that the user must hvae been permissive or that the authorities in charge of the temple have exercised such arbitrary power of exclusion as can private character of the institu- e of exclusion which is clearly the will can scarcely be regarded as indicating the exercise of a general right of exclusion at the choice of the uralan or person in charge of the temple (*Varadachariar and Burn, JJ.*) NARAYANAN NAMBUDRIPAD v. BOARD OF COMMISSIONERS FOR THE HINDU RELIGIOUS ENDOWMENTS, MADRAS. 1937 M.W.N. 1171.

RIPARIAN RIGHTS—Meaning of—Public river—Government as upper owner utilising water for filling tank elsewhere and not for riparian tenement—Putting up dam across river for diverting water to tank—Nature of right—If riparian right or easement right—Acquisition—Prescription—Excessive user—Actionabi- *See* EASEMENT— 46 L.W. 862.

1878), S. 30—*Im- ice notified in cur- Delivery f.o.r. made Price to distributor*

The appellants, importers into India of cars issued from time to time a price list and the terms of business between them and the distributors of such cars, were that the retail price to be charged by the distributor to the public was that stated in the price list current at the time of arrival of the vehicles in India and the price payable by the distributor to the appellants was the same price less a certain discount. The distributor had Delivery was ve in the case t of Bombay td., to whom e in Bombay. s in all cases ame was true and the distri-

Held, that the appellants' price to their distributors was a wholesale price within the meaning of S. 30. It was a cash price. The cars were invoiced a few days before arrival of the ship and the price became fixed then and not before. The sales were therefore sales at the time and place of importation in every reasonable sense.

Held, further, that the overhead charges had no under Cl. (*a*) of S. 30. OTOR COMPANY, LTD., R. 1938 P.C. 15 (P.C.).

like kind and quality, ice for goods themselves under assessment at time and place of importation—Cl. (a), if inapplicable for want of sales of other goods.

SEA CUSTOMS ACT (1878), S. 30.

the bill of entry there will not be an actual price relating to the goods themselves and complying with the requirements of Cl. (a). As a rule, therefore, the price appropriate to the goods under assessment will under the clause be deduced, if at all, from actual prices relating to other goods of like kind and quality. But if there is an actual price for the goods themselves at the time and place of importation and if it is a "wholesale cash price less trade discount", the clause is not inapplicable for want of sales of other goods. The goods under assessment may under Cl. (a) be considered as members of their own class even although at the time and place of importation there are no other members and the price obtained for them may correctly represent the price obtainable for goods of the like kind and quality at the time and place of importation. (*Sir George Rankin.*) FORD MOTOR COMPANY, LTD., *v.* SECRETARY OF STATE. **A.I.R. 1938 P.C. 15 (P.C.).**

——**S. 30 (a)**—*Price, if can be arrived on basis of actual price.*

The word 'ascertainable' in Cl. (*b*) of S. 30 imports more than could be satisfied by the result of a mere estimate. On the other hand the language of the section—"or are capable of being sold"—does not exclude all possibility of arriving at the price defined by Cl. (a) upon the basis of an actual price, though some adjustment may be needed to eliminate the difference *e. g.*, between cash and a month's credit. (*Ser George Rankin.*) FORD MOTOR COMPANY LTD., *v.* SECRETARY OF STATE. **A.I.R. 1938 P.C. 15 (P.C.).**

SPECIFIC RELIEF ACT (I OF 1877), Ss. 14, 15 and 16—*Relative scope and applicability of—Prior and later agreements to sell—Single item common to both—Reliefs in respect of—Considerations.*

Where *A* agreed to sell one of his plots of land to *B* and on a later date agreed to sell all his four plots of land to *C*, including the plot agreed to be sold to *B*, and where, after *B* had sued on his agreement and obtained a consent decree for sale of the item concerned, *C* filed a suit for specific performance of the agreement in his favour.

Held, that the question whether the plaintiff was entitled to relief depended on the application of Ss. 14 to 17 of Specific Relief Act which "constitute a complete code within the terms of which relief of the character in question must be brought, if it is to be granted at all"; that by reason of the prior agreement in favour of *B*, *A* was as much unable to carry out the whole of his part of the original agreement within the meaning of Ss. 14 and 15 of Specific Relief Act, as if he had no legal title to the common plot in question; that S. 14 did not apply as it could not be said that the plot in question bears only a small proportion to the whole; that S. 15 also did not apply as the plaintiff had expressed his unwillingness to pay the purchase price for the remaining plots, on payment of which alone the plaintiff can get specific performance; that S. 16 cannot be said to apply, for there was only one contract to sell, and in the absence of evidence to the contrary, the presumption is that it is an entire contract intended to be dealt with as a whole and not piecemeal. (*Broomfield and Macklin, JJ.*) HIRALAL *v.* JANARDAN. **39 Bom.L.R. 1299.**

——**S. 22**—*Delay in suing—If bar to relief.*

Mere delay in suing may not be sufficient to deprive a plaintiff of the relief of specific performance; but where a plaintiff has taken no steps to prevent the other party from entering into a contract with a third party in respect of the subject-matter of the contract, and the third party expends money, *e.g.*, by improving the property and discharging an encumbrance on the property in respect of which a contract of sale is entered into, if the plaintiff institutes a suit for specific performance just when the period of limitation is about to expire, no decree for specific performance can be granted, because that would be doing an injustice to the third party. (*Leach, C.J. and Madhavan Nair, J.*) SUBBARAYADU *v.* TATAYYA. **1937 M.W.N. 1158.**

——**S. 22**—*Discretion—Plaintiff setting up false case—Right to specific relief.*

The relief of specific performance is an equitable relief lying in the discretion of Court; and a plaintiff who sets up a false case cannot expect a Court of equity to grant him such relief. (*Leach, C.J. and Madhavan Nair, J.*) SUBBARAYADU *v.* TATAYYA. **1937 M.W.N. 1158.**

——**S. 42**—*Association and members—Declaration of members' right to inspect records—If can be granted.*

In a suit to restrain the defendant Association from preventing the plaintiffs who are its members from having access to the proceedings books for the purpose of perusal and inspection and from preventing the plaintiffs from making extracts from these books, it is doubtful if any declaration of the right of the plaintiffs to inspect and to take copies could be obtained. A declaration, if at all possible, could only be obtained if a case for a mandatory injunction is established. (*Remfry, J.*) RAMESWAR LAL *v.* CALCUTTA WHEAT AND SEED ASSOCIATION, LTD. **42 C.W.N. 161 = A.I.R. 1938 Cal. 89.**

——**S. 42**—Scope—Consequential relief not available to plaintiff—Declaratory decree—If to be granted. *See* BENGAL ESTATES PARTITION ACT, SS. 22 AND 25. **18 Pat.L.T. 843.**

STAMP ACT (II OF 1899) S. 2 (15)—*Decree for partition—If an 'instrument of partition'.*

A decree for a partition is an instrument of partition (*vide*, S. 2 (15) of the Stamp Act) and as such has got to be engrossed on stamp paper. (*Tekchand, J.*) RAM NARAIN KAUL *v.* BISHAN RANI. **40 P.L.R. 2.**

——**S. 35**—*Entry as to mortgage made in ordinary bahi not duly stamped—Secondary evidence of such entry—Admissibility.*

Where the entry as to a mortgage is made in an ordinary bahi and is not duly stamped though required by the Stamp Act, the secondary evidence of the contents of the entry is wholly inadmissible. (*Bhide, J.*) LADHA RAM *v.* HARI CHAND. **A.I.R. 1938 Lah. 90.**

——**S. 60 (1)**—*Abatement—Death of party—Effect.*

A reference made under S. 60 (1) Stamp Act, does not abate or become incompetent by reason of the death of the party who has executed the document which has given rise to the reference. (*Courtney Terrell, C.J., James and Manohar Lall, JJ.*) KHETRAMONI DEBYA, *In the matter of.* **18 Pat.L.T. 933 = A.I.R. 1938 Pat. 33 (S.B.).**

——**Sch. I, Arts. 33 and 55**—*Applicability—Hindu widow in possession of property allotted by decree in partition suit with interest similar to that of a life-estate holder—Deed surrendering interest to sons having right of succession on her death—Transfer of possession—Stamp duty—Gift deed or release.*

Art. 55 of the Stamp Act governs instruments whereby any person may renounce a claim upon any other person or against any specified property; but a document in which the executant is not renouncing any claim upon property but is transferring possession of it does not fall under Art. 55. A Hindu widow governed by the Dhayabhaga School of Hindu Law was allotted by a decree of Court in a partition suit certain properties with rights in the said properties similar to those of a Hindu widow in the estate of her deceased husband and was in possession of the properties in virtue of the

STAMP ACT (1899), Sch. I, Art. 55.

decree and was in enjoyment of the usufruct thereof.

Held (1) that the deed was an instrument of gift governed by Art. 33 of the 1st schedule to the Stamp Act and was not a release under Art. 55, (2) that stamp duty was payable on the value of the properties conveyed as described in the deed, the value to be stated in the deed being not the capital value of the property conveyed, but the present value of the life interest of the widow, whatever that might have been at the time of the execution of the deed. (*Courtney Terrell, C.J. James and Manohar Lall, JJ.*) KHETRAMONI DEBYA, *In the matter of*. 18 Pat.L.T. 933= A.I.R. 1938 Pat. 33 (S.B.).

——Sch. I, Art. 55—Applicability—Hindu widow in possession of property allotted to her by decree of Court in partition suit—Rights of widow similar to those of widow having life estate—Deed surrendering interest and transferring possessions to sons having right of succession on her death—Stamp duty—If release or gift. *See* STAMP ACT, ARTS. 33 AND 55. 18 Pat L.T. 933=A.I.R. 1938 Pat. 33 (S.B.).

SUCCESSION ACT (XXXIX OF 1925), S. 214—*Succession certificate—If can be produced in course of suit.*

S. 214 prohibits a Court from passing a decree before a succession certificate is produced, but there is nothing to stop the plaintiffs from prosecuting the suit and producing a succession certificate when called upon to do so in the course of the suit. The Court therefore should give opportunity to the plaintiff to produce a succession certificate. (*Almond, J.C. and Mir Ahmad, A.J.C.*) BALDEV *v.* PEOPLES BANK OF NORTHERN INDIA LTD. A.I.R. 1938 Pesh. 1.

——S. 291—*Security bond—If can be demanded where deceased is a Christian.*

Under S. 291 of the Succession Act, the District Judge can demand a bond from a person to whom probate is granted only when the deceased belonged to one of the classes enumerated therein. A Christian is not

probate—If becomes invalid on its subsequent revocation

There is nothing in the Probate and Administration Act (now Succession Act) to suggest that a grant either of probate or letters of administr... revocation, void *ab initio*. A mortgag... administrator on the grant of such pr... come invalid merely on account of the... cation of the probate by the Court. ... *Sharpe, J.*) A. B. NEOGI *v.* B. B. N... A.I...

——S 299—*Appeal—Granting of ... on security being furnished.*

——S. 372—*Succession certificate—If necessary in respect of interest accrued after death o...*

The interest on a debt forms part of ... person succeeding to the deceased is ... succession certificate for the interest ... death of the deceased. (*Almond, J.C.* ...

TORT.

A.J.C.) BALDEV *v.* PEOPLES BANK OF NORTHERN ... 1938 Pesh. 1.

... 1887), S. 11—*res judicata*— ...ing in Munsif's ... Judge's Court—Plea of *res judicata*—Plea by plaintiff that former suit not triable by Munsif—If open. *See* C. P. CODE, S. 11. 1937 M.W.N. 1292.

SURETY—Discharge of—Surety for judgment-debtor—Time granted to judgment-debtor by Court—If exonerates surety from liability. *See* C. P. CODE S. 55 (4) 1937 M.W.N. 1165.

——Liability—Letter of guarantee—Construction—Undertaking to pay debt "after attempts have been made to realise same from the principal debtor"—Liability of surety—When accrues—Creditor demanding debtor for payment—Right to proceed against surety. *See* CONTRACT ACT, S. 128. 1937 A.W.R. 1194.

——*Security bond—Form—Enforcement—Procedure—Right of suit—C. P. Code, S. 145.*

A security bond may be, and usually is, given to the Court. Such bonds, though given to the Court, being really for the benefit of the creditor, may be enforced at his instance by the ordinary process of the Court. S. 145 of the C P. Code, contains express provision for enforcement of such bonds by way of execution of the decree or order against the surety. The remedy under S. 145 is not exclusive, and does not preclude a regular suit on the security-bond to enforce the security. But where the bond is to the Court, it appears to be doubtful if the Court could sue upon it, or could even assign it for somebody else to sue upon it. (*Henderson and Biswas, JJ.*) MALDA DT. BOARD *v.* CHANDRA KETU NARAYAN SINGH. I.L.R. (1937) 2 Cal. 698= 66 C.L.J. 373.

TORT—Nuisance—Obstruction to flow of water caused by accumulation of silt over dam across public river put up by upper riparian proprietor—Nuisance—Actionability—Right of lower owner to abatement of. *See* EASEMENT—WATER RIGHTS. 46 L.W. 862.

——*Vicarious liability—Negligence of doctor—Servants at ports of call—Liability of ship-owner.*

A ship owner must be presumed, in the absence of ... ons of ... ll, and ... crew ... *and* ... *v.* NOOR AHMODE. 42 C.W.N. 179= A.I.R. 1938 Cal. 104.

——*Vicarious liability—Negligence of fellow servant*

in this country as one based on principle of justice, ... iscience. In order to make that ... person who is sought to be ... caused by the negligence of his ... the injured man and the man doing the injury were engaged in common undertaking.

in any common employment at that time. Where the duty of the master of a ship was to see that everything in the ship was going on satisfactorily, and the duty of the chief steward was to look after the ailing crew on board the ship, and the duty of the *laskar* was washing, painting and keeping look out when necessary,

Held, that the different classes of servants, the *laskars*, on the one hand, and the chief steward and master on the other were engaged in different departments of duty so absolutely unconnected with each other as to make them not engaged in a common employment, and that consequently the owner of the ship cannot on the ground of common employment plead non-liability to an injury committed upon the *laskar* by the carelessness or negligence of the chief Steward and Master of the ship. (*Guha and Mitter, JJ.*) T. & J. BROCKLEBANK, LTD. *v.* NOOR AHMODE. **42 C.W.N. 179 = A.I.R. 1938 Cal. 104.**

——*Vicarious liability—Negligence of Master of Ship and its chief steward—Liability of ship-owner.*

Where the master of the ship whose duty was to see that everything in the ship was going on satisfactorily and the chief steward whose duty was to look after the ailing crew on board the ship, were careless and negligent in the matter of taking reasonable and proper care of a deck *laskar* in his illness with the result that the latter was placed in a position of risk of life and was incapacitated from doing work for the rest of his life, the owner of the ship is liable. (*Guha and Mitter, JJ.*) T. & J. BROCKLEBANK, LTD. *v.* NOOR AHMODE. **42 C.W.N. 179 = A.I.R. 1938 Cal. 104.**

TRANSFER PROPERTY ACT (IV OF 1882), S. 3 —*Attestation—Knowledge of contents—Presumption.*

An attesting witness cannot be presumed, from the mere fact of attestation, to be aware of the contents of the document, much less of a mere recital of boundaries. A.I.R. 1933 Lah. 551, Rel. on. (*Bhide, J.*) CHUNI SHAH *v.* AMAR SINGH. **A.I.R. 1938 Lah. 97.**

——S 6—Spes successionis—*Release by Hindu reversioner of his interest in favour of widow—If binding on him after death of widow.*

Where on the death of a Hindu leaving a widow and a daughter, the widow succeeded as heir and the daughter being the next reversioner relinquished her right in respect of certain items of property, in favour of the widow and also executed a formal deed of release.

Held, that the transaction at its inception was nothing else but a relinquishment by the daughter of her reversionary interest in the properties, a mere *spes successionis*, in favour of the widow, and comes within the mischief of S. 6, T. P. Act, and is therefore invalid and not binding on the daughter after the death of the widow. (*Broomfield and Macklin, JJ.*) KARUSINGA *v.* NARSINHA. **39 Bom.L.R. 1287.**

——**Ss. 8 and 122**—*Scope and effect of—Gift by adopted son in favour of Hindu widow—Absence of words of limitation—Effect of—Estate conferred.*

Where a gift deed is executed in favour of a Hindu widow by an adopted son, giving her immovable property belonging to him and in his possession, to be enjoyed by her perpetually and as she liked, the combined operation of S. 122 of the T. P. Act, read with S. 8 of the Act, which would apply to Hindus (after the amendment of the Act in 1929), would give rise to the presumption that the deed confers on the donee the whole of the estate which the donor is capable of transferring. Even in the case of a deed of gift executed before 1929, *i.e.*, before the amendment of the Act, there being no "rule of Hindu Law" requiring a transfer in favour of a woman to be treated as a limited transfer, or qualified transfer, the transfer by way of gift must be

treated as conferring upon the donee the whole of the interest which the transferor is capable of passing at the date of the deed and hence the donee would take an absolute estate and not merely a qualified or limited estate. (*Wassoodew and Thakor, JJ.*) HILALSING *v.* UDESING. **39 Bom.L.R. 1217.**

——S. 41—*Applicability—Implied consent—What amounts to—Inference from circumstances and conduct—Devisee under will not taking steps to recover possession of properties—Keeping silent for several years with knowledge of exercise of acts of ownership by another—Right to recover properties from transferees from ostensible owner.*

The 1st defendant who was taken in adoption by the senior widow of a Hindu with the consent and concurrence of the junior widow gave the latter some immoveable properties absolutely under a deed of gift to be enjoyed by her perpetually and happily and as she liked. She died about five years later leaving a will under which she bequeathed those properties to her paternal uncle, the plaintiff in the suit. After the death of the widow the 1st defendant got his name entered in the record-of-rights, took possession of the properties and enjoyed the rents and profits and paid the assessment, and also executed two sale-deeds in favour of defendants 2 and 3 in respect of portions of the properties which were gifted by him previously to the widow. The defendants 2 and 3 purchased the properties after making due inquiries by examining the record-of-rights, and they had no reason to suspect that anybody but defendant No. 1 was the real owner and they acted in good faith. The plaintiff who got the will soon after the death of the widow did nothing at or after the revenue inquiry which was conducted after the issue of general notices; he also sat silent after the sale-deeds were executed by the 1st defendant and gave no notice to either of the defendants 2 and 3 or even to the 1st defendant. It was not shown or even alleged that the 1st defendant himself was aware of the will. Nearly four years after the death of the widow and two years after the sale-deeds plaintiff sued for possession of the lands devised to him by the widow under her will.

Held, (1) that the acts exercised by the 1st defendant were indubitably acts of ostensible ownership, and though there was no evidence of any express consent on the part of the plaintiff, to such acts, since the plaintiff sat silent throughout in spite of his rights under the will and allowed the 1st defendant to act as the ostensible owner, it must be inferred that the 1st defendant remained the ostensible owner of the properties by the plaintiff's implied consent; and (2) that S. 41 of the T. P. Act. applied to the case and the plaintiff could not therefore be held entitled to recover possession of the properties transferred to defendants 2 and 3 who were *bona fide* purchasers for value, but that he could only recover the properties in the possession of the 1st defendant. (*Wassoodew and Thakor, JJ.*) HILALSING *v.* UDESINGH. **39 Bom.L.R. 1217.**

——S. 41—*Applicability — Person consenting to transfer having no knowledge of his title.*

Consent mentioned in S. 41 includes a consent which is based on a mistake. Hence S. 41 applies even to a case where the person consenting to the transfer has no knowledge of his title to the property at the time of giving his consent. (*Coldstream and Din Mohammad, JJ.*) SHORI LAL *v.* DAMODAR DAS. **A.I.R. 1938 Lah. 86.**

——S. 41—"*Reasonable care*" — *Transferee—If bound to search register for more than 12 years.*

To constitute "reasonable care" on the part of the transferee from the ostensible owner under S. 41, T. P.

Act, it is not necessary that he should have searched [illegible]

required is only for 12 years. (*Bennet, J.*) MAZHAR HASAN *v.* MUKHTAR HASAN.

1937 A.L.J. 1356 (2)=1938 A.W.R. 4 (H.C.).

——S. 52—*Applicability—Application for leave to sue* in forma pauperis *in respect of certain lands dismissed—Effect on transfer.*

According to doctrine of *lis pendens*, any dealings with the property in suit by a party thereto cannot affect the rights of any other party 'under the decree or order which might be made therein'. Where a person makes an application for leave to sue *in forma pauperis* in respect of certain property and [illegible] that application, no rights with respe[illegible] arise in his favour out of this orde[illegible] does not apply. (*Bose and Puranik* [illegible] BAI *v.* SHRI DEO RADHA BALLABHJI.

A.I.R. 1938 Nag. 30.

——S. 52—Lis pendens—*Applicability—Pendency of suit in a Court not having jurisdiction.*

The doctrine of *lis pendens* cannot apply where the suit concerned was pending in a Court which had no jurisdiction to entertain it at all. (*Broomfield and Macklin, JJ.*) KARUSINGA *v.* NARSINHA.

39 Bom L.R. 1287.

——S. 53—*Fraudulent transfer by insolvent in favour of his wife more than two years before his adjudication—B purchasing property in execution of mortgage decree against her—Application by Official Receiver to avoid transfer—Transfer in favour of* B, *if could be set aside.*

A Mahomedan transferred certain properties to his wife in lieu of dower, but more than two years before his adjudication as insolvent. The property was mortgaged by the wife and in execution of the mortgage decree it was purchased by *B*. It was found that the transfer in favour of the wife was fraudulent. The Official Receiver thereafter applied to avoid the transfer.

Held, that the transfer in favour of the wife was voidable and not void and was liable to be set aside under S. 53, but only without impairing the rights of a *bona fide* transferee for valuable consideration. As the rights of *B* had come into existence before the application for avoiding the transfer in favour of the wife was made by the Receiver, the transfer in his favour must stand. (*Bhide, J.*) BASHARAT ALI SHAH *v.* RAM RATTAN (OFFICIAL RECEIVER).

A.I.R. 1938 Lah. 73.

——S. 53-A—*Applicability—Necessity for written agreement.*

A contract or an agreement in writing or a written agreement is a *sine qua non* under S. 53-A. Such written agreement may of course be the embodiment of what has already been orally agreed upon and may also refer to payment by the purchaser and receipt by the vendor of part of the p[illegible] essentially be a written agr[illegible] can be held to be an agre[illegible] will not, by the mere fact [illegible] sary to constitute the transfer can be ascertained with reasonable certainty, be sufficient to satisfy the require[illegible]

J.) MAUNG PO KWE *v.* MAUNG PO SEIN.

A.I.R. 1938 Rang. 49.

——S. 54—*Construction—'Intangible thing'—Sale-deed in respect of property valued at Rs. 99 and which is in possession of tenants—Registration—Necessity*

Where property in possession of tenants is transferred by a deed of sale for Rs. 99, it requires registration, as all that the vendor could actually transfer was only a right to possession or right to receive rent which is included in the expression 'intangible thing' in S. 54, T. P. Act. (*Skemp, J.*) SAHABUDDIN *v.* KALANDAR.

40 P.L.R. 24.

——S. 58—*Mortgagee aware of disputed and doubtful title of mortgagor—Transaction, if mortgage.*

Where the mortgagee knows already that the mortgagor is not in possession of the mortgaged properties and that he has only a doubtful and disputed title to [illegible] spite of such knowledge he takes a [illegible]nsaction does not amount to a mort[illegible]efinition of S. 58. (*Lort Williams J.*) GAJANAND AGARWALLA *v.* RANI PRAYAG KUMARI DEBI.

A.I.R. 1938 Cal. 48.

——S. 58 (c)—*Construction of deed—Mortgage or sale.*

The distinction between a sale-deed with a condition of re purchase and a mortgage by conditional sale is one of intention to be gathered from the deed itself and the extrinsic evidence of surrounding circumstances. The fact that there was no bargaining as to the amount of consideration and the price was inadequate is more in favour of the deed being a mortgage and not a sale than *vice versa*. Where a deed which purported to be a deed of sale contained a clause to the following effect: "If I (the executant) pay the sale price to the vendees within a period of 8 years the vendees shall without any excuse return the property sold and after 8 years I shall have no right left for the return of the property."

Held, that the deed was a mortgage by conditional sale (*Srivastava, C. J. and Hamilton, J.*) FAZAL AHMAD *v.* AFAQUL RAHMAN.

1937 O.W.N. 1236=1938 O.L.R. 10.

——S. 68—*Mortgaged property not in possession of mortgagor—Suit pending in respect of it—Mortgagee aware of such circumstances—Mortgagor found not entitled to such property—Suit by mortgagee before expiry of stipulated period for mortgage-money—If lies.*

The mortgagor executed a mortgage in respect of properties of which he was not in posseseion but to which he claimed to be entitled. A suit was pending against him in respect of such properties. The mortgagee was aware of all this. It was stipulated in the mortgage deed that the mortgage amount should be repayable within a year from the date of the final adjudication of the pending suit. The result of the suit was that the mortgagor was declared not entitled to any of the mortgaged preperties, but the decree conferred on him tenancy rights over part of them. Later on however the parties came to a compromise under which the mortgagor gave up those rights and obtained more [illegible] [illegible]it on the mortgage the mort[illegible] [illegible]tled to sue for the mortgage-[illegible] [illegible]ut waiting for the stipulated [illegible]

Held, that inasmuch as the mortgagee well knew that the mortgagor was not in possession of the properties [illegible] more than [illegible]

TRANSFER OF PROPERTY ACT (1882), S. 78

default of the mortgagor depriving the mortgagee of any part of the mortgage security within the meaning of S. 68 (1) (*c*). (*Lort Williams, J.*) GAJANAND AGARWALLA *v.* RANI PRAYAG KUMARI DEBI.
A.I.R. 1938 Cal. 48.

———S. 78—*Priority—Prior mortgagee not in possession of title-deeds—Subsequent mortgagee lending* bona fide *without notice of prior mortgage—Omission to call for title deeds—If ground for postponing him and giving priority to prior mortgagee.*

The omission on the part of a subsequent mortgagee who lends money *bona fide* in ignorance of the claim of a prior mortgagee, to call for the title-deeds is not by itself sufficient to postpone his claim to that of the prior mortgagee, when the latter has not the custody of the title-deeds. It is only in favour of the person in possession of the title-deeds that the doctrine of constructive notice can be invoked on the ground of the omission of the other party to call for the title-deeds. (*Leach, C.J. and Varadachariar, J.*) OONAMALAI AMMAL *v.* NARASIMHA RAO NAIDU. **1937 M.W.N. 1262.**

———(as amended), S. 92—*If retrospective.*

Per *N. J. Wadia, J.*—S. 92 of the T. P Act (as amended) has retrospective effect. (*Broomfield and Wadia, JJ.*) ISAP *v.* UMARJI. **39 Bom.L.R. 1309.**

———(as amended), S 92—*Principles underlying—Applicability as a rule of equity—Circumstances.*

The principles underlying S. 92 of the Transfer of Property Act (as amended) ought to be taken as a guide for determining when there is a conflict of authority, what equitable rules with reference to subrogation should be adopted in cases arising prior to the amendment. (*Broomfield and Wadia, JJ.*) ISAP *v.* UMARJI.
39 Bom.L.R. 1309.

———S. 101—Mortgage, if extinguished—Mortgaged properties under attachment against the owner in execution of money decree—Mortgagee purchasing them during the continuance of attachment—Effect. *See* C. P. CODE, S. 64. **1938 M.W.N. 60.**

———Ss. 111 (d) and 2 (c)—*Tenures created before passing of Act—Acquisition of such tenures—If can merge them in superior right.*

Where tenures are created before the passing of the Transfer of Property Act, the acquisition of such tenures by holder of superior right cannot merge them in the superior right under the common law of this country before the Transfer of Property Act was passed. S. 111 (*d*) therefore cannot be applied to such tenures. (*Nasim Ali and Remfry, JJ*) KUMAR CHANDRA SINGH *v.* SARAT CHANDRA GOSWAMI. **A.I.R.1938 Cal. 128.**

———S. 130—*Form of transfer—Money in deposit in bank in name of party—Agreement in writing between him and another—Intention that thereafter one part of it should belong to one of them and the other part tothe other—Effect—If amounts to transfer of actionable claim.*

Where it is agreed to between the parties to a document that one portion of certain money lying in deposit in a bank in the name of one of those parties should thenceforward belong to one of them and the other portion to the other, the document can be viewed as an assignment of an actionable claim within the meaning of S. 130, T. P. Act. That section does not require that such an assignment should be in any particular form or that there should be consideration for it. No particular words are necessary to effect the transfer of debt or any beneficial interest in movable property, if the intention of transfer is clear from the language used. If the intention is fairly clear that the money in deposit in the bank should be split up into two parts, one of which is to go to one of the parties and the other to the other party, that operates as an assignment of the entire debt in two separate portions to two separate individuals. (*Pandrang Row and Venkataramana Rao, JJ.*) RAMASWAMI CHETTIAR *v.* MANIKKAM CHETTIAR.
1937 M.W.N. 1249=(1938)1 M.L.J. 56.

TRUST—*Appointment of trustee—Appointment of himself as trustee by person having right of appointment—Legality.*

The appointment of himself as trustee by a person having the right of appointment is not *per se* illegal. (*Panckridge, J.*) PURAN CHAND *v.* ADVOCATE-GENERAL OF BENGAL. **42 C.W.N. 201.**

———*Trustee—Powers of—Permanent lease of waste lands—Validity—Presumption as to validity of ancient transactions — Applicability—Discretion of Court—Considerations.*

Courts have a discretion in drawing presumptions as to the propriety of transactions which took place many years ago, even when that transaction is a permanent lease by a trustee of waste lands belonging to the trust. The presumption has to be applied not with reference to the number of years which have elapsed before the action is brought but with reference to the death of persons who could have given useful information as to the circumstances under which the transaction took place. In a case where there is nobody who could give such evidence,the courts may presume that a transaction was in all probability entered into for a justifiable cause, especially when that appears to be in the interests of the trust. Further it is not an absolute rule of law that a permanent lease of waste lands belonging to a trust can in no circumstances be granted. (*Varadachariar, J.*) NELLAYAPPAR KANTHIMATHI AMBAL TEMPLE, TINNEVELLY *v.* ARUNACHALAM PILLAI.
1937 M.W.N. 1188.

TRUSTS ACT (II OF 1882), S. 15—*Duty of temple trustee—Loan by trustee of temple funds to relation—If justified*

A temple is not a money lending concern, and therefore for a trustee of the temple to divert its funds out of the usual course of business into such channels is not the kind of act which can be protected under S. 15. This is especially so when the money is loaned to the trustee's relative. (*Bose and Puranik, JJ.*) SAHANDRA BAI *v.* SHRI DEO RADHA BALLABHJI.
A.I.R. 1938 Nag. 30.

———Ss. 15 and 20—*Scope—Temporary investment of trust funds—Standard of care—Duty of trustee.*

The care to be applied to a temporary investment of capital can be no less than that which the Trusts Act requires for an investment of current expenditure not immediately wanted, and so an omission to apply the same standard of care would amount to the kind of neglect contemplated by S. 15. (*Bose and Puranik, JJ.*) SAHANDRA BAI *v.* SHRI DEO RADHA BALLABHJI. **A.I.R. 1938 Nag. 30.**

U. P. AGRICULTURISTS' RELIEF ACT (XXVII OF 1934),—*Construction—Duty of Court to have regard to object of Act.*

The U. P. Agriculturists' Relief Act was enacted for the advantage and relief of agriculturists; and the Courts should keep this fact in view when interpreting the provisions of any particular section of the Act which may have been drafted in ambiguous language. (*Collister and Bajpai, JJ.*) CHUNNI LAL *v.* AJUDHIYA PRASAD. **1937 A W R. 1173=1937 A L.J. 1235.**

———S. 2 (2) (f) and Expl. 2—*Applicability—Joint family paying rent of less than Rs.* 500 *as rent per annum.*

Where a tenancy is held by a joint Hindu family, S. 2 (2) (*f*) applies to the case, and the whole family

U. P. AGRIC. REL. ACT (1934), S. 2.

which pays the rent of the agricultural land not exceeding Rs. 500 per annum is an agriculturist. For any

claim under Explanation 2 that their share is less than Rs. 500, and that they would be agriculturists. (*Bennet, J.*) SURAJ NARAIN SINHA *v.* KEDAR PRASAD. **1938 A.W.R. 26 (H.C.)=1937 A.L.J. 1345.**

——**S. 2 (2) (f), Expls. 2 and 3**—*Applicability—Joint Hindu family paying annual rent of Rs. 5 in respect of holding—If "Agriculturist"—Right to instalments.*

Explanation 2 of S. 2 (2) of the U. P. Agriculturists' Relief Act does not apply to Ch. II, S. 3 of the Act; it is not necessary to resort to that Explanation in the case of a joint Hindu family which holds an agricultural holding the rent of which is only Rs. 5 per annum. A joint Hindu family which pays a rent not exceeding Rs. 500 is an agriculturist and
"person" in that clause includ
Such a family is entitled to ins
Act. (*Bennet, J.*) KEDAR PR
SINHA.

——**S. 7**—*Applicability—*
—Objection based on S. 7 afte
S. 7 of the U. P. Agricultu
even to a suit instituted prior
of the Act. An objection afte
that the suit, though institute
coming into force of the Act, ought
Court within whose jurisdiction the
competent and may be given effec
which the suit was instituted, thoug
in that Court properly at the time. (*Collister and Bajpai, JJ.*) CHUNNI LAL *v.* AJUDHIYA PRASAD. **1937 A.W.R. 1173=1937 A.L.J. 1235.**

——**S. 23**—*Scope—Order refusing instalments under S. 3—Appeal.*

The U. P. Agriculturists' Relief Act does not provide

Munsif's Court. The suit must therefore be instituted in that Court and not in the Court of the Civil Judge. (*Collister and Bajpai, JJ.*) BRIJ BEHARI LAL *v.* GOPI NATH. **1937 A.W.R. 1171=1937 A.L.J. 1224.**

UNITED PROVINCES ENCUMBERED ESTATES ACT, S. 4—*Application by members of Joint Hindu family—Applicants omitting to sign as guardians of their minor sons—Amendment after limitation—If can be allowed.*

Where the application ... of the Act,
... omit to sign
... sons but b
...rt at the earliest

U. P. LAND REV. ACT (1901).

opportunity, though after the expiry of limitation, and ask to be allowed to amend their application by the addition of the names of their sons, whose existence
...nceal, there is no reason why
...enefit of O. 6, R. 17 C. P.
...plication cannot be allowed
4 (4) of the Act. (*Darling, S.M. and Bomford, J.M.*) BANKEY BEHARI LAL *v.* SHYAM SUNDER CHAUBE. **1937 R.D. 590.**

——**S. 4 (4)**—*Applicability—Benefit under—Right to claim.*

The benefit of S. 4 (4) of the U. P. Encumbered Estates Act cannot be availed of or claimed by a person who parleys with his creditors and then finds that limitation has applied. The clause applies only in the case of persons who have been physically incapacitated from filing their applications or have the excuse of ignorance due to non-residence in the Province. (*Darling, S.M. and Bomford, J.M.*) RAM BUX SINGH *v.* RAM PRASAD. **1937 A.W.R. 1176.**

——**S. 4 (4)**—*"Prevented"—Meaning of—Suit on*

... six months' exten-
4 (4) (*Darling,*
KISHORI *v.* EMP-
1938 O.W.N. 37.

——**S. 6**—*Review—Power of Court—Application by creditor for review—Competency when he was no party to order.*

A Court passing an order under S. 6 of the U. P. Encumbered Estates Act has got power to review that order, by reason of the fact that the whole of the C. P.
..., since 1st January,
the Act. But the only
for a review is the
n rejected for wrong
t all a party before the
in question has no
(*Darling, S.M. and*
GH *v.* RAM PRASAD.
1937 A.W.R. 1176.

—— S. 14 ... dge—Appeal from—
...T, SCH I, ART. 1.
1937 A.L.J. 1373=
A.W.R. 22 (H.C.) (F.B.).

... REVENUE ACT (III OF 1901)—*Partition—Co-sharer purchasing tenant's grove—Right to be allotted that plot over and above share at partition—Proper course.*

A co-sharer who purchases a tenant's grove is not entitled to be given that plot over and above his share at a partition; he is entitled to his share in the *sir* and *khudkasht*, etc., under partition, while he would get so much of the grove in his patti as proprietor as repre

——S. 32—*Person holding land on rent in lieu of guzara—Status of.*

The status of a person holding land on payment of rent in lieu of her guzara is that of a statutory tenant and should be recorded as such in the *khatauni* (*Darling, S.M. and Bomford, J.M.*) RAJESHWARI KUER *v.* MAN SINGH. **1937 R.D. 595.**

——S. 34—*Transfer in respect of which mutation can be effected.*

Mutation can only be effected in favour of a transfer in respect of actual proprietary or other rights, such as under-proprietary rights, in a mahal. (*Darling, S.M. and Bomford, J.M.*) JANG BAHADUR SINGH *v.* SHEO PARTAB SINGH. **1937 R.D. 588.**

——S. 36—*Scope—Agreement fixing rent in contravention of S. 14, Agra Tenancy Act—Compromise order in terms of—Legality—Suit for arrears of rent founded on such order—Maintainability.*

An agreement of compromise which fixes the rent payable by an ex-proprietary tenant at an amount which is excessive and contrary to the provisions of S. 14 of the Agra Tenancy Act is void. An order passed in proceedings under S. 36 of the U. P. Land Revenue Act based on such an agreement of compromise is not a proper order on which a suit for arrears of rent can be based. (*Bennet, J.*) SUCHIT CHAUBE *v.* BALDEO RAI. **1937 A.W.R. 1181=1937 A.L.J. 1284.**

——S. 39—*Scope of—Partition of Court effected by parties—Application for change of entries in* khewat *and* khatauni *on basis of such partition—Competency—Power of Revenue Court.*

There is no provision in Ch. IV of the U. P. Land Revenue Act by which the parties can come to an agreement as to the manner in which partition shall be effected and after making such a partition out of Court, come to the Revenue Court and get the same entered in the papers by the back door of a correction case under S. 39 of the Act. Such a case is not so much a case of correcting errors as of recording a change and a transaction that has taken place affecting the rights and interests of parties. There is no objection to correcting the *kehewat* under S. 39 if the parties are agreed. But changes based on possession can be recorded in the *khatauni* only if they do not involve questions involving long drawn out disputes. The Court under S. 39 cannot be asked to record changes in the proprietary sections into which the *khatauni* is divided, which can only be done at partition. If the parties want entries to be recorded in accordance with their deed of private partition, they must go the Civil Court and get the validity of the deed confirmed first, before the application can be entertained. (*Darling, S.M. and Bomford, J.M.*) BIKARMAJIT NARAIN SAHI *v.* RANJEET NARAIN SAHI. **1937 A.W.R. 1207.**

——S. 42—*Scope—Dispute as to status of person admitted as tenant—Proceedings under Act—Propriety in the absence of any change or clerical error.*

A dispute as to the status of a person admitted as a tenant has to be decided under the U. P. Land Revenue Act according to S. 42 of that Act. Though there has been no change and no clerical error justifying proceedings under the Act, it may be tried under the Land Revenue Act. (*Bomford, J.M.*) DULARA *v.* NARAIN SINGH. **1937 A.W.R. 1213=1938 O.W.N. 27.**

——S. 201—*Applicability—Question of title*—Ex parte *order of Revenue Court on under S.* 111—*Appeal.*

S. 201, U. P. Land Revenue Act, is not applicable to an *ex parte* decision on a question of title under S. 111 of the Act by a Revenue Court. (*Darling, S.M. and Bomford, J.M.*) SIDHGOPAL *v.* CHANDRA KISHORE. **1937 A.W.R. 1210.**

——Ss. 218 and 34—*Mutation proceeding—Order based on compromise—One of parties subsequently denying genuineness of compromise—Board's power to revise order.*

Where in a mutation proceeding an order was passed in terms of a compromise filed on behalf of the parties but one of the parties subsequently appeared and stated that she had signed a blank paper and knew nothing of the terms of the compromise, and there was great justification for regarding the proceedings of the opposite party with great suspicion, the Assistant Collector should bring the case to the notice of the Board which can exercise its powers of revision under S. 218 of the Land Revenue Act. (*Darling, S.M. and Bomford, J.M.*) BHAWANI PRASAD *v.* JANAK KISHORI. **1937 R.D. 593.**

UNITED PROVINCES MUNICIPALITIES ACT (II OF 1916), Ss. 74 and 76—*Scope—Powers of chairman to dismiss municipal servants—Suit for damages in Civil Court for dismissal—Maintainability—Rules under S. 77 (1) (b)—Contravention of—Effect—Remedy of aggrieved persons.*

The chairman of a Municipal Board has power to dismiss certain class of servants under S. 74 of the U. P. Municipalities Act; and under S. 76, where there is no executive officer, the chairman has also the power to dismiss certain other class of servants. Where he dismisses municipal servants acting in the exercise of his powers under Ss. 74 and 76, no suit for damages can be maintained against him by the dismissed servants on the ground that the chairman acted in contravention of the rules framed under S. 77 (1) (*b*) of the Act regulating the procedure of dismissal. The rules framed by the Municipal Board have no statutory force and can be changed from time to time. The remedy of the aggrieved persons is by way of appeal for which a provision has been made in the rules. No action can lie in the Civil Court on the ground that the chairman acted through malice, when he has acted in the exercise of his powers under Ss. 74 and 76. (*Ganga Nath, J.*) SHANKERLAL DAHANIA *v.* BAL KISHAN. **1937 A.W.R. 1166=1937 A.L.J. 1227.**

——S. 77 (1) (b)—Rules framed under—Force of—Non-compliance—Effect—Suit in Civil Court for damages by servants dismissed under Ss. 74 and 76—Maintainability. *See* U. P. MUNICIPALITIES ACT, SS. 74 AND 76. **1937 A.W.R. 1166=1937 A.L.J. 1227.**

——S. 269—"*Depressions*"—*If confined to those caused by human agency—Natural depressions—Notice in respect of—Right of Municipal Board to issue.*

The word "depressions" in S. 269 of the U. P. Municipalities Act is not confined to a depression caused by human agency, but includes all sorts of depressions whether natural or made otherwise. There is nothing in the section to qualify that word. A Municipal Board is entitled under the section to issue a notice in respect of a natural depression as well. (*Ganga Nath, J.*) GOVIND DEOJI *v.* MUNICIPAL BOARD OF BINDRABAN. **1937 A.W.R. 1203=1937 A.L.J 1358.**

——S. 269—*Notice under—Right to issue—Notice issued by Medical officer—Legality.*

Where a Municipal Board which has no executive officer has delegated the powers under S. 269 of the U. P. Municipalities Act to the Medical Officer under S. 112 (1) and under a bye law framed by the Board—a right of appeal to the Board being provided for against orders of the Medical Officer—the Medical Officer is perfectly competent to issue notices under S. 269, and the notices issued by him are quite valid and legal. (*Ganga Nath, J.*) GOVIND DEOJI *v.* MUNICIPAL BOARD OF BINDRABAN. **1937 A.W.R. 1203=1937 A.L.J. 1358.**

U. P. MUNICIPALITY ACT (1916), S. 269.

——**S. 269**—*Powers under—Exercise of—Interference by Civil Court—Jurisdiction.*

A Municipal Board possesses very wide powers under S. 269 of the U. P. Municipalities Act, but they are not to be exercised for ulterior purposes or in a capricious, wanton and arbitrary manner. If they are so used, they can be controlled by the Civil Court. (*Ganga Nath, J.*) GOVIND DEOJI *v.* MUNICIPAL BOARD OF BINDRABAN. **1937 A.W R. 1203=1937 A.L.J. 1358.**

——**S. 326**—*Applicability—Notice under S. 269 issued by Medical Officer of Municipal Board—Suit to declare illegal and for injunction—Limitatu*

A suit against a Municipal Board for a that notices issued by the Medical Officer of, under S. 269 of the U. P. Municipalities Act are illegal

Cl. (3) of S. 326. (*Ganga Nath, J*) GOVIND DEOJI *v.* MUNICIPAL BOARD OF BINDRABAN.
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UNITED PROVINCES NAYABAD AND WASTE LAND RULES, R. 37 A—*Order passed before 19th November, 1936— Board's power to revise.*

The Government Notification, dated 19th November, 1936, which now runs as R. 37-A of the Nayabad and Waste Land Rules, gives the Board powers to revise orders passed by the lower Courts without of date. It is immaterial whether the revision was passed before or after the dat

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RAMLAGAN BHARTI. **1937 R D. 582**

——**S. 3 (3)**—*Scope—Non compliance—Effect on sale—Proof of loss as a result of material irregularity—Necessity.*

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1937 A W R. 1170

——**S 4 (a)**—*Valuation of land at less than decree—Right of decree-holder to take such land in part payment of decree.*

Under S. 4 (*a*) of the Regulation of Sales Act, the decree-holder is entitled to take the land valued at less than his decree only in full discharge of his decree with its encumbrances and interest. He cannot take the land up to its valuation in part-payment of his decree.

VENDOR AND PURCHASER.

(*Darling, S.M. and Bomford, J.M.*) JAGDEO SINGH *v.* MAHARAJ SINGH. **1937 R D. 587.**

UNITED PROVINCES TEMPORARY REGULATION OF EXECUTION ACT (XXIV OF 1934), Ss 6 and 8—*Decree against cultivators and non-cultivators—Application under S. 6 for relief under S. 8—Procedure—Benefit of Act—If to be given to all—Considerations.*

The intention of the legislature in passing the Temporary Regulation of Sales Act was primarily to give relief to cultivators and the Court must therefore endea-

shall, if possible, be granted to such of the judgment-

entitled to the benefit of the Act. The cultivators-judgment debtors should not be made to lose the benefit of the Act by reason of their association with non cultivators. (*Collister and Bajpai, JJ.*) BISHESHAR *v.* GAYA BUX SINGH. **1937 A.L.J. 1387=1938 A.W.R. 20 (H.C.).**

——**S. 7**—*Period for payment—Power of Court to extend.*

Under S 148, C. P. Code, and also in the exercise of enlarge of the U. payment decree.

——**S. 7**—*Period of thirty days—When commences.*

Under S. 7 of the U. P. Temporary Regulation of Execution Act, the maximum period of thirty days which Court for payment of the 25 per under the decree means thirty the order, and not thirty days pplication. (*Srivastava, C.J. and* IKA PRASAD *v.* AJODHYA PRA- **37 O W N. 1233=1938 O L.R. 6.**

CES TOWN AREAS ACT (II

Scope and effect of—Declaration conclusive for purposes not connected with Act—Finality on question of right of occupier of house to transfer right of occupation.

Any area included in a town area, declared by the Local Government under S. 3 of the Town Areas Act to be such, must be presumed to be no part of an agricultural village, and the decision of the Local Government ch finality under es of the Act. r case is whether se to transfer his ouse being situate the Town Areas The decision of Local Government is not conclusive and irrebuttable for all purposes. Though the decision of the Government in a contested case may have some evidential value on the point, the declaration of the Government cannot be taken as conclusive for purposes other than those of the Act. (*Niamatullah, J.*) BHOLA NATH.

VENDOR AND PURCH

Payment of deposit—Effect

U. P. LAND REV. ACT (1901), S. 32.

——**S. 32**—*Person holding land on rent in lieu of guzara—Status of.*

The status of a person holding land on payment of rent in lieu of her guzara is that of a statutory tenant and should be recorded as such in the *khatauni* (*Darling, S.M. and Bomford, J.M.*) RAJESHWARI KUER *v.* MAN SINGH. **1937 R.D. 595.**

——**S. 34**—*Transfer in respect of which mutation can be effected.*

Mutation can only be effected in favour of a transfer in respect of actual proprietary or other rights, such as under-proprietary rights, in a mahal. (*Darling, S.M. and Bomford, J.M.*) JANG BAHADUR SINGH *v.* SHEO PARTAB SINGH. **1937 R.D. 588.**

——**S. 36**—*Scope—Agreement fixing rent in contravention of S. 14, Agra Tenancy Act—Compromise order in terms of—Legality—Suit for arrears of rent founded on such order—Maintainability.*

An agreement of compromise which fixes the rent payable by an ex-proprietary tenant at an amount which is excessive and contrary to the provisions of S. 14 of the Agra Tenancy Act is void. An order passed in proceedings under S. 36 of the U. P. Land Revenue Act based on such an agreement of compromise is not a proper order on which a suit for arrears of rent can be based. (*Bennet, J.*) SUCHIT CHAUBE *v.* BALDEO RAI. **1937 A.W.R. 1181=1937 A.L.J. 1284.**

——**S. 39**—*Scope of—Partition of Court effected by parties—Application for change of entries in* khewat *and* khatauni *on basis of such partition—Competency—Power of Revenue Court.*

There is no provision in Ch. IV of the U. P. Land Revenue Act by which the parties can come to an agreement as to the manner in which partition shall be effected and after making such a partition out of Court, come to the Revenue Court and get the same entered in the papers by the back door of a correction case under S. 39 of the Act. Such a case is not so much a case of correcting errors as of recording a change and a transaction that has taken place affecting the rights and interests of parties. There is no objection to correcting the *kehewat* under S. 39 if the parties are agreed. But changes based on possession can be recorded in the *khatauni* only if they do not involve questions involving long drawn out disputes. The Court under S. 39 cannot be asked to record changes in the proprietary sections into which the *khatauni* is divided, which can only be done at partition. If the parties want entries to be recorded in accordance with their deed of private partition, they must go the Civil Court and get the validity of the deed confirmed first, before the application can be entertained. (*Darling, S.M. and Bomford, J.M.*) BIKARMAJIT NARAIN SAHI *v.* RANJEET NARAIN SAHI. **1937 A.W.R. 1207.**

——**S. 42**—*Scope—Dispute as to status of person admitted as tenant—Proceedings under Act—Propriety in the absence of any change or clerical error.*

A dispute as to the status of a person admitted as a tenant has to be decided under the U. P. Land Revenue Act according to S. 42 of that Act. Though there has been no change and no clerical error justifying proceedings under the Act, it may be tried under the Land Revenue Act. (*Bomford, J.M.*) DULARA *v.* NARAIN SINGH. **1937 A.W.R. 1213=1938 O.W.N. 27.**

——**S. 201**—*Applicability—Question of title—Ex parte order of Revenue Court on under S. 111—Appeal.*

S. 201, U. P. Land Revenue Act, is not applicable to an *ex parte* decision on a question of title under S. 111 of the Act by a Revenue Court. (*Darling, S.M. and Bomford, J.M.*) SIDHGOPAL *v.* CHANDRA KISHORE. **1937 A.W.R. 1210.**

U. P. MUNICIPALITIES ACT (1916), S. 269.

——**Ss. 218 and 34**—*Mutation proceeding—Order based on compromise—One of parties subsequently denying genuineness of compromise—Board's power to revise order.*

Where in a mutation proceeding an order was passed in terms of a compromise filed on behalf of the parties but one of the parties subsequently appeared and stated that she had signed a blank paper and knew nothing of the terms of the compromise, and there was great justification for regarding the proceedings of the opposite party with great suspicion, the Assistant Collector should bring the case to the notice of the Board which can exercise its powers of revision under S. 218 of the Land Revenue Act. (*Darling, S.M. and Bomford, J.M.*) BHAWANI PRASAD *v.* JANAK KISHORI. **1937 R.D. 593.**

UNITED PROVINCES MUNICIPALITIES ACT (II OF 1916), Ss. 74 and 76—*Scope—Powers of chairman to dismiss municipal servants—Suit for damages in Civil Court for dismissal—Maintainability—Rules under S. 77 (1) (b)—Contravention of—Effect—Remedy of aggrieved persons.*

The chairman of a Municipal Board has power to dismiss certain class of servants under S. 74 of the U. P. Municipalities Act; and under S. 76, where there is no executive officer, the chairman has also the power to dismiss certain other class of servants. Where he dismisses municipal servants acting in the exercise of his powers under Ss. 74 and 76, no suit for damages can be maintained against him by the dismissed servants on the ground that the chairman acted in contravention of the rules framed under S. 77 (1) (*b*) of the Act regulating the procedure of dismissal. The rules framed by the Municipal Board have no statutory force and can be changed from time to time. The remedy of the aggrieved persons is by way of appeal for which a provision has been made in the rules. No action can lie in the Civil Court on the ground that the chairman acted through malice, when he has acted in the exercise of hi powers under Ss. 74 and 76. (*Ganga Nath, J.*) SHANKERLAL DAHANIA *v.* BAL KISHAN. **1937 A.W.R. 1166=1937 A.L.J. 1227.**

——**S. 77 (1) (b)**—Rules framed under—Force of—Non-compliance—Effect—Suit in Civil Court for damages by servants dismissed under Ss. 74 and 76—Maintainability. *See* U. P. MUNICIPALITIES ACT, SS. 74 AND 76. **1937 A.W.R. 1166=1937 A.L.J. 1227.**

——**S. 269**—*"Depressions"—If confined to those caused by human agency—Natural depressions—Notice in respect of—Right of Municipal Board to issue.*

The word "depressions" in S. 269 of the U. P. Municipalities Act is not confined to a depression caused by human agency, but includes all sorts of depressions whether natural or made otherwise. There is nothing in the section to qualify that word. A Municipal Board is entitled under the section to issue a notice in respect of a natural depression as well. (*Ganga Nath, J.*) GOVIND DEOJI *v.* MUNICIPAL BOARD OF BINDRABAN. **1937 A.W.R. 1203=1937 A.L.J 1358.**

——**S. 269**—*Notice under—Right to issue—Notice issued by Medical officer—Legality.*

Where a Municipal Board which has no executive officer has delegated the powers under S. 269 of the U. P. Municipalities Act to the Medical Officer under S. 112 (1) and under a bye law framed by the Board—a right of appeal to the Board being provided for against orders of the Medical Officer—the Medical Officer is perfectly competent to issue notices under S. 269, and the notices issued by him are quite valid and legal. (*Ganga Nath, J.*) GOVIND DEOJI *v.* MUNICIPAL BOARD OF BINDRABAN. **1937 A.W.R. 1203=1937 A.L.J. 1358.**

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——S. 326—*Applicability—Notice under S. 269 issued by Medical Officer of Municipal Board—Suit to* [illegible]

[illegible] Act, and must be brought within the time limited by Cl. (3) of S. 326. (*Ganga Nath, J*) GOVIND DEOJI *v.* MUNICIPAL BOARD OF BINDRABAN.

1937 A W.R. 1203=1937 A L J. 1358

UNITED PROVINCES NAYABAD AND WASTE LAND RULES, R. 37 A—*Order passed before 19th November, 1936— Board's power to revise.*

The Government Notification, dated 19th November, 1936, which now runs as R. 37-A of the Nayabad and Waste Land Rules, gives the Board powers to revise orders passed by the lower Courts without qualific[illegible] of date. It is immaterial whether the order [illegible] revision was passed before or after the date of the notification. (*Darling, S.M. and Bomford, J.M.*) RATAN SINGH *v.* SHER SINGH. **1937 R D. 5**[illegible]

UNITED PROVINCES REGULATION OF SALES ACT (XXVI OF 1934), S. 3—*Order accept valuation passed in judgment debtor's absence—Judgment-debtor applying for review pleading non service of notice—Duty of Court.*

Where the Assistant Collector passes an order in the [illegible]

[illegible] *and Bomford, J.M.*) RAM NANDAN BHARTI *v.* RAMLAGAN BHARTI. **1937 R D. 582**

——S. 3 (3)—*Scope—Non compliance—Effect on sale—Proof of loss as a result of material irregularity—Necessity.*

Where it is defenitely found that there had been no [illegible]

[illegible] as a result of the material irregularity. (*Darling, S.M. and Bomford, J.M.*) CHHEDI SHUKUL *v.* SATRAM SHUKUL. **1937 A W R. 1175**

——S 4 (a)—*Valuation of land at less than decree—Right of decree-holder to take such land in part payment of decree.*

Under S. 4 (*a*) of the Regulation of Sales Act, the decree holder is entitled to take the land valued at less than his decree only in full discharge of his decree with its encumbrances and interest. He cannot take the land up to its valuation in part-payment of his decree.

VENDOR AND PURCHASER.

(*Darling, S.M. and Bomford, J.M.*) JAGDEO SINGH *v.* MAHARAJ SINGH. **1937 R D. 587.**

[illegible] **REGULA**[illegible] **OF 1934),** [illegible] *and non-cultivators—Application under S. 6 for relief under S. 8—Procedure—Benefit of Act—If to be given to all—Considerations.*

The intention of the legislature in passing the Temporary Regulation of Sales Act was primarily to give relief to cultivators and the Court must therefore endea[illegible]

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——S. 7—*Period for payment—Power of Court to extend.*

Under S 148, C. P. Code, and also in the exercise of [illegible] enlarge [illegible] of the U. [illegible] payment of the 25 per cent. of the amount due under the decree. [illegible]

——S. 7—*Period of thirty days—When commences.*

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[illegible] **WN AREAS ACT (II** [illegible] *effect of—Declaration* [illegible] *for purposes not connected with Act—Finality on question of right of occupier of house to transfer right of occupation.*

Any area included in a town area, declared by the Local Government under S. 3 of the Town Areas Act to be such, must be presumed to be no part of an agricultural village, and the decision of the Local Government [illegible] conclusive, but such finality under [illegible] ly for the purposes of the Act. [illegible] ion in a particular case is whether [illegible] occupier of a house to transfer his right of residence or occupation, his house being situate in an agricultural village; S. 3 (2) of the Town Areas Act is not conclusive on the point. The decision of Local Government is not conclusive and irrebuttable for all purposes. Though the decision of the Government in a contested case may have some evidential value on the point, the declaration of the Government cannot be taken as conclusive for purposes other than those of the Act. (*Niamatullah, J.*) MATHURA PRASAD *v.* BHOLA NATH. **1937 A.L J. 1301.**

VENDOR AND PURCHASER—Contract of sale—Payment of deposit—Effect—Breach—Right to return

of deposit—Principles. *See* CONTRACT ACT, S. 73.
1937 M.W.N. 1288.

WAJIB-UL-ARZ—*Construction — Tenants' right to break up new areas.*

A clause in the *Waji-bu-larz* that the land cultivated by a tenant in any *fasl* shall be measured and assessed to rent at the village rate, cannot be construed to mean that the tenant can break up entirely new areas without consulting the zamindar. (*Darling, S.M. and Bomford, J.M.*) NANHI DULLAIYA *v.* RAM PRASAD.
1937 R.D. 598.

WATER RIGHTS—*Inam village—Irrigation tank—Duty of inamdar—Right of ryots to water—Nature of—Assignment by inamdar of part of tank bed—Suit by ryots—Competency—Special damage—Proof of.*

It is no doubt the duty of an inamdar to preserve and maintain the tank in the inam village as a tank for the purpose for which it is intended. So long as the tank subserves the purposes of an irrigation tank, he ought not to do anything which might in any way interfere with the right of irrigation which the ryots owning lands in the tank ayacut have. The right of the Kudivaram tenants in an inam village is more in the nature of a proprietary right annexed to the ownership of the land rather than in the nature of an easement. But it cannot be said that the ryots in the inam village have any proprietary interest in the tank bed, their only right being to receive the accused supply of water from the tank. It is doubtful whether a mere assignment by the inamdar of any portion of the tankbed or waterspread of the tank would furnish a cause of action to the ryots. The latter would have to prove that by such assignment damage is likely to accrue and necessarily will accrue to them at least in the near future. All the ayacutdars under the tank should properly join and file a representative suit. If any individual ryot chooses to file a suit he must establish special damage. (*Venkataramana Rao, J.*) VANANGAMUDI THEVAN *v.* ALAGINATHA ANNAVI. 1937 M.W.N. 1265.

WILL—*Executor—Refusal to accept office—Effect—Vesting of estate—Heir at-law—Right of suit of—Limitation Act, S.* 17—"*Legal representative*"—*If includes heir.*

There is nothing to preclude an heir-at-law from maintaining an action in ejectment or otherwise recovering possession of the estate left by a testator where the executors appointed under the will of the testator decline to accept office. The entire estate, both movable and immovable property, left by the deceased must be deemed to vest in the heir-at-law until an administrator is duly constituted. The heir-at-law, if he likes, can get himself appointed administrator, but he is not bound to do so. It is open to legatees to have an administrator duly constituted; and as soon as an administrator is constituted, the estate would be divested from the heir-at-law, and the person competent to maintain a suit on behalf of the estate would then be such administrator. According to the plain language of S. 17, Limitation Act, "legal representative" would also include an heir. The term is not confined to an executor or administrator. (*Pandrang Row and Venkataramana Rao, JJ.*) SIVASANKARA MUDALIAR *v.* AMARAVATHI AMMAL. 1937 M W N. 1153 = 46 L.W. 880.

———*Executor—Status of—When trustee.*

The persons named executors in a will were not merely executors but were charged with the duty of managing the property and paying the income to chtiy. Oal y the income was disposed of under the wli

Held, that as only income was disposed of, and some one must have the legal estate in the corpus, and taking into consideration the duties cast upon the executors and also the possibility of having successive legal estates, the executors were in all but name trustees (*Ramesam and Stone, JJ.*) VENKATASUBRAMANIA AYYAR *v.* SIVAGURUNATHA CHETTIAR.
A.I.R. 1938 Mad. 60

———*Proof—Production of copy of will in handwriting of opposite party in application for probate—Copy containing copy of testator's signature but not names of attesting witnesses—No evidence of attestation of will or of existence of will on date of testator's death—Proof of valid execution—If can be presumed.*

Petitioner applied for revocation of the letters of administration granted to the respondent as in an intestacy and for a grant of probate to herself of a will alleged to have been made by her deceased husband. She tendered in evidence a copy of the alleged will, which copy was in the handwriting of the respondent. It purported to contain a copy of the signature of the testator, with the words "signed before us", but no names of attesting witnesses were found beneath. There was no indication at all as whether the attesting witnesses ever did attest it, nor was there any indication as to their identity. There was no other evidence of the due execution of the will. There was also no positive evidence as to whether any such will was in existence at the date of the testator's death.

Held that the valid execution of the will had not been proved and that the Court could not on the materials presume a valid execution of the will in the absence of proof that the contemplated formalities were completed. (*Wadsworth, J.*) ALAMELU AMMAL *v.* PARTHASARATHI NAIDU. 47 L.W. 31.

———*Proof of—Reasonable natural and probable terms—Suspicious circumstances—Effect on probabilities.*

Mere suspicion, cannot render a will improbable, which is otherwise reasonable, natural and proper in its terms. It is not in accordance with sound rules of construction to apply to such a will, those cannons of construction which demand a rigorous scrutiny of documents of which the opposite can be said, namely that they are unnatural, unreasonable or tinged with impropriety. (*Addison and Din Mahomed, JJ.*) KESHO RAM *v.* PANNI LAL. 40 P.L.R. 4.

WORKMEN'S COMPENSATION ACT (VIII OF 1923), S. 2 (1) (n)—*Construction—Workman employed on wages per day—If "workman" under Act.*

The expression "monthly wages not exceeding three hundred rupees" in S. 2 (1) (*n*) of the Workmen's Compensation Act means wages which do not exceed on an average Rs. 300 a month. The reference to employment on monthly wages in the clause means employment at wages which do not exceed the limit mentioned. It is not limited to workmen who are employed by the month only, so as to exclude workman employed by the day or by the week or by the year. A workman employed on certain wages per day is a workman under the Act. (*Beaumont, C.J. and Sen, J.*) ELLERMAN'S CITY AND HALL LINES *v.* ASIS THOMAS. 39 Bom.L.R. 1230.

———**Sch. II(vii)**—"*Handling*"—*Carpenter employed to repair boxes containing goods unloaded from ship in port—If workman.*

A man employed as a carpenter to mend or repair boxes containing goods which have been unloaded from a ship within the limits of a port is a person employed in the handling of goods within the limits of the port within the meaning of Sch. II (*vii*) of the Workmen's Compensation Act, and is therefore workman. (*Beaumont, C.J. and Sen, J.*) ELLERMAN'S CITY AND HALL, LINES *v.* ASIS THOMAS. 39 Bom.L.R. 1230.

WRIT OF PROHIBITION. *See* PROHIBITION—WRIT OF.

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of deposit—Principles. *See* CONTRACT ACT, S. 73.
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WAJIB-UL-ARZ—*Construction — Tenants' right to break up new areas.*

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It is no doubt the duty of an inamdar to preserve and maintain the tank in the inam village as a tank for the purpose for which it is intended. So long as the tank subserves the purposes of an irrigation tank, he ought not to do anything which might in any way interfere with the right of irrigation which the ryots owning lands in the tank ayacut have. The right of the Kudivaram tenants in an inam village is more in the nature of a proprietary right annexed to the ownership of the land rather than in the nature of an easement. But it cannot be said that the ryots in the inam village have any proprietary interest in the tank bed, their only right being to receive the accused supply of water from the tank. It is doubtful whether a mere assignment by the inamdar of any portion of the tankbed or waterspread of the tank would furnish a cause of action to the ryots. The latter would have to prove that by such assignment damage is likely to accrue and necessarily will accrue to them at least in the near future. All the ayacutdars under the tank should properly join and file a representative suit. If any individual ryot chooses to file a suit he must establish special damage. (*Venkataramana Rao, J.*) VANANGAMUDI THEVAN *v.* ALAGINATHA ANNAVI. 1937 M.W.N. 1265.

WILL—*Executor—Refusal to accept office—Effect—Vesting of estate—Heir at-law—Right of suit of—Limitation Act, S. 17—"Legal representative"—If includes heir.*

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A.I.R. 1938 Mad. 60.

———*Proof—Production of copy of will in handwriting of opposite party in application for probate—Copy containing copy of testator's signature but not names of attesting witnesses—No evidence of attestation of will or of existence of will on date of testator's death—Proof of valid execution—If can be presumed.*

Petitioner applied for revocation of the letters of administration granted to the respondent as in an intestacy and for a grant of probate to herself of a will alleged to have been made by her deceased husband. She tendered in evidence a copy of the alleged will, which copy was in the handwriting of the respondent. It purported to contain a copy of the signature of the testator, with the words "signed before us", but no names of attesting witnesses were found beneath. There was no indication at all as whether the attesting witnesses ever did attest it, nor was there any indication as to their identity. There was no other evidence of the due execution of the will. There was also no positive evidence as to whether any such will was in existence at the date of the testator's death.

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Mere suspicion, cannot render a will improbable, which is otherwise reasonable, natural and proper in its terms. It is not in accordance with sound rules of construction to apply to such a will, those cannons of construction which demand a rigorous scrutiny of documents of which the opposite can be said, namely that they are unnatural, unreasonable or tinged with impropriety. (*Addison and Din Mahomed, JJ.*) KESHO RAM *v.* PANNI LAL. 40 P.L.R. 4.

WORKMEN'S COMPENSATION ACT (VIII OF 1923), S. 2 (1) (n)—*Construction—Workman employed on wages per day—If "workman" under Act.*

The expression "monthly wages not exceeding three hundred rupees" in S. 2 (1) (*n*) of the Workmen's Compensation Act means wages which do not exceed on an average Rs. 300 a month. The reference to employment on monthly wages in the clause means employment at wages which do not exceed the limit mentioned. It is not limited to workmen who are employed by the month only, so as to exclude workman employed by the day or by the week or by the year. A workman employed on certain wages per day is a workman under the Act. (*Beaumont, C.J. and Sen, J.*) ELLERMAN'S CITY AND HALL LINES *v.* ASIS THOMAS. 39 Bom.L.R. 1230.

———**Sch. II(vii)**—*"Handling"—Carpenter employed to repair boxes containing goods unloaded from ship in port—If workman.*

A man employed as a carpenter to mend or repair boxes containing goods which have been unloaded from a ship within the limits of a port is a person employed in the handling of goods within the limits of the port within the meaning of Sch. II (*vii*) of the Workmen's Compensation Act, and is therefore workman. (*Beaumont, C.J. and Sen, J.*) ELLERMAN'S CITY AND HALL, LINES *v.* ASIS THOMAS. 39 Bom.L.R. 1230.

WRIT OF PROHIBITION. *See* PROHIBITION—WRIT OF.

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"THE YEARLY DIGEST"

OF

INDIAN AND SELECT ENGLISH CASES.

I—INDIAN DECISIONS.

ACCOUNTS—*Suit for—Interest—When can be allowed.*

The plaintiff in a suit forrendition relating to a number of properties wi alleged that the defendant had dealt as co-sharer on behalf of themselves, while their plaint the relief asked expressly for only. The defendant had also filed cross-suit against plaintiffs for accounts. Both sides were found liable to account and the defendant was allowed interest to be calculated apparently on balances as they stood from year to year.

Held, that the suit was not one in which interest before date of final settlement ought to have been allowed, assuming that the Court had discretion to allow it, which it was perhaps doubtful. Interest would fairly be payable only on the amount found due on a balance of both accounts. (*Coldstream and Monroe, JJ.*) VIDYA WANTI KAUR *v.* SARDAR SHAHDEV SINGH.

A.I.R. 1938 Lah. 139.

ADVERSE POSSESSION—*Co-sharers—Exclusive possession of some—Effect of—Ouster—Partition—If amounts to.*

The exclusive possession of co sharers cannot be adverse to a person who is also a co-sharer with them unless they repudiate his title. Mere partition between them would not imply denial of his title or his ouster. (*Niyogi, J.*) RAMJI *v.* MADKI.

173 I.C. 103=A.I.R. 1938 Nag. 89.

——*Essentials of—Vacant land—Exclusion of owner—Inference as to adverse possession, when justified—Application of rule as to possession following title.*

Possession cannot be adverse unless it is held in such circumstances as are capable in their nature of notifying mankind that the party is on t[illegible] own openly and exclusively. equivocal in a possession which possession cannot be adverse denial of his title execluded sion to be adverse must be notorious, exclusive and [illegible]

AYYA PATRUDU *v.* JALALUDDIN SAHIB.

(1938) M.W.N. 185=47 L.W. 202=(1938) 1 M.L.J. 190.

——*Guardian and Ward—Possession of guardian—If adverse to ward.*

AGRA TENANCY ACT (1926).

——*Waste land—Construction of temporary chhappars.*

The construction of some temporary chhappars on a land which is lying waste is not sufficient in law to establish adverse possession, although such chhappars have been surrounded by an enclosure consisting of bushes. (*Bhide, J.*) SHAH NIWAZ *v.* GHULAM SHAH.

40 P.L.R. 91.

——*Widow—Possession of Hindu widow—If can be adverse to Reversioners.*

Where a widow takes possession of the property after the death of the last maleholder as a Hindu widow with a limited estate and there is nothing to show that the character of her title or possession was altered at any time, such possession could not be adverse to her husband's reversioners and any rights which she acquires by reason of her possession would be accretions to the estate of her husband to which her husband's reversioners are entitled to succeed. The period of her possession therefore cannot be tacked on to that of her alienee. (*Coldstream and Din Mohammad, JJ.*) GANGA RAM *v.* NAURATA RAM.

A.I.R. 1938 Lah. 187.

AGRA PRE EMPTION ACT (XI OF 1922), S. 12, Class. iii and iv—*Determination of class of pre-emptors—Rules governing.*

The provisions of S. 12, class *iii* of the Agra Pre-

S. 12 must be determined with reference to the constitu- on the date of the sale and not with constitution of the mahal on some *Iqbal Ahmad, J.*) PRAN SINGH *v.*

1938 A.L.J. 156=1938 A.W.R. 133 (H.C.)

AGRA TENANCY ACT, (III OF 1926)—*Applicability—Widow succeeding to husband under Act of 1881 and dying after 1926—Succession to—Law applicable.*

The law of succession to be followed in the case of a tenancy is the law as it stands succession opens. In the case

AGRA TENANCY ACT (1926).

succeeds under Act XII of 1881, but who dies after the enactment of Act III of 1926, it is the latter Act that governs succession to the widow. (*Darling, S. M. and Bomford, J.M.*) RAMDAYAL *v.* BINDESHWARI PRASAD. **1938 R.D. 121=1938 A.W.R. 72 (B.R.).**

———*Suits under—Technicalities—Reliance upon—Principle as to.*

It is a sound principle that technicalities should not be pressed too far in suits under Tenancy Act. (*Darling, S. M. and Bomford, J. M.*) TIKORI *v.* HARAKH CHAND. **1938 R.D. 1=1938 A.W.R. 13 (B.R.).**

———**S. 3, Cl. (14)**—Decree—Meaning of—If includes determination of any question under S. 47, C. P. Code. *See* AGRA TENANCY ACT, SS. 249 AND 3 CL. (14). **1938 A.L.J. 63.**

———**S. 3 (15)**—*Grove—Area of 7 biswas containing 10 full grown mango trees—If grove.*

Where in a small area of 7 biswas there are ten full grown mango trees, the plot is certainly a grove, however those trees are arranged. The fact that some casual cultivation is possible does not matter, when the trees preclude any considerable portion of the land being used primarily for any other purpose. (*Darling, S. M. and Bomford, J. M.*) SARDHA DIN *v.* MASURIADIN. **1938 R.D. 147=1938 A.W.R. 80 (B.R.)**

———**Ss. 4 (d) and 14 (2)**—*Construction—'Cultivated'—Meaning.*

Whether it is with reference to S. 4 (*d*) or 14 (2) of the Agra Tenancy Act the word 'cultivated', does not mean the same thing as 'ploughed' and provided that no other party is put in posssssion of the land, it is difficult to see why cultivation should not cover a normal period of fallow, more especially where the fields are included in a farm, the whole of which will not normally be under the plough every year without a rest. (*Darling, S. M. and Bomford, J. M.*) JUGUL KISHORE TANDON *v.* RAO NARSINGH RAO. **1938 A.W.R. 35 (B.R.).**

———**S. 14 (2)**—Construction—'Cultivated'—Meaning. *See* AGRA TENANCY ACT, SS. 4 (*d*) AND 14 (2). **1938 A.W.R. 35 (B.R.).**

———**S. 16**—*Company, if could acquire occupancy right—Mere shareholders in business rather than actual cultivators.*

The question whether a recorded tenant, a company can acquire occupancy rights, depends upon whether the partners regarded themselves as a number of partners cultivating as partners and co-tenants under the Act or an association engaged in the business of cultivating not in any personal capacity but as share-holders in a business. Wheir their whole conduct suggests that they were share-holders in a business rather than actual cultivators in any personal capacity, such a company cannot acquire [illegible] y rights. (*Darling, S. M. and Bomford, J.M.*) [illegible]CKINNNON *v.* SAMPAT KUMAR SINHA. **1938 R.D. 4=1938 A.W.R. 16 (B.R.).**

———**S. 17**—*Occupancy rights—Grant of—Lambardar admitting persons as joint in tenancy with female occupancy tenant—If confers rights on persons so admitted.*

The fact the lambardar admits some persons as joint in tenancy with a female occupancy tenant, cannot have the effect of extending the occupancy rights of the female which are only good for her life to the persons admitted by the lambardar. (*Darling, S.M.*) KOMIL *v.* SANWAL SINGH. **1938 R.D. 114=1938 A.W.R. 53 (B.R.).**

———**Ss. 18 and 121-123**—*Applicability—Occupancy holding—Plot becoming grove—Status of grove-holder—Disappearance of grove—Effect—Occupancy rights retained by tenant after disappearance of grove—Transfer of—Validity—Right and status of transferee—Application to establish occupancy rights by means of application for correction of* Khatauni*—Maintainability—Proper remedy—Liability to ejectment.*

AGRA TENANCY ACT (1926), S. 25.

Occupancy rights lapse in any plot of an occupancy holding which becomes a grove, the occupancy rights therein are superseded by grove rights, and when the grove disappears the grove-holder becomes a non-occupancy tenant in the plot, the former occupancy rights not reviving on the plot ceasing to be grove. Where, however, the former occupancy tenants manage to retain their occupancy rights in spite of the disappearance of the grove plot, a transferee from them is not entitled to claim the same rights. Occupancy rights are not transferable and the transferee does not acquire any such rights from the recorded occupancy tenants. All that the transferee can acquire are grove rights which are extinguished on the disappearance of the grove. Thereafter the transferee is either a sub-tenant or a trespasser who has never been admitted, or at best a non-occupancy tenant. He is not entitled to apply for correction of the khatauni to establish his claim to occupancy rights. His proper remedy is to bring a regular suit under Ss. 121-123 of the Agra Tenancy Act, if he is not content with the entry as a sub-tenant. But if he fails to establish his claim to be an occupancy tenant and is declared a mere non-occupancy tenant under S. 21 of the Act, he is liable to be ejected forthwith by the zamindar. (*Darling, S.M.*) BANWARI *v.* ABID HUSAIN. **1938 R.D. 124.**

———**S. 24**—Applicability and Scope—Tenant under Act XII of 1881—Widow succeeding and completing 12 years—Right of occupancy—Death of widow after 1926—Daughter's son not co-sharing in cultivation with grandfather—Right to succeed to tenancy. *See* N.-W.P. RENT ACT (XII OF 1881), S. 8. **1938 R.D. 121=1938 A.W.R. 72 (B.R.).**

———**S. 24**—*Co-sharing—What constitutes—Minority of one of the parties, if affects the question.*

To constitute co-sharing, there should be pooling of resources, and this requirement applies whatever may be the age of one of the parties. In the absence of evidence that daughters' sons living with and helping the grandfather had any holdings of their own or agricultural stock which they pooled with that of their grandfathers', it cannot be held that they co-shared with their grandfather, however much they helped in the agricultural duties which boys of their age could perform. (*Darling, S.M. and Bomford, J.M.*) TIKORI *v.* HARAKH CHAND. **1938 R.D. 1=1938 A.W.R. 13 (B.R.).**

———**S. 24**—*Widow tenant—Re-marriage—Re-admission to tenancy—Proof of—Mere acceptance of rent—Effect of.*

Mere acceptance of rent from a widow tenant who has remarried cannot amount to an admission to tenancy or re-admission so as to afford protection from ejectment, when there is no fresh contract of re-admission. (*Darling, S.M. and Bomford, J.M.*) TITRA *v.* ZAHID ALI. **1938 R.D. 130.**

———**Ss. 25 (1) and (2)**—*Applicability—Widow succeeding to husband as co-tenant under Act of* 1901—*Death of after* 1926—*Succession—Daughter's son not co-sharing with grandfather—Rights of.*

The son of the daughter of a widow who succeeded her husband as co-tenant in an occupancy holding is not entitled to be recorded as co-tenant in succession to the widow when he has never co-shared with his grandfather. S. 25 (1) of the Agra Tenancy governs the case, and not S. 25 (2). The fact that the widow succeeded under the Act of 1901, would not make S. 25 (2) applicable. (*Bomford, J.M.*) MAHADEO MALLAH *v.* RUM DAS MALLAH. **1938 R.D. 123=1938 A.W.R. 84 (B.R.).**

AGRA TENANCY ACT (1926), S. 35.

——Ss. 35 and 107—*Succession—Widow tenant acquiring rights of occupancy—Sub-letting of entire holding and retirement to another village—Right of daughter's son to succeed as heir.*

Where a widow tenant who has acquired occupancy rights in a holding in her own right leaves the village and retires to another village after sub-letting her whole holding, her daughter's son who does not even allege co-sharing with his grandfather cannot succeed to the widow on her death and is not entitled to be recorded as occupancy tenant in succession to the widow. (*Darling, S.M. and Bomford, J.M.*) RAM DAYAL *v.* BINDESHWARI PRASAD. 1938 R.D. 121 = 1938 A.W.R. 72 (B.R.).

——Ss. 37 and 121—*Application by recorded tenant for partition under S. 37—Possibility of opposition from landlord—Suit under S. 121, if necessary.*

A tenant who has been recorded as a co-tenant in proceedings under S. 42 of the Tenancy Act, is entitled to sue under S. 37 for partition of his share. The necessity of filing a suit under S. 121, in case of opposition from the landlord, does not apply to the suit of such a recorded co-tenant. (*Bomford, J.M.*) RAM AUTAR *v.* GANESH. 1938 A.W.R. 45 (B.R.).

——Ss. 37 and 121—*Procedure—Simultaneous under, involving identical questions—Decreeing of one and dismissal of other—Appeal in both—Proper procedure—Decree allowing appeal in one and order of remand in other—Propriety.*

Where a suit is filed by a tenant against his landlord under S. 37 of the Agra Tenancy Act, and the landlord files a suit against the tenant under S. 121, and the [illegible]

remands the other suit to the lower court for further inquiry, when the same questions are exactly in issue in each case. To allow the appeal in one and to remand the the other is not the correct or proper procedure. (*Darling, S.M. and Bomford, J.M.*) RENUKA RAI *v.* SHYAM DUTT RAI. 1938 R D. 133 = 1938 A.W.R. 81 (B R.).

——Ss. 37 and 99—*Recorded co-tenant—Right to apply for partition under S. 37—Zamindars supporting defendants—If affects plaintiff's right.*

A suit by a recorded co-tenant under S. 37 of the Tenancy Act, cannot be met by the plea that the suit ought to be under S. 99 as the zamindars are supporting the defendants, for the possession of one co tenant is the possession of all co-tenants and as the defendants have not been ousted, it cannot also be said that the plaintiff has been ousted. (*Bomford, J.M.*) RAM AUTAR *v.* GANESH. 1938 A.W.R. 45 (B.R.).

—— S. 43—*Rent, if can be attached before it falls due.*

Under S. 43 of the Agra Tenancy Act, the liability for the rent opens from the day of admission to tenancy and hence it is certainly open to a landholder to attach the rents before the date on which they fall due. (*Darling,* [illegible]

that tenant. If these other tenants, do not allow the tenant getting his share divided to take physical

AGRA TENANCY ACT (1926), S. 44.

possession of his share, but flout the orders of the revenue Court by keeping him out of possession, they are trespassers pure and simple and can be ejected as such. (*Bomford, J.M.*) CHITTAR *v.* JHUNVA. 1938 R.D. 110 = 1938 A.W.R. 50 (B.R.).

——Ss. 44 and 107 (2)—*Applicability—Occupancy holding—Tenant permitting his sons to divide it amongst themselves—Father receiving rent and remaining liable to landlord—Notice to quit on one of the sons—Refusal—Suit under S. 44, if maintainable.*

Where an occupancy tenant permitted his sons to divide the holding between themselves and received the rent from them and continued to be responsible to the landlord, and where after several years he served a notice to quit on one of the sons and on his refusal to leave filed a suit under S. 44 of the Agra Tenancy Act.

Held, that the case was covered by S 44, for the son was obviously retaining possession without the consent of the immediate landholder and against the provisions of the statute.

Held further, that S. 107 (2) might only apply if the whole holding had been left in the charge of the son concerned, but as in fact only a portion was left in his charge, the section had no application. (*Darling, S.M. and Bomford, J.M.*) GOVIND DAS *v.* AJODHIA PRASAD. 1938 R D. 58 = 1938 A.W.R. 20 (B R.).

——S. 44—*Limitation—Partition of sir land—Holder of divided plot—Suit for ejectment of trespasser—Defendant in possession as mortgagee—Limitation—Starting point—Plaintiff's knowledge of mortgage right prior to confirmation of partition—Effect.*

A suit to eject the defendants from a field which the [illegible] n partition as his share of the joint [illegible] the defendants were holding as [illegible] e plaintiff's consent has to be brought within 12 years from the date when the partition was confirmed. It is only from that date that the plaintiff becomes entitled to sue. and the fact that the defendant is a mortgagee in possession and that the plaintiff knew that the defendant was a mortgagee before that date cannot affect the period of limitation for the suit under S. 44 of the Agra Tenancy Act. (*Bomford, J.M*) SACHITANAND PANDEY *v.* SHIVA SARAN RAI. 1938 R D. 125 = 1938 A.W.R. 70 (B.R.)

——S. 44—*Limitation—Starting point—Knowledge, possession of defendant—If means personal knowledge of zamindar.*

In the case of large estates the knowledge of possession of the defendant required for the period of limitation for a suit under S. 44 of the Agra Tenancy Act cannot be taken as the knowledge of the landlord personally. The period of limitation must be reckoned from the date of knowledge by the estate. (*Darling, S. M. and Bomford, J M.*) RENUKA RAI *v* SHYAM DUTT RAI. 1938 R.D. 133 = 1938 A.W.R. 81 (B.R.).

——S. 44—*Limitation—Suit to eject widow on ground of remarriage—Starting point of limitation—Date of remarriage or date of knowledge of landholder.*

In a suit to eject as trespasser a widow tenant who [illegible] od of limitation runs from the [illegible] intiff-landholder obtains know- [illegible] (*Darling S.M. and Bomford,* [illegible] ID ALI. 1938 R D. 130.

[illegible] *for suit under Ss. 86 and* [illegible] *nant—Dismissal for de-* [illegible] *same person under S. 44*

[illegible] Ss. 86 [illegible] the Agra Tenancy [illegible] was sued as a

default, a subsequent suit under S. 44 of the Act against the same defendant treating him as a trespasser after the tenant in chief had abandoned his interest in the holding, is not barred, for there has been a change in the position giving rise to a fresh cause of action. (*Darling, S.M. and Bomford, J.M.*) BADU *v.* HULASI. 1938 R.D. 57 = 1938 A.W.R. 29 (B.R.).

——S. 44—*Procedure—Suit by holder of sir plot allotted on partition—Defendant proved to be mortgagee of plot—Procedure—Remedy of defendant—Right of plaintiff to possession.*

Where in a suit for ejectment under S. 44, by a person who gets *sir* land on partition, the defendant pleads and proves that he is a mortgagee of the plot that has been allotted to the plaintiff, the claim of the plaintiff for possession of his plot should not be dismissed. The mortgagee has his remedy against the other party of the original mortgagor and must pursue his remedy in that direction. (*Bomford, J. M.*) SACHITANAND PANDEY *v.* SHIVA SARAN RAI. 1938 R.D. 125 = 1938 A.W.R. 70 (B R.).

——S. 73—*Remission in contravention of—Zamindar's remedy.*

Where the remissions of rent are in violation of the provisions of S. 73 of the Agra Tenancy Act, the zamindar is entitled to treat them as *ultra vires* and proceed straight away to realise the rents by suits. If he fails to do so the loss he thereby incurs is directly attributable to his own in action in not taking the proper proceedings. A suit against the Secretary of State for damages is not maintainable in respect of such a loss. (*Thom and Iqbal Ahmed, JJ.*) ABDUL QAIYUM *v.* SECRETARY O[illegible]

the proviso to S. 99 applied. (*Darling, S.M. and Bomford, J. M.*) BABU LAL *v.* PAL.

1938 A.L.J. (Supp.) 1 = 1938 A.W.R. 33 (B.R.).

——S. 99 (1)—*"Claiming through the landholder"—Meaning.*

A person making a false claim without a shadow of a title cannot be regarded as "claiming through the landholder" within the meaning of S. 99 of the Agra Tenancy Act and plead that he can only be ejected by a suit under that section. (*Bomford, J. M.*) CHITTAR *v.* JHUNNA. 1938 R.D. 110 = 1938 A.W.R. 50 (B.R.).

——S. 107 (2)—Applicability—Only a portion of holding left in charge of another. *See* AGRA TENANCY ACT, SS. 44 AND 107 (2). 1938 R.D. 58 = 1938 A.W.R. 20 (B.R.).

——Ss. 121-123—Applicability—Tenant of grove land retaining occupancy rights after disappearance of grove—Transferee from—Status of—Claim to occupancy rights—Remedy—Application for correction—Maintainability. *See* AGRA TENANCY ACT, SS. 18 AND 121 123. 1938 R.D. 124.

——S. 121—Necessity of suit under—Possibility of opposition from landlord. *See* AGRA TENANCY ACT, SS. 37 AND 121. 1938 A.W.R. 45 (B R.).

——S. 121—*Widow succeeding occupancy tenant—Commutation of batai rent without reference to occupancy tenant—Widow's name removed from* khatauni *—Suit under S. 121—Onus as to loss of occupany rights.*

Where a widow of an occup[illegible], whose name [illegible] off the *khatauni*, s[illegible] 121 of the [illegible] Tenancy [illegible] [illegible]cy rights

BENG. AG. & AS. CIVIL COURTS ACT (1887), S. 37.

INDIA, LTD. *v.* CENTRAL BANK OF INDIA. 172 I.C. 745=42 C.W.N. 321=1938 O.L.R. 68 (2)= A.I.R. 1938 P.C. 52=(1938) 1 M.L.J. 268 (P.C.).

ments of other provinces, yet this does not import an intention that the social and family life of Muslims should be differently regarded from p vince. The right of the wife to her do mental feature of the marriage contract; place in the scheme of the domestic relations affecting

amount of dower is a part of the contract of marriage, the mere principles of the law of contract as embodied in the Indian Contract Act are insufficient of themselves to account for the main features of the law of dower. The Mahomedan texts and the principles of Mahomedan law have therefore to be applied to determine every facet of the law of dower among Mahomedans in Bengal, Bihar, Agra and Madras, as in the other provinces. (*Sir George Rankin.*) SABIR HUSSAIN *v.* FARZAND HASAN.

BENGA (VII OF

administ

The areas mentioned in S. 1 (3) of the Bengal Agricultural Debtors Act need not be administrative or judicial "districts". Under the Act, the Local Government can notify an area the entirety of which lies within the limits of the administrative district, but which does not include the whole of such district, or they may notify an area lying partly in another. (*Panckridge, J.*) DAS *v.* CHOGEMULL.

——Ss. 34 and 40—*Civil Jurisdiction to decide if debtor resides or property is situate within Board's jurisdiction.*

On receipt of a notice under S. 34 of the Begal Agricultural Debtors Act, the Civil Court cannot refuse to take any action on the ground that the debtor ordinarily reside or that the mortgaged propert within the jurisdiction of the Board. This is which is not within the jurisdiction of the Civil Court at all, but is to be decided by the appellate officer appointed under S. 40 of the Act. (*Henderson, J.*)

rate.

The question whether the applicant before the Board is a 'debtor' within the meaning of S. 2 (9) of the Bengal Agricultural Debtors Act, cannot be investigated by the Civil Court receiving a notice under S. 34 of the Act from the Board. It is, at any rate, in the first in-

——S. 34—*Notice received by Civil Court—Its territorial jurisdiction not lying within any notified area—Duty to issue stay order.*

BENGAL CESS ACT (1880), S. 64-A.

Sub-S. (3) of S. 1 of the Bengal Agricultural Debtors Act must be read in conjunction with sub-S. (2) of the same section. Read together, the sub-sections mean that until an area is notified no Debt Settlement Board, when this has been done to treat the proceedings of th the provisions of the urt in Bengal receiving a from a Board duly established is bound to issue the stay order contemplated in that section, although its territorial jurisdiction does not der S. 1 (3). *J.*) NUR-

42 C.W.N. 293.

LUVION AND DILUVION REGU- (XI OF 1825), S. 4 (5)—*Applicability—* of *alluvial accretion—Several estates concerned—Principles and methods of apportionment.*

Regulation XI of 1825 does not lay down any rule for division or apportionment of the alluvial accretion when several estates or interests are concerned and the increment has been to more than one riparian estate or n contain- and the evidence nciples of

from the extremities of the estates of the competing frontagers perpendicular to the newly formed coasts may be an equitable and satisfactory method, if circumstances permit. (*Nasim Ali and Mukherjea, JJ.*) SAHABADDIN SARKAR *v.* MOULVI KAFILADDIN TAPADAR. 66 C.L.J. 304.

380), S. 54— *it notice was in effect.*

notice under S. 54, the Court is entitled to presume unless the contrary is shown that this referred to service of a notice framed in accordance with law. The mere non-produc- ce cannot be regarded as in the presumption of correct- KAMAL KRISHNA *v.* SARAT A.I.R. 1938 Cal. 145.

——S. 56—*Liability to cess—Issue of notices under Ss. 52 and 54—If a condition precedent.*

It is clear on the wording of S. 56 that the liability lands to pay any nure under Ch. 4 due publication of The issue of such notices is indeed a condition precedent to the accrual of such liability. (*Biswas, J.*) KAMAL KRISHNA *v.* SARAT KUMAR ROY. A.I.R. 1938 Cal. 145.

——S. 64-A—*Scope of—Niskar lands in separate possession of each co sharer—Liability for cess—Limits.*

S. 64-A of the Bengal Cess Act creates joint and liability in all persons who may be jointly inter-

specified quantity of land within the niskar, either in khas or through tenants, each such co-sharer will be liable in respect of the land held or owned by him, and the

AGRA TENANCY ACT (1926), S. 271.

it does not include the determination of any question within S. 47, C. P. Code. Any order passed under S.47 is not a decree but remains an order under the Agra Tenancy Act. Hence no second appeal would lie from an order passed under S. 47, C. P. Code, under the Tenancy Act. Where a lower appellate Court assumes Jurisdiction in a matter, treating it as one in which a second appeal is allowed by a statute, a second appeal would lie to the High Court and the High Court could then correct the mistake of the lower Court. But it is not so in a case which, as treated by the lower Court, is one in which a second appeal is expressly prohibited by the statute. (*Ganga Nath, J.*) DHARAM SINGH *v.* TIKAM SINGH. **1938 A.L.J. 63= 1938 R.D. 149=1938 A.W.R. 53 (H.C)= A.I.R. 1938 All. 124.**

———**S. 271 (1)(a)**—*Scope—Suit under S. 44—Defendant setting up mortgage right—Mortgage not denied——Question of proprietary right, if raised—Jurisdiction of Revenue Court.*

Where in a suit under S. 44, the defendant pleads that he is a mortgagee and the mortgage is not denied, it is not open to the defendant to contend that the defence raises a question of proprietary right, so as to nessitate the sending of an issue to the Civil Court for decision. And when the point is raised for the 1st time in second appeal before the Board of Revenue it is without force. The question whether the defendant is a mortgagee of the plaintiff is one of fact, as also his status, and is a point for the Revenue Courts to decide. (*Bomford, J.M.*) SACHITANAND PANDEY *v.* SHIVA SARAN RAI. **1938 R.D. 125= 1938 A.W.R. 70 (B.R.).**

ALLUVION AND DILUVION—Apportionment of alluvial accretion—Several estates concerned—Principles and methods of apportionment. *See* BENGAL ALLUVION AND DILUVION REGULATION (1825), S. 4 (5). **66 C.L.J. 304.**

APPEAL—*Competency—Preliminary decree in mortgage suit—Appeal—Omission to apply for stay of proceedings—Subsequent final decree—Failure to appeal from—If bar to maintainability of appeal from preliminary decree.*

Pending an appeal from a preliminary decree in a mortgage suit the trial Court made a final decree. The appellant did not ask for a stay of proceedings after he instituted his appeal nor did he file an appeal against the final decree. At the hearing of the appeal a preliminary objection was raised that the appeal was not competent.

Held, that the appeal from the preliminary decree was not incompetent, and that the passing of the final decree was no bar to the hearing of the appeal from the preliminary decree, and that the Court in appeal had also the power to vary or reverse or affect the final decree. (*Rangnekar and Norman, JJ.*) BASAWANT *v.* KALLAPPA. **40 Bom.L.R. 164.**

———*Failure by party to appeal—Party, if debarred from having recourse to other modes of relief.*

Where there is an appeal against a decision, the effect of not appealing is that the decision holds good for what it is worth. So far as concerns any other modes of relief available, the person not appealing is in no worse position than if he had appealed and failed. 24 Cal. 546, Rel. on, (*Addison and Din Mohammad, JJ.*) INTIZAMIA COMMITTEE *v.* CENTRAL BANK OF INDIA LTD. **A.I.R. 1938 Lah. 129.**

———*Question of fact—Inference of intention from circumstances.*

Whether a particular intention can be inferred from a particular set of circumstances is rather a question of

BANKER AND CUSTOMER.

fact than of law. (*Sir George Lowndes.*) BALASUBRAMANYA PANDYA THALAIVAR *v.* SUBBIA TEVAR. **172 I.C. 724=47 L.W. 110= 1938 O.W.N. 117=1938 O.L.R. 61= 1938 O.A. 54=1938 A.L.R. 77= A.I.R. 1938 P.C. 34 =(1938) 1 M.L.J. 426 (P.C).**

ARBITRATION—*Award—Finality of—Presumption of—Plea that award is beyond scope of reference—Burden of proof.*

The Courts will make every reasonable intendment in favour of an award being a final, certain and sufficient termination of the matters in dispute, and unless and until the contrary is shown, the Court will presume that the arbitrator has determined only such matters as were in dispute and were referred to him, and that the burden of proving that the arbitrator has awarded on matters not within the submission or has failed or omitted to award on matters which were within the submisson lies upon the party who seeks to impeach the award. (*Rupchand Bilaram, Ag.J.C. and Lobo, A.J.C.*) VISHINDAS KHUSHALDAS *v.* TEJUMAL KHUSHALDAS. **A.I.R. 1938 Sind 59.**

———*Award—Nature of—Partition proceedings—Award declaring rights of parties in property without giving them possession—If merely declaratory.*

In partition proceedings, the award declared the rights of the parties in the property and did not state that possession was to be given to the parties.

Held, that the award was merely declaratory and hence possession of the properties could not be given to the parties in the execution proceedings. (*Tek Chand and Abdul Rashid, JJ.*) SANT LAL *v.* RAMAYA RAM. **A.I.R. 1938 Lah. 177.**

———*Award—Setting aside—Grounds.*

An award cannot be set aside on the ground of uncertainty upon a point upon which there is no controversy between the parties. (*Rupchand Bilaram, Ag. J.C. and Lobo, A.J.C.*) VISHINDAS KHUSHALDAS *v.* TEJUMAL KHUSHALDAS. **A.I.R. 1938 Sind 59.**

———*Award—Uncertainty—What is.*

Where an award directs certain produce to be sold at market price, the amount to be realized is sufficiently certain and cannot make the award uncertain. (*Rupchand Bilaram, Ag.J.C. and Lobo, A.J.C.*) VISHINDAS KHUSHALDAS *v.* TEJUMAL KHUSHALDAS. **A.I.R. 1938 Sind 59.**

———*Award—Validity—Piecemeal awards.*

It is not competent to an arbitrator to decide a matter piecemeal and deliver several awards, unless he is so authorised by the agreement between the parties. (*Rachhpal Singh and Bajpai, JJ.*) GANGA DHAR *v.* INDAR SINGH. **1938 A.W.R. 63 (H.C.)= 1938 A.L.J. 113**

ARBITRATION ACT (IX OF 1899)—*Applicability of provisions—Architect settling cost of work redone.*

When a member of the firm of architects is holding an inquiry as to the cost of certain work redone, on the refusal of the contractor to do so, he acts in his capacity as an arbitrator and is subject to the provisions of the Arbitration Act. (*Rupchand Bilaram, Ag. J. C. and Lobo, A.J.C.*) HARNAMSING *v.* PARSRAM LALCHAND. **A.I.R. 1938 Sind 45.**

BANKER AND CUSTOMER—*Negligence of customer—Liability—Facts to be shown.*

Even if there is a duty as between the banker and the customer in drawing a cheque in a proper mode, it must be shown in order to hold the customer liable for negligence in drawing cheques, that there was a breach of the duty by the neglect of some usual and proper precaution. (*Lord Wright.*) MERCANTILE BANK OF

BENGAL TENANCY ACT (1885), S. 148.

daries, provided of course it is shown that the previous settlement was on the basis of the supposed area. On the other hand, it may happen in a particular case that at the time of the assessment of the previous rent, the area was actually ascertained and specified in the *patta* or *kabuliyat*, but the settlement was still not on the basis of the area, the rent being fixed as a consolidated

when there is a real increase of area. (*Biswas, J.*) NANDA KISHORE LALA *v.* DWARKA NATH SINGHA. 42 C.W.

——S. 148—*Succession to tenancy not* ... *Landlord getting credible information as to* ... *all heirs—Decree for rent obtained against other persons—If rent decree.*

It is, no doubt, the duty of the persons ... inheritance to a permanent tenure to notif... sion and it is not the duty of the superior landlord to find out who all the heirs of a deceased tenure-holder are. But where the landlord prior to the institution of the suit for rent or during its pendency gets credible information with regard to succession, it is not open to him to ignore that information and proceed with the suit for rent as against some other person and thereafter to say that the decree which he has obtained ... person is a decree which should be treate... for rent. (*Mukherji, J.*) ALI BAKSH... CHITTA RANJAN GUHA. 4...

BERAR INAM RULES (1859), Rr. V, XI & XV—*Applicability and scope—Inam grant—Representative of inamdar not applying to Inam Commissioner or getting certificate or paying quit rent—Right to claim protection from attachment.*

... go... the... tec... gr...

not upon the person entitled as his representative—who does not apply to the Inam Commissioner or get the certificate given to the inamdar is not entitled to such protection from attachment. Such a representative who is not called upon to pay a quit rent does not receive a a free-hold estate as provided by R. V. ... *and Puranik, J.*) LAXMAN *v.* RAMCHAN... 1938 ...

BERAR PATELS AND PATWARIS LAW, S. 6 (3)—*Applicability—"Withholding of payment"—Meaning of—Patwari agreeing to accept payment after next harvest—Effect of—"Emoluments of patwari"—Meaning of—Rate fixed by agreement—Power of Deputy Commissioner to fix emoluments.*

The words "emoluments of a patwari" in first time of S. (3) of the Patels and Patwaris Law cannot be interpreted as meaning the emoluments at the rate fixed by ...

unless there has been a withholding of payment by the proprietors; and when the withholding is condoned by the patwari by agreeing to accept payment later on after next harvest, there is no such withholding as would invoke the application of S. 6 (3). A contract should not be varied in one particular and maintained in another

BIHAR TENANCY ACT (1885), S. 29.

particular without the consent of the contracting parties; and although there is nothing illogical in this being done in the peculiar circumstances of a contract between a jagirdar and a patwari in a Jagir village, such a departure from the ordinary law should be clearly indicated in the section of the law. (*Roughton, F.C.*) SYED CHHABAN *v.* RAJARAM. 1938 N.L.J. 64.

Government, on the nomination of the Jagirdar S. 6 (3) ... The fact that he is loosely described ... him a substitute, ... Law, of a malik who is unable to work himself. (*Roughton, F.C.*) ...

transfer-fee.

There is no provision in the Bihar Tenancy Act which authorises the Collector to refuse to accept a deposit of the landlord's transfer fee properly tendered to him. The only question which he has to determine before the issue of a receipt for the fee tendered is whether the deposit is in accordance with S. 26 F (1) (c),

with a view to reduce the amount of the landlord's fee—in which case the transferee in liable to a penalty, and to decide disputes as to who is entitled to receive the fee deposited. (*Agarwala, J.*) MAHADEO JHA *v.* JOGESHWAR THAKUR. 1938 P.W.N. 135.

... amended in 1934), S. 26-O—*Scope and Retrospective effect—Transfer without con...on for ejectment by landlord—Deposit of ... fee with Collector and grant of receipt by ...—Effect—Consent of landlord—If deemed to be given.*

O. 26 O of the Bihar Tenancy Act as amended in 1934, is retrospective in operation. Where pending an action by the landlord for ejectment of the transferee on the ground of want of consent to the transfer of the

manner required by the Act and is granted the necessary receipt by the Collector the consent of the landlord to the transfer must, under S. 26-O (3), be *prima facie* be deemed to have been given from the date on which the receipt is granted, with the result that the landlord's action for ejectment must fail. (*Agarwala, J.*) MAHADEO JHA *v.* JOGESHWAR THAKUR. 1938 P.W.N. 135.

——S. 29—*Scope—Occupancy tenant—Kabuliat re...* ... *land at* ... *—Effect* ... regard ... ...upancy ... ...ent per

bigha for certain period after which it was to be doubled, the effect of the kabuliat being that the rent for the portion previously held was enhanced and was subsequently again doubled.

Held, that the enhanced rent reserved for the period being for what was a substantially different holding did

not contravene the provisions of S. 27. But its doubling after the period clearly contravened, S. 29. (*Wort and [illegible], JJ.*) RAJNITI PRASAD SINGH *v.* RAMUD GAR. **A.I.R. 1938 Pat. 110.**

———**S. 181**—*Grant of land to gorait in lieu of services—Resumability.*

Chakrana Jagirs when they are granted in lieu of remuneration for zamindari service differ essentially from those jagirs which may be granted as rewards for past services or grants of land burdened with some formal service; and there does not appear to be any particular reason why an office of which remuneration is given by the grant of chakrana lands should be distinguished from an office of which remuneration is given in any other way, in cash or kind. Therefore a zamindar when he appointed the first gorait and assigned for his remuneration the goraiti jagir cannot be supposed to have deprived himself thereby of the right to dismiss this servant and appoint another in his place if he should please, or of the right to take jagir away and substitute for it remuneration in cash or kind. The zemindar is entitled to dismiss at his pleasure a servant of this kind, whose services are private and personal to the zamindar although the remuneration of his office consists of the enjoyment of certain land. (*James, J.*) SHILLINGFORD *v.* GENA TATMA. **A.I.R. 1938 Pat. 141.**

BOMBAY DISTRICT POLICE ACT (VI OF 1890), S. 71—*Scope—Order under S. 42 prohibiting playing of music—Breach—Ringing of temple bell at time of worship—Offence—*Mens rea*—Effect of.*

A notification was issued by the District Magistrate of Poona under S. 42 of the Bombay District Police Act, prohibiting the playing of music in or at a Hindu temple, which was specified in the notification. The accused, a worshipper at the temple, rang but once a small temple bell when he worshipped there, as was usual for the worshippers to ring it when they visited the shrine to make *darshan.*

Held, that the bell was not a musical instrument, and the mere ringing of the temple bell by the accused did not amount to the making of a music, although a bell could be used for the production of music, and the accused was not therefore liable to conviction for breach of the notification in question.

Wassoodew, J.—In as much as the act of the accused [illegible] ringing the bell was in itself not contrary to the notification, the mere presence of *mens rea* in the accused [illegible] not render him liable to conviction, because both the intention and the act must concur before any one could be convicted. (*Barlee and Wassoodew, JJ.*) EMPEROR *v.* RAMAKRISHNA GOPAL BHIDE. **40 Bom.L.R. 59.**

BOMBAY MUNICIPAL BOROUGHS ACT (XVIII OF 1925), S. 73 (ii)—*Construction —"Kept for use within the said borough"—Meaning of—Vehicle kept and used for main purpose in one municipality but making occasional visit to another municipality for minor object—Right of latter municipality to tax vehicle.*

S. 73 of the Bombay Municipal Boroughs Act is a taxing section and has to be construed strictly in favour of the tax payer. The words "kept for use" in S. 73 (ii) cannot be construed as involving a liability to tax in case of every vehicle which is kept with the intention of being used even occasionally within the borough imposing the tax, what has to be considered is the main real or pressing object in keeping the vehicle. The words "kept for use" really mean "maintained with the main object of being used." Where a vehicle makes a visit to a Municipality occasionally for a very minor object their main and major use being outside that municipality, the vehicle is not liable to be taxed by that Municipality. In such a case it cannot be said that the vehicle is kept for use so as to enable that Municipality to tax it. (*Barlee and Macklin, JJ.*) BANDARA MUNICIPALITY *v.* BURMA SHELL STORAGE AND DISTRIBUTING CO. OF INDIA, LTD. **40 Bom.L.R. 111**

———**Ss. 123 and 137**—*Construction and relative scope—Notice of proposed construction—No steps taken by Chief Officer within one month—Right of owner to proceed with construction—Drains constructed for house—Right to demand demolition on the ground of want of sanction or notice.*

Where a notice specifying the building sought to be constructed is given, and the Chief Officer of the Municipality has not taken steps within a month in relation thereto, the building owner can proceed with his proposed construction ; that is on the basis that the consent of the Chief Officer must in such circumstances be implied. There is no warrant for holding that S 123 of the Bombay Municipal Boroughs Act is not concerned with the question of drainage. The section in terms does deal with the drains and sewers of the proposed new building. Where a proper notice has been given under S. 123, and the proposed building including the drains has been proceeded with properly under S. 123 (5), the Municipality cannot require the drains to be removed under S. 137. S. 137 is primarily designed to give the Municipality a power exercisable at any time merely by notice in writing to require the demolition of a drain constructed without proper consent or contrary to regulations, whereas the penalty under S. 123 for breach of that section is primarily a fine, and demolition can only be ordered after conviction has been obtained under sub-S. (7) (*b*). (*Beaumont, C.J. and Divatia, J.*) EMPEROR *v.* DIRAJLAL DALSUKHRAM. **40 Bom.L.R. 67.**

———**S. 123 (1)**—*Notice under—Form of—Endorsement on plan showing proposed drain—If sufficient notice—Separate letter asking for leave—If necessary.*

The sending of a plan to the Municipality showing a drain and a septic tank, with an endorsement upon it saying that it is a plan as to the proposed drainage and septic tank amounts to the giving of notice to the Chief officer of the Municipality within the meaning of S. 123 (1) of the Bombay Municipal Boroughs Act, as to the work proposed to be constructed, without any separate covering letter asking for leave. There is nothing in S. 123 which requires that the notice should be in a document separate from the plan itself. (*Beaumont, C.J. and Divatia, J.*) EMPEROR *v.* DIRAJLAL DALSUKHRAM. **40 Bom.L.R. 67.**

BROKER. *See* PRINCIPAL AND AGENT—BROKER.

CALCUTTA HIGH COURT INSOLVENCY RULES, 1910, R. 79—*Affidavit of debtor purporting to be notice—Rejection of, as out of time—Debtor, if can tender evidence at the hearing.*

The rejection of an affidavit of the debtor which purported to be a notice under R. 7 9of the Calcutta Insolvency Rules on the ground that it was filed out of time, does not amount to the shutting out of evidence or the preventing of the debtor from giving any further evidence at the hearing in rebuttal of the case put forward by the petitioning creditor. (*Costello, A.C.J. and Edgley, J.*) AHMAD MAHOMED PARUK *v.* PRAPHULLA NATH TAGORE. **I.L.R. (1938) 1 Cal. 13.**

CENTRAL PROVINCES CIVIL CIRCULARS—*Circulars 2-4, Para. 11—Suit dismissed against all defendants with costs—Only one counsel's fee should be awarded to them.*

Where there are more than one defendant, each represented by separate pleader, and there is a simple

C. P. DEBT CONCILIATION ACT (1933), S. 21.

... is dismissed with ... be allowed and the ... ll the defendants. ... J.) HARGOVIND DULLABH JIWAN *v.* KIKABHAI RAHIMTULLAH.

A.I.R. 1938 Nag

CENTRAL PROVINCES DEBT CONCILIATION ACT (II OF 1933), S. 21—*Applicability—"Debt" Meaning—Joint decree against several persons—Application under S. 4, by some only—Sale of property of others in execution—Confirmation of—If can be stayed.*

"Debt" in S. 21 of the C. P. Debt Conciliation Act means a debt of the debtor who applies under S. 4. Where in the case of a joint decree against several persons only one of them applies under S. 4, S. 21 cannot come into operation, so as to stay the confirmation of the execution sale of the properties of the other judgment-debtor who have not so applied under S. 4. (*Niyogi, J.*) MADHO *v.* RAMCHANDRA.

1938 N.L.J. 60.

——**S. 21**—*Property sold by Civil Court before filing of Boards certificate—Subsequent confirmation of sale—Validity.*

Under S. 21 of the Debt conciliation Act, the Civil Court is not bound to stay proceedings until it has been brought to its notice that there are proceedings pending before the Board by production of a certificate before it. In the absence of such certificate, it is open to the Court to continue the proceedings. Where, therefore, such certificate is not filed in the Court until the property has been sold in execution of a decree, the subsequent confirmation of the sale is not barred by any provision in the Act, and both the sale and confirmation of the sale are valid. (*Pollock and Digby, JJ.*) MAHTABSINGH *v.* KRISHNACHANDRA. 10 R.N. 227= 172 I.C. 592=A.I.R. 1938 Nag. 109.

——**S. 21**—*Scope—If controls, O. 21, R. 92, C. P. Code—"Proceedings"—Meaning of—Sale in execution held prior to debtor's application under S. 4—Confirmation of sale—If precluded.*

The word "proceedings" in S. 21 of the C. P. Debt Conciliation Act must be understood as referring to proceedings in which the creditor and debtor, *i.e.*, the decree-holder and the judgment-debtor alone are concer-

C. P. TENANCY ACT (1920), S. 6.

family and is not alienated"—Usufructuary mortgage by muafidar*—Effect of—If suspends* muafi.

A *muafi* grant was stated to be "*Ba wafe hissedari wa rishtedari*" at a previous settlement, *i.e.*, that the land ...

alienated." The *muafidar* transferred the land to a stranger by way of a usufructuary mortgage.

Held, that the conditions of the *muafi* had been alienated, and the land being no longer in the possession of the family must be held to have been alienated, and that consequently the *muafi* right should be regarded as having ceased so exist so long as the mortgagee remained in possession, and the proprietor would be entitled to collect the revenue assessed upon the land.

Held, further, that on the owner resuming possession by redemption, the *muafi* would revive. (*Greenfield, F.C.*) SETH MEGHRAJ *v.* KASHIRAM.

1938 N.L.J. 52.

——**S. 75 (3)**—*Reference under by Civil Court—Revenue Courts' power to question properiety of.*

Under S. 75 (3) of the C. P Land Revenue Act, when a reference is made by the Civil Court, the Revenue Courts must act upon it. It is not open to them to say that the reference is improper and that the point upon which the reference has been made is one to be decided by the Civil Court itself. (*Greenfield, F.C.*) SETH MEGHRAJ *v.* KASHIRAM. 1938 N.L.J. 52.

CENTRAL PROVINCES TENANCY ACT (I OF 1920), Ss. 6 and 105—*Absolute occupancy holding pre empted by landlord—Mortgagee—Suit by impleading landlord pre-emptor—Pre-emptor discharged—Decree—Mortgagee purchasing holding in execution—Suit by to recover possession against landlord—Competency—Right to pre-emption money.*

The substantive right of pre-emption given to the landlord under S. 6 (4) (*c*) is independent of the right of any mortgagee of the tenant right and is paramount. In addition to this the value of the absolute occupancy holding as if it were not mortgaged or charged as fixed by the Revenue Officer is conclusive and cannot be ...

C. P. TENANCY ACT (1920), S. 6.

the land free to the landlord. But the mortgagee could recover the money deposited in Court which was only a security substituted for land. And the fact that he had failed to ask for a decree against the pre-emption price in his previous suit on mortgage could not preclude him from doing so. (Change in S. 6 to remedy defect suggested.) (*Stone, C. J. and Niyogi, J.*) RAMKARAN BONDRU *v.* SURAJMAL KANHAIYALAL.

A.I.R. 1938 Nag. 80.

——**S. 6**—*Mortgage—Purchase of mortgaged holding—Rights and liabilities of—Failure to redeem mortgage—Pre-emption by landlord—Effect on rights of mortgage.*

The purchaser of the mortgaged property is not personally liable to pay anything in excess of the value of the mortgaged property. If the purchaser of the mortgaged property fails to redeem, he loses his right to the mortgaged property which in the case of landlord pre-empting under S. 6, C.P. Tenancy Act (1920) is the pre-emption money. (*Stone, C. J. and Niyogi, J.*) RAMKARAN BONDRU *v.* SURAJMAL KANHAIYALAL.

A.I.R. 1938 Nag. 80.

——**S. 6**—*Scope—Notice to incumbrancer—If necessary.*

S. 6 does not provide for notice to any incumbrancer and hence it is not imperative on the Revenue Officer to give a notice to any incumbrancer. (Compulsory issue of notice by Revenue Officer of pre-emption proceedings to all incumbrancers is urged by legislative amendment of the section.) (*Stone, C.J. and Niyogi, J.*) RAMKARAN BONDRU *v.* SURAJMAL KANHAIYALAL.

A.I.R. 1938 Nag. 80.

——**S. 105 (a)**—Scope—Pre-emption money—Disposal of—Civil Courts jurisdiction. *See* C. P. TENANCY ACT, SS. 6 AND 105. **A.I.R. 1938 Nag. 80.**

——**Sch. II, Art. 1**—*Applicability—Co-tenant in exclusive possession.*

Art 1 of Sch. II has no application to a co-tenant claiming to be in exclusive possession of a holding. The ordinary law of limitation applies to such a case. (*Niyogi, J.*) RAMJI *v.* MADKI. **173 I.C. 103 = A.I.R. 1938 Nag. 89.**

CERTIORARI—*Writ of—Principal underlying the issue of—Failure of Election Commissioner to record finding that the election has been materially affected in its result—Irregularity and illegality, patent—Interference.*

If a statutory tribunal performs its duties in disregard of the ordinary law or of the procedure and conditions imposed upon it by the law which gives its jurisdiction, the High Court can and should interfere to prevent an abuse of the power conferred by the statute; but it does not follow that the tribunal which obviously is the only tribunal having jurisdiction loses it by such disregard. Where in an election dispute the irregularity and illegality that attended the election, was so open and patent that it was not even contested, the mere fact that the Election Commissioner did not in so many words say that the rejection of certain votes by the election officer had materially affected the result of the election, could not vitiate the order and make it one without jurisdiction. (*Pandrang Row, J.*) VENKATA MANIKYARAO *v.* BHADRACHALAM. **(1938) M.W.N. 196.**

CHOTA NAGPUR TENANCY ACT (VI OF 1908) S. 4—*Applicability—Person inducted on land by co-sharer thicadar without consent of others—Status of.*

Under the Chota Nagpur Tenancy Act non-occupancy rights can arise only in the case of a holding which means "parcel or parcels of land" which is the subject-matter of a separate tenancy and not an undivided share. Hence a person who has been inducted on the land by one of the co-sharer thicadars without the consent of others is not a non-occupancy raiyat. (*Wort and Manohar Lall, JJ.*) NARAYAN RAM SAHU *v.* KARTIC SINGH. **A.I.R. 1938 Pat. 113.**

——**S. 14**—*Scope—Tenure-holder creating zarpeshgi—Death of tenure-holder without heirs—Resumption by owner and grant of zarpeshgi to another—Suit by latter to eject original zarpeshgidar—Competency.*

The landlord granted a certain tenure to a person who created a zarpeshgi in respect of the land. On the death of the tenure-holder without heirs, the landlord resumed the land and granted a zarpeshgi to another. The new zarpeshgidar sued for possession of the land from the original zarpeshgidar and the landlord was impleaded as defendant.

Held, that even though the landlord was not plaintiff, the suit was properly constituted and that even if the landlord was not impleaded the plaintiff as the transferee of the landlord could equally enforce the rights under S. 14 just as much as the landlord. (*Rowland, J.*) BHAIRODAYAL SAHU *v.* JAGESHWAR SAHU.

A.I.R. 1938 Pat. 118.

——**S. 74 (a)**—*Interpretation—Application under—Limitation—S. 231, if applicable.*

S. 74 (*a*) according to ordinary interpretation is not dealing with a cause of action at all; it is defining the right to apply to the Deputy Commissioner to make an appointment of a village headman in the event [illegible] vacancy and that application may be made ei[illegible] the landlord or by the tenants. It presupposes t[illegible] is a custom requiring the appointment of [illegible] headman and what is dealt with by the sectio[illegible] the nature of a litigation or a dispute, b[illegible] calling into ope[illegible]on of an adminis[illegible] on the part of the Deputy Commissione[illegible] appear, therefore, more natural to sa[illegible] there is not in the strict sense a cause [illegible] under S. 74 (*a*) but merely a right to [illegible] administrative operation which may be [illegible] by either the landlord or the tenants, S. [illegible] incapable of application. Even assuming that S. [illegible] does apply, the right of application under S. 74 (*a*) must be construed as a continuing right which endures as long as there is a vacancy. This would fit in with the exigencies of the case and indeed with the language of S. 74 (1) which does not fix any specific time at which the application should be made and accordingly from which the period of limitation would run. On the contrary the section makes the right of applying conditional on a state of facts, namely where a tenancy has been vacated. While that condition exists there is no ground for fixing on any specific moment of time. (*Lord Wright.*) JAGADISH CHANDRA DEO DHABAL DEB *v.* SANTAL. **172 I.C. 649 = 19 Pat. L.T. 74 = 1938 O.L.R. 53 = 1938 P.W.N. 107 = 1938 A.L.R. 71 = 4 B.R. 234 = (1938) O.W.N. 52 = A.I.R. 1938 P C. 61 = (1938) 1 M.L.J. 302 (P.C.).**

CIVIL PROCEDURE CODE (V OF 1908) S. 2 (2)—Applicability to Agra Tenancy Act. *See* AGRA TENANCY ACT, SS. 249 AND 3, Cl. (14).

1938 A.L.J. 63.

——**S. 2 (11)**—*Legal representative—Scope of the definition—If restricted to legal heir—Co-parcener getting property by survivorship—If covered by definition.*

In order to be a legal representative under S. 2 (11). C. P. Code, it is not necessary that a person should be a legal heir of the deceased person. The last portion of the section is wide enough to cover the case of a co-parcener who gets property by survivorship on the death of a co-parcener who sues or is sued in a representative character. (*Ganga Nath J* GYAN DATT

v. SADA NAND LALL. 1938 A.L.J. 56= 1938 A.W.R. 58 (H.C.).

———S. 11—Applicability—Foreign judgment—*Res judicata*—Conditions of. *See* C. P. CODE, S. 13. 40 Bom. L.R. 77.

———S. 11—*Connected cases—Common trial—Dismissal of one suit and decreeing of the other—Appeal against one decree only*—Res judicata.

A suit was instituted by *A* against ... certain amount. Another suit was ... against *A*. The two suits were cons... together as the issues were practical... Court dismissed *A's* suit but decre... appealed against the decree passed ... not appeal against decree passed in his own suit.

Held, that the unappealed decree did not operate as *res judicata*. The existence of a contradictory decision was not fatal and it was the later decision of the highest Court that would be binding on the parties. (*Bhide, J.*) RAM SARUP *v.* SARNU MAL.

A.I.R. ...

———S. 11—Constructive *res judicata*- ... of Court allowing mortgagor to be in ... house—Subsequent order to vacate—I... *res judicata*. *See* C.P. CODE, O. 40, R. 1 AND 2 AND S. 11. (1938) 1 M.L.J. 249.

———S. 11—Decree for possession in favour of Mel... ...dar in prior suit—Subsequent suit in ejectment by ... —If barred. *See* MALABAR COMPENSATION ...

...*that plaintiff cannot sue alone—Subsequent suit* ... *arrears of rent treating defendant as statutory* ... —Res judicata.

... same defendant treating him as a statutory tenant is not ...

... stantially in issue in the previous suit, much less was ...

1938 O.A. 31=1938 R.I ...

1938 O.W.N. 126=

———S. 11—*Execution procee*... *Applicability—Conditions—Order against decree-holder subsequent to sale—If* res judicata *against purchaser in later proceeding*

S. 11, C. P. Code, no doubt applies to orders passed in execution proceedings, but such orders would affect only the parties or their privies and not strangers not deriving title from such parties. An order passed against the decree-holder after an auction-sale, to which the auction-purchaser is not a party cannot operate as *res judicata* as against the auction-purchaser in a subsequent proceeding. (*Niyogi, J.*) MADHAO *v.* RAMCHANDRA. 1938 N.L.J. 60.

———S. 11—*Findings—Finding of trial Court not* ...

George Rankin.) HAR KISHEN DAS *v.* SATGUR PRASAD. 1938 O.A. 87=1938 O.W.N. 138 (P.C.).

———S. 11—*Heard and finally decided—Declaratory suit—Question of plaintiff's title raised in appeal but suit dismissed on other ground—Question of title*—Res judicata.

...

MST. BHAGAN. A.I.R. 1938 Lah. 179.

———S. 11—*Heard and finally decided—Issue neither raised nor decided—If* res judicata.

A suit was brought by an inam holder for a declaration that the whole village except certain minor inams ...

... decided.

Held, that the decree did not make the title to the ...ank-beds *res judicata*. (*Venkatasubba Rao and Abdur Rahman, JJ.*) APPA RAO *v.* SECRETARY OF STATE. A.I.R. 1938 Mad. 193.

———S. 11—*Miscellaneous proceedings—Correction* ... *U.P. Land Revenue Act*—Res judicata.

...ction case under S. 39 of the U. P. Land ... Act cannot operate as *res judicata*. (*Darling S.M. and Bomford, J.M.*) RAM DAYAL *v.* BINDESHWARI PRASAD. 1938 R.D. 121= 1938 A.W.R. 72 (B.R.).

———S. 11—*Miscellaneous proceedings— Correction case under S. 42, U. P. Land Revenue Act*—Res judicata—*Subsequent suit for declaration under S. 121 of U.P. Land Revenue Act—Maintainability.*

... capacity, a decision in such suit holding the plaintiff to ... the zamindars' ... d bars a suit by ... Act to declare the ... The zamindars ... to re-open the prior litigation ... *ing S.M. and Bomford, J.M.*) ... IRI HAJJAM.

... 132=1938 A.W.R. 77 (B.R.).

———S. 11—*Prior decision—Two suits disposed of at same time—One of them instituted prior to the other*—Res judicata.

Where two suits are disposed of at the same time, there is no prior decision which can operate as *res judicata*, though one of them was filed before the other. (*Darling, S.M. and Bomford, J.M.*) RENUKA RAI *v.* SHYAM DUTT RAI. 1938 R.D. 133= 1938 A.W.R. 81 (B.R.).

———S. 11, Expl. 4—*Former suit as exclusive owner—Subsequent suit as co-sharer for accounts—If barred.*

... wner against ... t being dis... ...nts as a co... barred from

C. P. CODE (1908), S. 80.

Before the properties were actually sold, *X* applied for rateable distribution of the sale proceeds.

Held, that the decree of *X* against the firm was in effect a decree against the two partners individually and consequently they were the common judgment-debtors in the two decrees and *X* was, therefore, entitled to get rateable distribution of the sale proceeds. (*Bartley and Nasim Ali, JJ.*) RADHA KANTA PAL *v.* PULIN KRISHNA PAL. **42 C.W.N. 310.**

———**S. 80**—*Suit against Official Receiver of estate for arrears of rent—Notice—If necessary.*

In a suit against an Official Receiver of an estate for recovery of arrears of rent notice under S. 80 is not necessary as omission of receiver to pay rent is not an act purporting to have been done by him in his official capacity. (*Nasim Ali and Remfry, JJ.*) DEBENDRA NATH ROY *v.* OFFICIAL RECEIVER.

A.I.R. 1938 Cal. 191.

———**S. 92**—*Parties—Suit for removal of trustee—Ijaradar from trustee—If necessary party.*

In a suit for the removal of a trustee under S. 92, C. P. Code, the ijaradar from the trustee is not a necessary party. (*S. K. Ghose, and Patterson, JJ.*) MASSIRAT HOSSAIN *v.* HOSSAIN AHMAD CHOWDHURY.

42 C.W.N. 345.

———**S. 92**—*Public or private trust—Provisions in favour of both private individuals and public.*

There is no hard and fast rule that, merely because there are certain provisions in favour of private individuals and certain others in favour of the public, therefore, the case falls within or without the class of public trusts to which S. 92, C. P. Code. applies. The Court must look to the real substance of the trust and the primary intention of the creator of the trust in every case. (*S. K. Ghose and Patterson, JJ.*) MASSIRAT HOSSAIN *v.* HOSSAIN AHMAD CHOWDHURY.

42 C.W.N. 345.

———**S. 100**—*Finding of fact—Appellate Court erring in law in arriving at conclusion upon facts.*

Where the lower Appellate Court errs in law in holding on the facts of a case that the descent has not been from preceptor to disciple, the finding can be interfered with in second appeal. (*Dalip Singh and Skemp, JJ.*) GHULAM MOHY-UD-DIN *v.* MT. HAJRAN BIBI. **A.I.R. 1938 Lah. 182.**

———**S. 100**—*Finding of fact—Interpretation of facts found by lower Court.*

Where the lower Court has arrived at a certain finding of facts, and the facts are clear but the dispute relates not to the facts but to interpretation of facts by the lower Court, it can be dealt with in second appeal. (*Dalip Singh and Skemp, JJ.*) LABH SINGH *v.* MST. JASSO.

A.I.R. 1938 Lah. 180.

———**S. 100**—*Question of law—Inference from proved facts.*

Where certain facts are found and an inference is drawn from the facts so found, it is open to the Court in second appeal to consider whether as a matter of law such inference is justified by the facts found. Whether the evidence is directed to prove fraud or conspiracy, this principle will equally apply because that principle applies to all circumstantial evidence and amounts simply to this that the inference drawn from such evidence must be one which necessarily flows from it. (*Fazl Ali, J.*) NARAIN PANDE *v.* GAYA RAI.

A.I.R. 1938 Pat. 147.

———**S. 104**—Applicability—Order in contentious proceedings under S. 295, Succession Act. *See* C. P. CODE, O. 41, R. 1. AND S. 104.

A.I.R. 1938 Sind 36 (F.B.).

C. P. CODE (1908), S. 115.

———**S. 110**—*Construction—"Indirectly"—Possibility of future suits—If enough.*

Under S. 110, C. P. Code, the question whether a decree involves indirectly a claim or question respecting property the value of which is Rs. 10,000 or upwards, must be decided with reference to actual circumstances at the time and not to circumstances, which are remote, and not in particular to a mere possibility, that future suits as to all or part of the larger extent of the property alleged to be concerned may be instituted at some time in the future. 43 M.L.J 728, followed. (*Costello, Ag. C. J. and Edgley, J.*) KUMAR CHANDRA SINGH *v.* GOBINDA DAS. **42 C.W.N. 298.**

———**S. 110**—*Substantial question of law—Rejection of affidavit filed by debtor under R. 79, Calcutta Insolvency Rules.*

Where an Insolvency Judge rejected an affidavit of he debtor which purported to be a notice under R. 79, f the Calcutta Insolvency rules, 1910, on the ground that it was filed out of time.

Held, that there was no substantial point of law within he Contemplation of S. 110, C. P. Code, whether or not the judge was right in rejecting the affidavit. (*Costello A.C.J. and Edgley, J.*) AHMAD MAHOMED PARUK *v.* PRAPHULLA NATH TAGORE.

I.L.R. (1938) 1 Cal. 13.

———**S. 115**—*Case decided—Order giving leave to defend conditionally under O. 37, R. 3—Revision.*

An order giving leave to defend conditionally under O. 37, R. 3, C. P. Code, is an interlocutory order and does not amount to a "case decided" within the purview of S. 115, C. P. Code. Even assuming the order not to be an interlocutory order, the Court cannot be said to act illegally or material irregularity in the exercise of its jurisdiction in giving leave to defend conditionally, and the order is not, therefore, open to revision under S. 115, C. P. Code. (*Addison and Abdul Rashid, JJ.*) MANOHAR LAL *v.* KAROBAR KHANDAN MUSHTARKA.

40 P.L.R. 69.

———**S. 115**—*Illegally or with material irregularity—Order dismissing application as barred by limitation—Disregard of S. 4, Limitation and refusal to apply it—Revision—Interference.*

Where a Court dismisses a suit or an application on the ground of limitation it does not refuse to exercise jurisdiction. On the contrary it takes cognizance of the suit and exercises jurisdiction by holding that on a point of law the suit fails. To ignore the plain terms of S. 4 of the Limitation Act is to deprive a litigant of the Statutory privilege given to him by that section; and a refusal to apply the section in a case in which it does apply amounts to exercising jurisdiction illegally and with material irregularity, justifying interference in revision under S. 115, C. P. Code. (*Beaumont, C. J.*) VEERAPPA *v.* IRATAPPA. **40 Bom.L.R. 152.**

———**S. 115**—*Interlocutory orders—Order allowing application for leave to sue* in forma pauperis—*Revision application by defendant—Interference—Discretion of High Court.*

According to the practice of the High Court of Patna a revision petition does lie under S. 115, C. P. Code against an order granting leave to a pauper plaintiff to sue *in forma pauperis*. The fact that the order is an interlocutory order or that the government have not moved in the matter is no bar to the High Court exercising its discretion in revision. (*Dhavle and Varma, JJ.*) BIHARI SAHU *v.* SUDAMA KUER.

19 Pat. L.T. 101.

——S. 115—*Jurisdiction—Absence—Appeal incompetent but entertained—Order of appellate Court—Interference—Order of original Court itself without jurisdiction—Effect of—If can be restored.*

The High Court under S. 115, C. P. Code, ought not obviously to interfere in revision so as order which itself is without jurisdiction o irregularity in the exercise of jurisdiction, order under revision is one *without jurisdiction.* (*Row-*

—*Revision—Interference.*

aside the order of the Mamlatdar exercises a jurisdiction not vested in him and the case therefore falls within the terms of S. 115, C.P. Code. (*Beaumont, C.J.*) BABAJI *v.* BALA FAKIRA MAHAR.

40 Bom.L.R. 104.

——S. 115 —Jurisdiction—Absence—Reference under ... —Termination by decree in ... order of ... ion Act— ... nce. *See* ... L.J. 54

——S. 115—*Limitation—Order without adjudicating on question of limitation—Interference.*

High Court can interfere in revision in a case which is on the face of it time-barred and where the lower Court has made an order without adjudicating on the question of limitation. A.I.R. 1916 Cal. 651, Rel. on. (*Roberts, C.J. and Sharpe, J.*) CHATTAL TRADING CO. LTD. *v.* BABU MAHIM CHANDRA.

appealed against—Revision—Order ur 151—If open to revision. *See* C. P AND 151.

——S 115—*Revision—Competency—auction purchaser's application for confirmation of sale.*

If falls under S. 144.

S. 144 C.P. Code, is confined to cases in which the decree of a trial Court has been varied or reversed by some superior Court or by reason of some order passed ...

paid out to the decree holder, a third party brought a suit and got a decree establishing his title to the property sold in execution. The auction purchaser applied to the Court to get back his money, and the Court passed an order allowing him to recover the amount

which the decree-holder had drawn out. An appeal was preferred against this order, and the appellate Court reversed it.

Held, (1), that the order of the first Court for restitution was one passed under S. 151, C. P. Code, in the ...

if aggrieved, being by way of revision in the High ... of the first Court was ... e reason that the execu- ... side, the purchaser had no independent right to obtain a refund, the petitioner should not be penalised for the mistake, and that it was a case for allowing such an amendment to be made as ... properly ... appel- ... et aside, ... end his ... setting aside the sale and adding facts relied on for avoiding the bar of limitation. (*Rowland, J.*) RAMESHAWAR LAL JHUNJHUNWALA *v.* RAMCHARAN PRASAD SAHU.

19 Pat. L. T. 111.

——S. 144—*Applicability—Sureties.*

Section 144 was not intended to apply to sureties but only to the parties to the suit or their representatives. The surety only undertakes to return the property, namely the material object and not the liability for safeguarding the rights of the owner in respect of the property. If any loss is caused to the owner by reason of the property not being returned in the condition in which it was when it was taken, or if for any other reason the owner suffers damages, that has nothing to do with the execution of the decree as such, (*Stone, C.J. and Niyogi, J.*) SYED FAKIR SYED HUSSAIN *v.* ABDUL SAMAD KHAN. 173 I C. 155=A.I.R. 1938 Nag. 101.

——Ss. 144 and 151—*Order under—Appeal—Revision.*

In a proceeding started under S. 144, C. P. Code, ... not apply, but granted ... 151. ... the rights of the ... was capable ... though it was ... or under both ... ion lay against ... RNATH DAS *v.* ... Pat. L.T. 118.

——S. 148—Conditional order granting leave to withdraw suit with liberty to file fresh one—Extension. *See* C.P. CODE, O. 23, R. 1 (2).

66 C L J. 275.

——S. 149—*Appellate Court finding Court fee fixed ... Court to be insufficient—Duty to grant time.*

... re in the trial Court the defendants themselves ... ted that the Court fee was payable on a certain ... and the Court after enquiry had fixed that amount as the proper value of the suit, the Appellate Court, when it finds this value to be insufficient, should grant the plaintiffs time to make good the deficiency. This is eminently a case to which the provisions of S. 149 C. P. Code, apply. (*Tek Chand, J*) ABDUL ... MOHAMMAD AMIR.

40 P.L R. 33.

——... ppeal — Restitution—Order for —Appealability—Remedy—Revision. *See* C. P. CODE, SS. 144 AND 151. 19 Pat L T. 111.

——S. 151—Appeal—Restitution—Order under S. 144 read with S. 151—Appealability—Revision. *See* C. P. CODE, SS. 144 AND 151. 19 Pat L.T. 118.

C. P. CODE (1908), S. 151.

——**S. 151**—*Applicability — Inherent powers—When to be exercised.*

It is a well-recognised principle that where a party has another remedy, and will not adopt or negligently fails to pursue it, the Court will not, as a general rule, grant him relief under its inherent powers under S. 151. (*Rowland, J.*) RAMESHAWAR LAL JHUNJHUNWALA *v.* RAMCHARAN PRASAD SAHU. **19 Pat.L.T. 111.**

——**S. 151**—*Inherent powers—Restitution—Duty of Court—Other remedy open—If bar to restitution under inherent powers—Property wrongly taken away in execution against another under erroneons order—Duty to make restitution on establishment of title.*

Where property has been taken away from a third party under an erroneons order of the Court, and that party has subsequently established by a suit that the property belongs to him, and not to the judgment-debtor in execution of a decree against whom the property was so taken, the Court must use its inherent powers to restitute to such innocent party his property of which he has been deprived by the erroneous order of the Court. The fact that a suit is maintainable at the instance of that party is no ground for refusing redress under S. 151 when the wrong has been done under the order of the Court. (*Khaja Mohammad Noor, J.*) RAMESHWAR LAL JHUNJHUNWALA *v.* MST. SUBDI.

19 Pat.L.T. 119.

——**S. 151**—Inherent powers—Restitution—Powers of Court—Execution Sale—Property subsequently held to be third person's in separat suit—Restitution to purchaser of purchase money. *See* C. P. CODE, SS. 144 AND 151. **19 Pat.L.T. 111.**

——**Ss. 151 and 152**—*Scope and applicability.*

Ss. 151 and 152, C. P. Code, cannot apply to a case where there is no accidental slip or error or omission on the part of the Court or there is no accidental slip, error or omission oi slip in the plaint which intended one thing and owing to an accidental slip stated another, but the parties were labouring under a mistake at the time of the decree and the mistake was embodied in the decree. (*Dalip Singh, J.*) ABDUL SATTAR *v.* FAZAL-UL-RAHMAN. **40 P.L.R. 100.**

——**O. 6, R. 17**—*Applicability—Party deliberately omitting to join necessary party to application and concealing existence—Subsequent application to amend—If can be allowed.*

Where an applicant under S. 4 of the U. P. Encumbered Estates Act does not join in his application all the necessary parties as required by law, and asserts that there are no other parties to be added, wilfully concealing the existence of some persons who ought to be impleaded, he cannot be permitted to amend his application by adding the omitted parties, when the omission is brought to light by a creditor. The benefit of O. 6, R. 17 cannot be given to such a party. (*Darling, S. M. and Bomford, J.M.*) HAR PRASAD *v.* PARMESHWARI DAS. **1938 R.D. 137= 1938 A.W.R. 44 (B.R.).**

——**O. 6, R. 17**—*Scope—If exhaustive— Application for leave to sue* in forma pauperis—*Property omitted from schedule—Amendment to include—Power of Court to allow.*

O. 6, R. 17, C. P. Code, is not exhaustive of the powers of the Court in the matter of amendment; a Court has therefore jurisdiction to allow an amendment of an application for leave to sue *in forma pauperis*, by including an item of property which was originally omitted from the application or annexure thereto. Such an amendment cannot be held to be illegal or without jurisdiction on the ground that O. 6, C. P. Code applies only to pleadings and not to applications to sue *in forma pauperis*. (*Dhavle and Varma, JJ.*) BIHARI SAHU *v.* SUDAMA KUER. **19 Pat.L.T. 101.**

C. P. CODE (1908), O. 21, R. 2.

——**O. 20, R. 4 (2)**—Judgment—Contents. *See* C. P. CODE, O. 41, R. 31, AND O. 20, R. 4 (2). **A.I.R. 1938 Pat. 69.**

——**O. 21, R. 1**—*Applicability—Compromise of claim proceedings—Agreement to receive in instalments —In default of payment on due dates, whole amount to be paid—Default on due date, a holiday—Tender into Court next day—Right to apply for full amount, if arises.*

The agreement between parties was that the amount due should be paid in instalments, and if there was any default in such payment, the whole of the amount is to become payable. In such a case where the due date fell on a holiday and the instalment was not paid, it could not be deposited in Court on the next working day relying upon O. 21, R. 1, C. P. Code, for where two alternatives are provided one cannot be chosen in such a manner as to prejudice the rights of the other party. One could not commit a default and thereby extend the time in derogation of the terms settled between the parties. In such a case the entire amount becomes payable. (*Bennet, Ag. C.J. and Ganga Nath, J.*) ROSHAN LAL *v.* GANPAT LAL. **1938 A.L.J. 121= 1938 A.W.R. 93 (H.C.).**

——**O. 21, R. 2**—*Adjustment of decree—Executory contract—If enough.*

A decree can be lawfully adjusted by a contract. It is not necessary that there must be a completed transaction. It is enough if the decree-holder enters into a fresh contract with the judgment-debtors for the satisfaction of the decree and if the contract is lawfully enforcible even though executory, it might operate as an adjustment of the decree. Distinction must be made, however, between a case where the decree-holder accepts as an immediate satisfaction or adjustment of the decree a promise of the judgment-debtors to do something in future and the case where the agreement is to accept a decree as adjusted or satisfied only if the thing promised is actually done at a future date. (*Mukherjea, J.*) SERAJUL HAQUE *v.* NOABALI MEAH.

42 C.W.N. 313.

——**O. 21, R 2**—*Applicability—Execution by attachment of decrees in favour of judgment-debtor—Realisation—If a payment out of Court.*

Where a decree-holder applied for execution by attachment of certain decrees in favour of his judgment-debtor and in pursuance of an order of Court proceeded to realise the amounts due in respect of the attached decrees, the payments made by the judgment-debtor under the attached decrees, are to be deemed to have been made in Court and not outside Court. Hence O. 21, R. 2 has no application to cases of such payments. (*Rachhpal Singh and Ismail, JJ.*) THOMAS SKINNER *v.* RAM RACHPAL. **1938 A.L.J. 59= 1938 A.W.R. 80 (H.C.)=A.I.R. 1938 All. 141.**

——**O. 21, R. 2**—*Predecretal agreement—Mortgage suit—Agreement between preliminary and final decree—If could be pleaded in bar of executian.*

Where an unregistered agreement was alleged to have been executed by the decree holder after the passing of the preliminary decree and before the final decree whereby he agreed not to execute the decree against some of the items of the hypotheca, it was

Held, that there was nothing in the above agreement which showed that it was intended to attack the decree sought to be executed, for it could not be said that it was intended to attack the final decree which had not yet been passed. Any agreement which merely relates to the execution of the decree and does not attack the

C. P. CODE (1908), O. 21, R. 6.

decree itself could be pleaded in bar of execution. (*Pandrang Row and Abdur Rahman, JJ.*) MEENAKSHISUNDARAM AYYAR *v.* SWAMINATHA IYER.
1938 M.W.N. 193.

—— **O. 21, R. 6 (b)**—*Scope—Mistake as to number of suits and names of judgment-debtors in certificate—Effect—If fatal—Application for execution—If not in accordance with law—Omission of decree-holder to correct mistake—If invalidates application for execution—Limitation Act, (Art.)* 182 (5).

Where the Court transmitting a decree for execution to another Court has fully complied with all the requirements of O. 21, R. 6, C. P. Code, and the copy of the decree sent to the executing Court contains all the correct particulars as to the number of suit and the names of the judgment-debtors, the mere fact that there is a mistake in the certificate of non-satisfaction of the decree as to the number of the suit and the names of the judgment-debtors would not affect the jurisdiction of the execution Court to proceed with the execution. The mistake is a mere irregularity. Even an omission to ... an ... the ... cu- ... of non-satisfaction nor the omission of the decree holder to have the mistake in the certificate corrected would render his application for execution one not in accordance with law. Any default on the part of the decree-holder in prosecuting his application for execution after it has been filed cannot invalidate his application which is otherwise in accordance with law. (*Fazl Ali and Agarwala, JJ.*) KAMESHWAR PRASAD SINGH *v.* LALU MAL.
1938 P.W.N. 73

—— **O. 21, R. 12**—*Application for attachment of moveable property in possession of judgment debtor—Decree holder, if bound to supply inventory of articles or their value.*

Where the movable property sought to be attached is in ... sought to be attached or their approximate value. (*Bartley and Nasim Ali, JJ.*) MUNICIPAL COMMISSIONER OF HOWRAH *v.* SHAIK MOSAF...

—— **O. 21, R. 29**—Equitable right ... able against assignee of decree. *See* C... AND O. 21 R. 29. 40

—— **O. 21, R. 35**—*Applicability*—... *foreclosure suit—Execution against par... not bound by decree—Legality*

Under O. 21, R. 35, C. P. Code, a ... foreclosure and possession can only be e... the person bound by the decree. Wh... bound by the decree is in possession of ... property, the decree for possession ca... executed against such person. If the Police assist the decree-holder in removing that person ... they exceed the powers given by O. 21, R... Code. (*Greenfield, F.C.*) ... LAL.

—— **O. 21, R. 50**—*Decree* ... *serving summons in suit* ... *Execution petition state* ... *partners—Leave not obtain* ... *execution.*

Where a decree is obtained against a firm by serving summons in the suit upon two persons as partners of that firm, the mere fact that three other persons are stated to be the remaining partners of the firm in the petition

C. P. CODE (1908), O. 21, R. 90.

for execution of the decree cannot make the execution invalid. These other persons do not, no doubt, come under O. 21, R. 50 (1) (*b*) and (*c*), C.P. Code. The decree holder cannot execute the decree against them unless he has obtained leave from the Court which has passed the decree. If this leave has not been obtained, he is entitled to proceed against the other two judgment-debtors, and the execution petition is valid so far as they are concerned. (*Bartley and Nasim Ali, JJ.*) RADHA CANTA PAL *v.* PULIN KRISHNA PAL.
42 C.W.N. 310.

—— **O. 21, R. 89**—*Interpretation—If refers to withdrawal by decree holder of sale proceeds deposited.*

The words "less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder" in O.21, R. 89, refer to a payment made to the decree-holder out of Court and not to the withdrawal by the decree-holder of the sale proceeds deposited in Court by the auction purchaser. (*Puranik, J.*) RAMCHANDRA MAHOTRAO *v.* RAMCHANDRA GUJABA.
A.I.R. 1938 Nag. 54.

—— **O. 21, R. 89**—Jurisdiction—Sale by Collector in execution transferred by Court—Application to Court to set aside sale—If incompetent. *See* LIMITATION ACT, S. 4. 40 Bom.L.R. 152.

Where a decree holder whose decree is fully satisfied fails to enter up satisfaction of the decree and proceeds to execute his decree fraudulently and the property is sold in court auction and where the owner deposits the amount due under O. 21, R. 89, C.P. Code and gets the sale set aside, on a question whether such an owner can recover the money from such a decree-holder.

Held, that the owner's right to recover back the money paid under compulsion of execution which ... g of S. 72 of the ... liability is one ... the money so paid.

Held, further that the fact that the payment was ...

—— **O. 21, R. 90**—*Material irregularity in publ...*

... grossly inadequate, the Court ... red by ... l. on. ... RAM ... A.I.R. 1938 Lah 152.

—— **O. 21, Rr 90 and 69**—*Material irregularity—Adjournment of sale—Failure to record reasons.*

O. 21, R. 69, C.P. Code, no doubt directs the sale officer to record his reasons for the adjournment of the

C. P. CODE (1908), O. 21, R. 90.

sale. But his failure to record his reasons would not amount to a material irregularity, for it cannot be said to go to the root of the matter. (*Bose and Puranik, JJ.*) ANANDI PRASAD *v.* GOVINDA BAPU.

10 R.N. 210 = 172 I.C. 465 = A.I.R. 1938 Nag. 107.

——O. 21. Rr. 90 and 69—*Material irregularity—Adjournment of sale by sale officer—Omission to specify hour.*

The failure of the sale officer to specify the exact hour to which the sale is adjourned would amount to a material irregularity. When the Code directs a specific hour to be named, it is not fulfilling its directions to say in a vague way that the sale will be "resumed in an hour or so". But this is not enough to justify setting aside the sale unless the applicant has sustained substantial injury by reason of such irregularity. (*Bose and Puranik, JJ.*) ANANDI PRASAD *v.* GOVINDA BAPU

172 I.C. 465 = 10 R. N. 210 = A I.R. 1938 Nag. 107.

——O. 21, Rr. 91 and 93—*Scope—If exhaustive—Execution sale—Delivery of possession — Subsequent claim by dispossessed person under O. 21, R.100—Order holding judgment debtor had no saleable interest—Application by purchaser for refund of purchase money—Dismissal on the ground that the remedy was by way of suit—Suit by purchaser—Maintainability—Remedy of purchaser—Omission to sue to set aside order on claim—Effect.*

Appellant who was the auction purchaser of certain properties sold in execution of decree lost some of them as a result of claim proceedings under O. 21, R. 100, C. P. Code, the Court holding that the Judgment debtor had no title or saleable interest in them. His application to the execution court for repayment of the purchase money of the properties he had lost thus was refused on the ground that his remedy was a regular suit. He thereupon brought a suit impleading the decree-holder, but not the judgment-debtor. Both the Courts below dismissed the suit on the ground that he ought to have applied under O. 21, R. 91, C.P. Code.

Held, that the appellant (auction-purchaser) had only one remedy under the present code, namely by way of an application under O. 21, R. 91, C. P. Code; and after getting the sale set side by such application, to apply for repayment of his purchase money under O. 21, R. 93.

Fazl Ali, J. The appellant not having brought a suit to challenge the order passed in proceedings under O. 21, R. 100, C. P. Code, as it was open to him to do, was precluded from asking the Court to hold as a fact, merely on the basis of an order passed in a summary proceeding, that the judgment-debtor had no saleable interest in the property. (*Fazl Ali and Rowland, JJ.*) PALI RAM *v.* LAHERIA SARAI CENTRAL CO-OPERATIVE BANK LTD.

19 Pat.L.T. 80 = A I.R. 1938 Pat. 150.

——O. 21, R. 91-A (Bom)—Scope and effect of—Application to set aside sale—If to be made to Collector—Jurisdiction of Court. *See* LIMITATION ACT, S. 4.

40 Bom.L.R. 152.

——O. 21, R. 92—*Order refusing to set aside sale—Second appeal.*

No second appeal lies from an order refusing to set aside a sale. (*Bose and Puranik, JJ.*) ANANDI PRASAD *v.* GOVINDA BAPU.

10 R.N 210 = 172 I.C 465 = A.I.R. 1938 Nag. 107.

——O. 21, R. 92—Scope—If controlled by C. P. Debt Conciliation Act, S. 21. *See* C. P. DEBT CONCILIATION ACT, S. 21

1938 N.L.J. 60.

C. P. CODE (1908), O. 23, R. 1.

——O. 21, R. 92 (1) and (2)—*Scope of—Auction purchaser, if can apply for confirmation of sale.*

There is no provision in the Code of Civil Procedure for an application by the auction-purchaser for confirmation of the sale; confirmation follows automatically under R. 92 (1) and the setting aside follows automatically under R. 92 (2) of O. 21. (*Burn and Lakshmana Rao, JJ.*) SATYANANDAM *v.* NAMMAYYA.

47 L.W. 51.

——O. 21, R. 93—*Interpretation—If implies that decree-holder can withdraw purchase money before confirmation of sale.*

O. 21, R. 93, is intended to arm the Court with power to order the return of the money to the purchaser in case the same has been paid to any person in the meantime. It should not be read as containing an implication that the decree holder is entitled to withdraw the purchase money before confirmation of sale, during the execution proceedings in the executing Court. (*Puranik, J.*) RAMCHANDRA MAHOTRAO *v.* RAMCHANDRA GUJABA.

A.I.R. 1938 Nag. 54.

——O. 21, R. 100—*Scope—Possession—Person in possession subject to mortgage but not made party to suit on mortgage—Right to be restored to possession.*

Where an applicant under O. 21, R. 100 had been found to be in possession, but subject to the mortgage right of the decree-holder to whose mortgage suit the applicant had not been a party, the application should be allowed, as it is immaterial in an application under O. 21, R. 100 whether or not his possession was subject to the mortgage right of the decree holder. (*Dhavle, J.*) RAMCHANDRA JHA *v.* PRASAD THAKUR.

A.I R. 1938 Pat. 90.

——O. 21, R. 103—Scope—Claim under O. 21, R. 100 by dispossessed person—Order allowing and holding that judgment-debtor had no title to property sold—Remedy of purchaser—Application for refund of purchase money—Dismissal—Subsequent suit for refund—Maintainability. *See* C. P. CODE, O. 21, RR. 91 AND 93.

19 Pat.L.T. 80.

——O. 22, R. 4—*Abatement of appeal—Decree common among all defendants-respondents—Abatement of appeal against one of them—Abatement in toto.*

Although the decree appealed against is common among all the defendants against whom the suit was dismissed, the abatement of appeal against one of the defendants-respondents does not have the effect of the abatement of the entire appeal if the interest of that defendant is quite distinct and separate from that of the other defendants. (*Thomas and Zia-ul-Hasan, JJ.*) RAM CHANDRA *v.* MAKHDOOM SINGH.

172 I.C. 655 = 1938 O.L.R. 21 = 1938 O. A. 26 = 1938 O.W.N. 40 = A.I.R. 1938 Oudh 62.

——O. 23, R. 1 (2)—*Leave to withdraw suit with liberty to file fresh one—Conditional order on payments of costs—Suit filed without payment of costs—Costs deposited with permission of Court, before hearing of the suit Such suit, if maintainable—C. P. Code, S. 148.*

An order granting leave to withdraw a suit with liberty to file a fresh one was in the following terms "the plaintiffs be permitted to withdraw the suit with liberty to bring a fresh one unless barred as prayed for. Defendant will get costs which must be paid within one month as a condition precedent to a fresh suit". A fresh suit was filed. The costs were neither paid within the time allowed, nor even prior to the filing of the fresh suit. The costs were paid with the permission of the Court, before the commencement of the hearing of the fresh suit on an objection as to maintainability of the fresh suit.

C. P. CODE (1908), O. 25, R. 1.

Held, that whether the conditic ... costs attaches to the permission to ... fresh suit, the Court extended the tin ... Code, for payment of the costs. Ev ... be taken as attaching to the permission to file the fresh suit, the conditional permission had become final on payment of the costs and hence the suit was maintainable. (*Nasim Ali and Remfry, JJ.*) ABDUL KHALEQUE *v.* SUSIL CHANDRA CHAUDHURI. 66 C.L.J. 275.

——O. 25, R. 1—*Discretion of Court*

The power given to the Court under O. 25, R. 1, C.P. Code, is discretionary, and in deciding whether to exercise that power, the Court must have regard to the circumstances of each case, and unless it be shown that an order for security is necessary for the protection of the defendant, it ought not to order security to be taken from the plaintiff (*Lort Williams, J.*) CELLULAR CLOTHING CO., LTD. *v.* SEN ABDOOL & CO.
42 C.W.N. 270.

——O. 26, Rr. 16 and 17—*Scope of—Examination of witnesses, secretly and in the absence of parties—If permissible.*

The provisions of O. 26, R. 16 are permissive in the sense that they vest a discretion in the Commissioner to examine or not to examine a witness. But when once the Commissioner has decided to examine a witness, then the mandatory provisions of R. 17, come into play which in their turn attract the the provisions of O. 18, of the C. P. Code and of S. 138 of the Evidence Act. As such it is certainly not permissible for a Commissioner to record the statements of witnesses secretly and in the absence of parties. (*Iqbal Aamad, J.*) ... *v.* SHIAM SUNDAR LAL. 1938 A W ...

——O. 30, R. 1—*Judgment obtained against firm—Effect of.*

When a suit is brought against a firm and judgment obtained against it, the action is really against the persons who constitute the firm and the judgment is really a judgment against the individuals. (*Bartley and Nasim Ali, JJ.*) RADHA KANTA PAL *v.* PULIN KRISHNA PAL. 42 C W N. 310.

——O. 33, R. 1—"*Sufficient means*"—*Test of—Occupancy holding held by applicant—If to be taken into account.*

In deciding whether an applicant for permission to sue *in forma pauperis* is possessed of sufficient means to enable him to pay the Court-fee prescribed by law, the ...

v. BAHORANSINGH. 1938 N.L.J. 37.

——O. 33, Rr. 5, 6 and 7—*Scope—Court declining to reject application under R. 5 (a)—Notice under R. 6—Evidence and argument—Subsequent objection under R. 5 (a) based on admissions of applicant after notice—Maintainability.*

After notice is issued under R. 6, of O. 3... Code, the Court, it is true, is required under R. ... hear arguments as to whether the applicant is subject to any of the prohibitions specified in R ... an objection which relates to rule 5 (a) cannot ... out by the evidence required under R. 6 and taken under R. 7 (1), which must be confined to proof of the pauperism and disproof thereof. Evidence and admissions obtained from the applicant, which go beyond the issue of pauperism cannot be regarded as available to the objector for asking the Court to reject the application under R. 5 (a), when he has not been able to establish

C. P. CODE (1908), O. 40, R. 1.

... notice ... ted the ... Rr. 2 ... AHU *v.* SUDAMA KUER. 19 Pat.L.T. 101.

——O. 34, R. 6—*Costs—Order imposing personal liability for—Legality—Personal remedy for mortgage debt barred.*

Ordinarily costs awarded to a mortgagee decree-holder in a mortgage suit or appeal in the absence of any express direction to the contrary would be part of the mortgage amount decreed and would be a charge on the mortgaged property. But where the trying Court imposes personal liability for costs on the mortgagor in express terms, the order is *intra vires* although his personal liability for the mortgage debt is time barred, and can be executed against the person of the mortgagor apart from the sale of the mortgaged property. (*Coldstream and Din Mohammad, JJ.*) KRISHAN LAL *v.* SIRI JAIN MANDIR PANCHAITI. A.I.R. 1938 Lah. 188

——O 40, R. 1—*Receiver—Appointment—Effect—Property in possession of receiver—Suit for possession of—Sanction of Court—Necessity.*

Where an estate is in the possession of a receiver appointed by Court, a suit for possession of the estate from that receiver can only be brought with the leave of Court. It is necessary for the plaintiff to apply to the Court which has appointed the receiver for sanction for the purpose of bringing the action for possession of the estate. Where property is in possession of an officer of the Court, if there are legal or equitable rights in that ... son who claims to enforce those rights must apply for leave to enforce them. Whether such right be a right to take possession, or a right to bring an action, or a right to do various other things, the Court requires an application to be made to it for leave to enforce the same. If no such sanction is obtained, the action commenced without the sanction must fail. (*Wort and Manohar Lall, JJ.*) NRISHINGHA CHARAN NANDY CHOUDHURY *v.* ASHUTOSH DEO GHATWAL.
19 Pat.L.T. 35.

——O. 40, Rr. 1 and 2 and S. 11—*Mortgage suit—Simple mortgage—Whether receiver could be appointed—Original order of Court allowing mortgagor to be in a portion of the house—Subsequent order to vacate—No ... judicata—Power of Receiver to get ... art to enable him to collect rent.*

...uit on a mortgage the mortgagee obtain... ...l a receiver was appointed to collect rents from the mortgagor in possession of a portion of the suit property but because the receiver was unable to realise the rent an order was passed against the mortgagor to vacate the portion he was occupying, on the contention that the appointment of a receiver in a simple mortgage suit was wrong.

... (F.B.), foll.

Held further, that the Courts allowing by its original order the mortgagor to be in possession of the property could not be barring the later order to vacate by any principle of constructive *res judicata*. The Court certainly did not decide any question against the mortgagee either expressly or by implication which would amount

CONTEMPT OF COURTS ACT (1926).

principle on which the Court proceeds in taking notice of this class of contempt is based on the interest of the public and not on the interest of the particular Court or Judge who is attacked. Where attacks are made on the personal character of a Judge, or where base or improper motives in the decision of a case are attributed to a Judge, the process of the Court should be used; but the process of contempt for scandalising the Court is one which should be sparingly used. A general expression of opinion hostile to the utility of Courts of Justice, without any attack on any particular Judge or comment on any particular case, is not likely to affect the public and need not disturb the equanimity of Judges, and does not amount to such a contempt of Court as should be dealt with by the process of contempt. (*Beaumont. C.J. and Wassoodew, J.*) GOVERNMENT PLEADER, BOMBAY *v.* TULSIDAS SUBHANRAO JADHAV.

40 Bom.L.R. 75.

CONTEMPT OF COURTS ACT (XII OF 1926)—*Contempt of Court—Newspaper article—Allegation of evidence in contemplated prosecution being unreliable and obtained by unfair means—Suggestion of improper means to obtain admissions from accused—Effect of—If amounts to contempt of Court.*

It is well settled that any act done or writing published which is calculated to interfere with or obstruct the due course of justice or the legal process of the Court is contempt of Court, although the Court will not take action for contempt unless it thinks that the conduct of the party in question is calculated seriously to interfere with the course of justice. Proceedings in contempt are not taken merely in respect of technical offences. To suggest in a newspaper article that evidence intended to be used in a prosecution which is either proceeding or is plainly contemplated, has been obtained by improper means and is unreliable or to suggest that admissions by the accused have been improperly obtained is such as is calculated to interfere with the due course of justice, and amounts to contempt of Court, as such allegations introduce at once into the trial an element of prejudice against the prosecution evidence. (*Beaumont, C.J. and Wassoodew, J.*) GOVERNMENT PLEADER, BOMBAY *v.* SHANKAR DATTATRAYA JAVADEKAR.

40 Bom.L.R. 73.

CONTRACT — *Construction — Copyright — Author agreeing to grant to publishers sole and exclusive license to print, publish and sell his work—Agreement, if amounts to assignment of copyright.*

The author agreed to grant the publishers the sole and exclusive license to print, publish and sell his works in book form in the English language in certain parts of the world but reserved the entire copyright of the volume as his property and also reserved to himself all other rights except those mentioned in the agreement.

Held that the agreement merely amounted to a publishing agreement and could not be regarded as an assignment of copyright. (*Tek Chand and Abdul Rashid, JJ.*) YEATES *v.* ERIC DICKINSON.

A.I.R. 1938 Lah. 173.

———*Obligation to repay—Plaintiff's money forfeited for defendants dues—Right to recover.*

Where a portion of the amount deposited by the plaintiff was appropriated by Government for the satisfaction of a debt due from the defendants, it is not a case of any voluntary payment by the plaintiff, but of one of appropriation without his consent. As the defendants obtained the benefit of the appropriation, an implied obligation on their part to repay the plaintiff arose, on which he can sue to recover the amount. (*Iqbal Ahmad, J.*) PHEKU RAM *v.* GANGA PRASAD.

1938 A.W.R. 123 (H.C.).

CONTRACT ACT (1872), S. 16.

———*Third party — Right of suit — Contract of insurance of motor omnibus—Policy giving insurer right to enforce legal rights of insured against third parties and to do so in name of insured—Indemnity to insured against his legal liability in respect of death or injury to passengers—Accident and death of passenger—Suit by heirs for damages against insurance company—Maintainability.*

A stranger to a contract cannot sue on the contract, and a person who has suffered injury or damage for which an assured under a contract of insurance is liable, not being a party or privy to the contract of insurance, has no right to the money payable under the policy of insurance which he can enforce directly against either the insurers or the insured. A clause in the insurance policy giving the insurance company power to enforce the legal rights of the insured against a third party, and entitling the company to do so in the name of the insured cannot be read as giving a third party a right to sue the company in respect of a liability of the insured, because such a clause is merely an agreement between the insurer and insured and does not add to the rights of either party against a third person. Where a passenger in a motor omnibus receives injuries and dies in consequence of an accident due to the driver's negligence, the heirs of the deceased have no right to sue the Insurance Company with which the Motor omnibus is insured on the basis of a clause in the policy of insurance, under which the insurance company is given powerto enforcethe legal rights of the insured against a third party, and is entitled to do so in the name of the insured. Nor can the victim of the accident be regardered as a beneficiary under an implied trust by reason of the fact that the policy of insurance contains an indemnity clause under which the company undertakes to indemnify the insured against his legal liability in respect of death of, or bodily injury to, passengers etc. What is insured against, is the insured's legal liability, and the policy is taken for his benefit and not for the benefit of any passenger; and the clause cannot be read as vesting any rights in the passenger. (*Norman, J.*) BRITISH INDIA GENERAL INSURANCE CO., LTD. *v.* JANARDAN.

40 Bom.L.R. 155.

———*Variation—Rates agreed in contract abandoned by consent—Substituted proposed rates not accepted by contractor—Work done by contractor—Right to fair and reasonable rates.*

Where the original schedule of rates, payable to the contractor fixed under a contract between the Railway and the contractor was abandoned with the consent of both the parties and the new enhanced rates proposed to be substituted by the Railway for those rates were not accepted by the contractor, but the contract employing the contractor remained in operation and the contractor did the work for the Railway, which the latter accepted, the amount which the contractor is entitled to recover fromtheRailway for the work done should be determined onthe basis of fair and reasonable rates.(*Sir ShadiLal.*) BENGAL NAGPUR RAILWAY CO., LTD. *v.* RUTTANJI RAMJI. **173 I.C. 15 = A.I.R. 1938 P.C. 67 (P.C.).**

CONTRACT ACT (IX OF 1872), S. 16—*Plea of undue influence—Facts to be found—Mere inadequacy of consideration, if sufficient—Proof of the relations of the parties—Value.*

An error would arise if the positions to be ascertained in cases of undue influence are put in the wrong order. The first thing to be found is whether the party who is said to have induced the contract was in a position to dominate the will of the other. After that the question arises, has the contract been so induced? Inadequacy of consideration alone is not a ground for holding that a

CONTRACT ACT (1872), S. 16.

be shown that the influence was undue (*Mockett and Horwill, JJ.*)

——S. 16 (

Presumption—

—If condition

favour of paramour— ... void for undue influence—Circumstances to be considered.

It is well-established that when a person obtains any benefit from another, whether under a contract or as a gift, by exerting his influence which, in the opinion of Court, prevents the grantor from exercising an independent judgment in the matter of in question, the latter can, in a Cou[illegible] set aside the contract or recover the gift.

the burden, if

of proving that in fact he exerted no influence ... purpose obtaining it. This rule of equity is not restricted to cases where strictly or techincally fiduciary relationship is established. It extends to cases where the poss[illegible] influence exists from confidence

the raising of the presumption of undue

application of the rule of presumption

depend not merely upon the circumsta

the transaction but upon the relationsh

relation of paramour and mistress may

such cases if the party obtaining be benefit is in a position to dominate and in[illegible]

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The plaintiff who wa

her husband while she wa

her father during her infancy, was looked after by her mother. She had inherited some pr

brother who was not very much order

who too died at a compartively young age

defendant who was an influential man in the village, being a watandar patil took the plaintiff under his protection and helped her to secure her property from her brother-in-law *D.* She was entirely depending on the generosity of the defendant until then. After this the defendant kept her as his mistress fc

own house and later in the house of

made the viction of false prosecutions

escaped with the help of the defend:

believe that she escaped arrest only

intervention and through the services

The latter managed her estate and

as the plaintiff was without any experience of manage

ment and was altogether illiterate. T

having by various pretences and show of

by using his position gained influence and

CONTRACT ACT (1872), S. 68.

the plaintiff got her to execute and gift in his favour in respect of the d by her from her brother which was and shortly after drove her out of his house. The plaintiff sued for a declaration that the gift deed was void as having been obtained by undue on of the

s plaintiff towards mption of undue influence; (2) that the gift deed was a bargan which must "shock the conscience" or in other words be regarded as unconscionable, and on the face of it was a *most improvident transaction; (3) that the onus must be* laid on the defendant to establish that no undue influence was exercised and that his relationship was not abused and that the act was a righteous and voluntary one; (4) that the defendant whose conduct was time [illegible] the onus and the gift-deed and possession of the pro- th mesne profits. (*Wassoodew and Thakor, JJ.*) SHIVGANGAWA *v.* BASANGOUDA. 40 Bom.L.R. 132.

——S. 25—*Implied promise to pay—Sufficiency.*

Mere implied promise to pay is not sufficient for the [illegible] More than three years from the last t and signed by tined no words ay. On a suit

requirements of FIRM KARAM 1938 Lah. 155.

by minor—

being null and nor on attaining the age of majority cannot form a valid contract on [illegible] d. The consideration ontract cannot be im- the minor entered on s no application to the *hammad, J.*) NAZIR A.I.R. 1938 Lah. 159.

pay off father's time- ... Extent of liability.

bond not to his deceased bond can be ly against the estate of the deceased in his no personal decree can be passed against the (*Din Mohammad, J.*) NAZIR AHMAD *v.* AS. A.I.R. 1938 Lah. 159.

68—*Applicability—Money advanced to guardian—Liability of minor—Burden of proof—Duty of creditor.*

In a case where a creditor seeks to make the estate of the minorl iable for advance made for necessaries (including in term advances made for necessary purposes),

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creditor has advanced money for meeting such necessaries after satisfying himself about the same, the creditor is entitled to a decree against the estate of the minor unless it is proved by the other side that the guardian did not actually apply the money for necessary purposes. (*Vivian Bose and Puranik JJ.*) SADASHEO BALAJI *v.* SHANKAR GOVIND. A.I.R. 1938 Nag. 68.

———S. 68—*Burden of proof.*

In the case of necessaries supplied to an infant, the onus of proof lies on the creditor. He has to show first that goods or the money which represents them are suitable to the condition in life of the infant and secondly that they are suitable to his actual requirements at the time; or in other words that the infant has not got a supply from other sources. (*Vivian Bose, J.*) SADASHEO BALAJI *v.* HIRALAL RAMGOPAL.

A.I.R. 1938 Nag. 65.

———S. 68—*Liability of minor under transaction by guardian—Test of—Alienation by guardian—Distinction.*

It is one thing to lay down set of rules with respect to a transaction which denudes a minor of his property, or a part of it, and quite another to determine whether money and articles supplied to him which add to his property or to his convenience and comfort are necessaries or benefits within the meaning of S. 68. The test of 'fair and proper' can be applied in both cases, but the standard must necessarily differ for what is fair and proper in the shape of benefits conferred or comforts supplied, may not be fair and proper in the case of an alienation. One important point of distinction between the two classes of cases is this: in the case of an alienation where necessity is alleged, enquiries made in good faith protect the transferee, whereas in the case of necessaries such considerations are irrelevant. Then again an alienation by a minor would be void whatever the purpose for which it was made, but in the case of necessaries supplied to him it is immaterial whether the order comes from him or from his guardian, in both the cases the test is precisely the some: the suitability of the goods supplied, or the benefits conferred, having regard to the social status and condition in life of the minor, and to his actual requirements at the time of the transaction. (*Vivian Bose, J.*) SADASHEO BALAJI *v.* HIRALAL RAMGOPAL. A.I.R. 1938 Nag. 65.

———S. 68—"*Necessaries*"—*Meaning of—If confined to goods.*

The term 'necessaries' is not confined to goods. It can include other things such as good teaching and instruction whereby the minor may profit himself afterwards, and also money to enable him to obtain these necessaries. For example, the term includes costs incurred in defending a suit to save the minor's property and to defend him in a criminal prosecution; so also reasonable marriage expenses of a minor himself or a sister or other coparceners and such religious ceremonies as the minor would have had to perform if he had been an adult; Case law referred.

But where a guardian of a Hindu minor borrowed money for Divali expenses,

Held, that the amount would not be allowed as it was not necessary. (*Vivian Bose, J.*) SADASHEO BALAJI *v.* HIRALAL RAMGOPAL. A.I.R. 1938 Nag. 65.

———Ss. 69 and 70—*Applicability—"Bound by law to pay"—Meaning—Purchaser of mortgaged property free of encumbrance—Vendor agreeing to pay off encumbrance—Assignee of debts from vendor's widow undertaking to pay encumbrance—If "bound by law to pay—Non-payment—Suit by mortgagee—Decree—Payment by purchaser to avert court sale—Suit against

assignee of debts for re-inbursement—Maintainability—Privity of contract.*

C purchased certain properties from *A*, free of encumbrances; the properties were subject to a mortgage in favour of *N*; but *A* himself undertook to discharge the debt of *N*. The appellant, after the death of *A*; took an assignment of certain debts due to *A*, from his widow expressly agreeing to discharge out of the realisation of the same, the debt due to *N* as well as other debts. Appellant did not, however, discharge the debt of *N*; who therefore sued on the mortgage and obtained a decree for sale, in execution of which he brought the properties to sale. *C*, in order to save his properties had to pay the decree amount and did pay it, and he thereafter sued the appellant and the widow of *A*, for recovery of the amount that he had to pay in satisfaction of the mortgage decree.

The appellant pleaded that there was no privity of of contract between him and *C*, and that the latter could not take advantage of the agreement between him and the widow of *A*.

Held, that the appellant was "bound by law" to pay the debt due to *N*, he having contracted to pay it and received consideration for the promise, that *C*, was not liable to pay the debt in question, but was merely interested in discharging it, and that the case was governed by S. 60 of the Contract Act, if not by S. 70 as well. The expression "bound by law to pay" in S. 60, cannot be interpreted as an obligation under a contract and not under law. The expression does not mean bound by law to the plaintiff, but that the defendant at the suit of any person might be compelled to pay. (*Abdul Ghani and Nageswara Iyer, JJ.*) RANGE GOWDA *v.* THIMME GOWDA.

16 Mys. L.J. 27=42 Mys. H.C.R. 637.

———S. 72—Construction—'Coercion'—Meaning of. *See* C. P. CODE. O. 21, R. 89 AND CONTRACT ACT, S. 72. 47 L.W. 188.

———S. 73—*Interest as damages—Detention of debt.*

S. 73 is merely declaratory of the common law as to damages. Interest cannot be allowed at common law by way of damages for wrongful detention of debt. (*Sir Shadi Lal.*) BENGAL NAGPUR RAILWAY CO., LTD. *v.* RUTTANJI RAMJI. 173 I C. 15= A.I.R. 1938 P.C. 67 (P.C.).

———S. 73, Illus. (n)—*Creditor's right to recover interest.*

The Illus. (*n*) to S. 73 does not confer upon a creditor a right to recover interest upon a debt which is due to him when he is not entitled to such interest under any provision of the law. (*Sir Shadi Lal.*) BENGAL NAGPUR RAILWAY CO., LTD. *v.* RUTTANJI RAMJI.

173 I.C. 15=A.I.R. 1938 P.C. 67 (P.C.).

———S.178—*Pledge of railway receipts—Effect of—Pledgee handing over receipts to pledger—If loses rights in property pledged.*

A railway receipt is a document of title and a pledge of the railway receipt operates as a pledge of the goods, though by the general law a pledge of documents is not *prima facie* deemed to be a pledge of the goods. The pledgee does not lose his right of property as pledgee by parting with the custody of the railway receipts or by entrusting them to the pledger or his agents or mandatories for the special purpose of convenient dealing with the goods by collecting them from the Port Trust and putting them into the pledgee's godowns. Such a procedure is the usual course of business and is either necessary or at least convenient for the conduct of the business. (*Lord Wright.*) MERCANTILE BANK OF INDIA *v.* CENTRAL BANK OF INDIA. 172 I.C. 745= 42 C.W.N. 321=1938 O.L.R. 68 (2)=

CONTRACT ACT (1872), S. 202.

1938 O.W.N. 206 = A.I.R. 1938 P C. 52 = (1938) 1 M L J. 268 (P C)

——S. 202—Applicability—Power of attorney executed by pensioner in favour of creditor—Authority to agent to draw out pension and to appropriate part towards debt—If agency complied with interest—Revocability. *See* MYSORE T. P. REGULATION, S. 6 (*h*).

42 Mys H C.R. 715

COPYRIGHT ACT (1911, 1 & 2 GEO V Ch 46), Ss 6 and 7—*Remedies under—If alternative.*

Though the remedies given by S. 6, Copyright Act, are not alternative to those given by S 7, yet when an owner of a copyright right obt... damages under S. 6 it often happens that he can ... respect of damages under S. ... damages awarded under S. ... mission to publish the work in question, the author is not entitled to damages also under S. 7. (*Tek Chand and Abdul Rashid, JJ.*) W.B. YEATS *v* ERIC DICKINSON. A.I.R. 1938 Lah. 173.

CO SHARERS—*Exclusion possession by one—Right of others to money compensation.*

Where one of the co-sharers is in exclusive possession of the joint property, the other co sharers are entitled to money compensation at a proper rate in respect of exclusive use by the co-sharer. (*Tek Chand, J.*) NASIR DIN *v.* ABDUL RAHIM. 40 P.L.R 95.

——*Joint land—Exclusion or ouster—What amounts to—Burden of proof.*

Whether there has or has not been an exclusion of one co sharer from the joint property must be primarily a question of fact. A mere demand for partition made by one co sharer followed by a refusal, with nothing more, would not amount to exclusion. In order to prove exclusion, it must be shown that ... conduct on the part of the co share ... keep his co sharer out of the enjoy ... property and a complete denial of his rights. (*Rangnekar, J.*) DATATRAYA SITARAM *v.* SHANKAR.

40 Bom L R. 118.

COURT-FEES ACT (VII OF 1870), S. 7 (v)—*Applicability—Suit by junior member for partition of Thavazhi properties.*

Where the suit is by a junior member for partition of the Thavazhi properties, for the purpose of determining the Court-fee payable, the point to be considered is, whether on the date of suit it can be said that the defendant's possession was possession ... Thavazhi. If he is not in such posse... should be paid under S. 7 (*v*). (*Va*... MANAVEDAN *v.* MANAVEDAN. (1938) M.W.N. 161.

——**S. 7 (v) and Sch. II, Art 17 (vi)**—*Suit for possession of temple properties—Court fee payable*

In a suit for possession of lands and ... the defendant alleging that the plaintif... certain temple and that the property ... plaint is owned by the Idol which is installed in that temple and that the defendant has taken illegal possession of the property, and for an injunction to the defendant restraining him from interfering with the plaintiff's management of the same, the plaintiff is bound to pay *ad valorem* Court-fee on the market value of the property. ... where t... owing ... Court-f... Such properties ordinarily are the materials and the site of the temple and the materials and the sites of such buildings as are adjunct to the temple and are not directly productive of any income for the temple. (*Jai Lal, J.*) HARI DAS *v.* RAJA RAM. 40 P.L.R. 113.

COURT-FEES ACT (1870), Sch. II, Art. 17-A.

——S. 8 (c)—*Suit for declaration that certain municipal assessment is illegal and for injunction—Power of Court to enquire into plaintiff's valuation.*

In a suit brought by the plaintiff on behalf of himself and as representative of the rate payers of a Municipality for a declaration that a certain assessment made by that Municipality is illegal ... wrongly valued. Even if the prayer for injunction is redundant and S. 7 (iv) (c) does not at all apply, it is ... tion of valuation ... (*S K. Ghose,* ...) ... *v.* MUNICIPAL COMMISSIONER OF THE BARASAT MUNICIPALITY.

42 C.W N. 315.

——S 10—*Court-fee—Question as to—Time for determination.*

Once a Court finds that the market value of the property is different to that alleged in the plaint, the plaintiff should be at once called upon to make up the proper Court fee as determined, before the trial of the suit takes place. It is obviously improper for the Court to hold up the decision on the question of Court-fee until the end of the suit and incorporate the order passed in the decree which is perfectly useless. A.I.R. 1935 Lah. 75, relied on. (*Dalip Singh, J.*) SIS RAM *v.* SOHAN LAL. 40 P.L R. 88.

——S 13—*Scope of—Refund of Court fee paid in lower appellate Court—Power to order.*

The words of S. 13 of the Court-Fees Act do not ...

(1938) 1 M.W.N. 161.

——S. 17—*Sale of land—Suit by plaintiff for its possession as owner or in alternative by pre emption—Court-fees.*

If a plaintiff prays for one of two reliefs in the alternative, based on one cause of action, the value of the suit for purposes of court-fee is determined by the higher of the two reliefs claimed. Where the plaintiffs sue for possession of land alleging that are the owners and that defendant No. 2 had no right to sell it to de... ternative that if they ... have a preferential ... by a single cause of action in the suit, namely, the sale of the property by defendant No. 2 in favour of defendant No. 1, but in ... are claimed in ... the Court-Fees ... *d, J.*) ABDUL ... 40 P.L.R. 33.

——**Sch I, Arts 4 and 5**—*Applicability—Appeal—Dismissal for non payment of printing charges—Application for restoration—Court-fee—C. P. Code, O. 41, R. 19 and O. 47, R 1.*

An application for restoration of an appeal dismissed for non-payment of printing costs should be treated as ... *J.*) SINGHESHWAR PRASAD *v.* SAHI CHAND.

A.I.R. 1938 Pat. 111.

——**(as amended in Madras) Sch. II, Art. 17-A (1)**—*Applicability—Suit for partition—Contention that certain mortgages are not binding.*

COURT-FEES ACT (1870), Sch. II, Art. 17.

Art. 17-A (1) governs only cases where no consequential relief is prayed for. If as incidental to his remedy by way of partition, a plaintiff contends that a mortgage executed on the joint family property is not for family purposes, it cannot be said that the suit is one which no consequential relief is prayed. (*Obiter.*) (*Varadachariar, J.*) MANAVEDAN *v.* MANAVEDAN.

1938 M.W.N. 131.

——**Sch. II, Art. 17 (vi) and S. 7 (v)**—Suit for possession of temple properties—Court-fee payable. *See* COURT FEES ACT, S. 7 (V) AND SCH. II, ART. 17 (VI). **40 P.L.R. 113.**

CRIMINAL PROCEDURE CODE (V OF 1898), S. 45—*Proclaimed offender—Meaning—Proclamation not made strictly according to S. 87.*

If a proclamation has been made in respect of an accused person under S. 87, Cr. P. Code, although it is not made strictly in accordance with the terms of that section, it is sufficient to constitute him a proclaimed offender under S. 45, Cr. P. Code. ((*Zia-ul Hasan and Smith, JJ.*) EMPEROR *v.* RAM SARUP.

172 I.C. 530 = 39 Cr.L.J. 154 = 1938 A.Cr.C. 1 = 1938 O.L.R. 8 = 1938 O.A. 7 = 10 R.O. 182 = 1938 O.W.N. 7.

——**S. 88**—*Issue of warrant under —If proclamation under S. 87, to be presumed—Evidence Act, S. 114.*

There is a presumption of law that the acts of a Court must be presumed to have been duly performed. So when a warrant is issued under S. 88, Cr. P. Code, a presumption that the necessary proclamation under S. 87, has already been issued, arises. (*Allsop, J.*) SHIB CHARAN *v.* EMPEROR. **1938 A.W.R. 124 (H.C.).**

——**S. 110**—*Scope of—Application if limited to strangers to a locality—Proof of previous convictions, if necessary.*

There is nothing in the wording of S. 110 or of any other section of the Cr. P. Code, that leads to the inference that S. 110 can only be used where the parties are strangers to the locality in which the offences are committed. If the persons, or the acts which they commit, are such as to make it difficult to deal with them under the ordinary provisions of law then S. 110 can be used. Proof of a certain number of prior convictions is not a prerequisite to a person being bound over under this or similar sections. (*Horwill, J.*) SHANMUGAM ASARI *v.* EMPEROR. **47 L.W. 196 = 1938 M.W.N. 93 = (1938) 1 M.L.J. 178.**

——**S. 110 (e) and (f)**—*Applicability—Leaders of local factions.*

Where the general evidence against a person was that he led local factions responsible for constant threat and bullying, and it is accepted, it cannot be argued that S. 110 (*e*) and (*f*) do not apply to such factions leaders. A man is not any the less dangerous to the community, because he lives in a house and owns lands. (*Horwill, J.*) VENKATARAMANAYYA, *In re.* **47 L.W. 139.**

——**S. 133**—*Order under—If an injunction.*

A conditional order under S. 133 does not amount to injunction. (*Stone, C.J. and Vivian Bose, J.*) HARGOVIND DULLABH JIWAN *v.* KIKABHAI RAHIMTULLAH. **A.I.R. 1938 Nag. 84.**

——**S. 145 (4)**—*Appointment of Receiver—Power of Court.*

Under S. 145 (4) a Magistrate has no power to appoint a receiver and to give in his charge the property in dispute. It can at the most attach it, but the Code does not make it clear by what method the attachment is to be effected. But if the analogy of S. 88 were to be followed, the Magistrate ought to attach the land through the Collector of the District. The word "attach" merely means to bring under the control of the Court, and the

CR. P. CODE (1898), S. 161.

Magistrate is entitled to effect that object in any way which is within his power. The appointment of a receiver with the powers of a receiver under the Civil Procedure Code is not one of those ways because unless that power is expressly given, a Magistrate cannot exercise it. At the same time, if the Magistrate's attachment is to be effected, Magistrate must put some person into possession of the property, who will have authority to maintain his possession. However the word "receiver" should not be applied to such person because of possibilities of misunderstanding. The person so appointed can be reimbursed for the legitimate costs incurred by him in management of the property. Another reason for which a "receiver" endowed with powers under the Civil Procedure Code, should not be appointed is that the proceedings under S. 145 are intended to be carried through without delay and the time during which the subject of the dispute needs to be under attachment is so short as certainly not to justify the appointment of a receiver having the powers of a receiver under the Civil Procedure Code. (*Mackney, J.*) MAUNG SAN U *v.* MAUNG LU GALE. **A.I.R. 1938 Rang. 88.**

——**S. 145 (4), second proviso**—*Appointment of receiver—Power of Court.*

Per *Biswas, J.*—Strictly speaking, it is a matter which is arguable whether or not a 'receiver' can be appointed in any proceeding under Chapter XII except under S. 146, Cr. P. Code. Even though a receiver may not be appointed consequent on an attachment made under S. 145 (4), second proviso, a Magistrate is competent to make suitable arrangements for the custody of the property attached. (*Mukherjea and Biswas, JJ.*) FAIZUR RAHMAN *v.* SHEIKH LADLEY. **42 C.W.N. 351.**

——**S. 145 (4), second proviso**—*Order for attachment pending decision of another Court—Legality.*

An order for attachment under S. 145 (4), second proviso, Cr.P. Code, can be operative only until the decision of the Magistrate himself under that section. An order directing that the attachment should be operative until the decision in some other proceedings pending in other Courts is clearly contrary to the terms of the proviso. (*Mukherjea and Biswas, JJ.*) FAIZUR RAHMAN *v.* SHEIKH LADLEY. **42 C.W.N. 351.**

——**S. 145 (4), second proviso**—*Order of attachment—When may be made.*

It is only after drawing up a proceeding in terms of sub-S. (1) of S. 145, Cr. P. Code, that the Magistrate acquires Jurisdiction, to make an order of attachment under the last proviso to sub-S. (4). (*Mukherjea and Biswas, JJ.*) FAIZUR RAHMAN *v.* SHEIKH LADLEY. **42 C.W.N. 351.**

——**S. 145 (6)**—*Proceeding under S. 147—Road in dispute found to be private road of one party—Order in form under S. 145 (6)—If justified.*

Where in a dispute regarding a road, proceedings under S. 147 are started and the Court finds that the disputed portion of the road is the private road of one party, the appropriate order to be passed is a declaration that the road was not a public road and the prohibition directed against the opposite party. Where instead of that, the Magistrate declares that the road was in possession of the first party, and prohibits all disturbance of such possession until eviction in due course of law, by an order in form under S. 145 (6), there is no prejudice to the opposite party. (*Agarwala, J.*) DHANSAR COAL CO., LTD. *v.* BABU LAL AGARWALA. **A.I.R. 1938 Pat. 133.**

——**S. 161**—Statement made in answer to requisition by investigating officer under—If privileged. *See* PENAL CODE, S. 499, EXC. 9. **47 L.W. 136.**

CR. P. CODE (1898), S. 164.

——S. 164—*Confession recorded under—Procedure—Failure to comply with the requisites of criminal Rules of practice—Confession, if vitiated.*

Omission to comply with the requisites of the criminal rules of practice, would not vitiate a confession provided S. 164 of the Cr. P. Code is complied with. (*Burn and Mockett, JJ.*) DASI VIRAYA *v.* EMPEROR.

47 L.W. 161=1938 M.W.N. 90=
(1938) 1 M.L.J. 289.

——S. 164—*Recording of confession—Subsequent custody of accused.*

thereafter wish the accused for any particular purpose, they may be handed over to the Police for that purpose. There certainly ought to be an interval between the taking of the confession and the handing over of the accused to the Police for any subsequent purpose. (*Young, C.J. and Monroe, J.*) SURAT SINGH *v.* EMPEROR. 18 Lah. 740.

——S. 181 (2)—*Criminal breach of trust—Jurisdiction—Place of accounting in firm* V *at Akyab agreeing to do business at Cochin on firms'* ... *and accounts to Akyab*—K ... *business and going away*—C ... *breach of trust lodged at Aky*... *had no jurisdiction, offence bei*...

The failure of a person to re... it to the place to which he ha... necessarily constitute the offenc... trust although a person may have to account for money; it is not the failure to account, but the misuse of the money for dishonest purposes, which constitutes the offence. *K* was a partner in a firm *V* at Akyab and there was an agreeement by which *K* was to go to Cochin and receive the consignment of rice sent by the firm and sell it there. He was required to submit accounts and pay the net cash balance resulting from the business to the firm at Akyab. *K* failed to remit money or to account for it, and closed the business in Cochin but instead of returning to Akyab went to his native place. The firm *V* filed a complaint for breach of trust before a Magistrate in Akyab but he held that he had no jurisdiction,

Held, that the Court in Akyab had no jurisdiction. If *K* had left the money in Cochin the offence of breach of trust was committed at Cochin and if he took the money elsewhere he must have misappropriated the money in Cochin, because it was there that he failed to do with the money that which he was required to do; in any case the offence was committed at Cochin. A.I.R. 1936 All. 193. Not approved. (*Mackney, J.*) VASANJI KHIMJEE *v.* KANJI TOKERSEY.

A.I.R. 1938 Rang. 94

——S. 195 (1) (a)—*Complaint in writing of public servant—What amounts to.*

Where a Tahsildar submitted a report to his superior Executive officer, the Sub-Divisional officer, proposing to lodge a complaint under S. 186, I. P. Code, against a ...

CR. P. CODE (1898), S. 297.

172 I.C. 51=39 Cr.L.J. 58=
A.I.R. 1938 Nag. 106.

...nded ...oubt ... and ... his mind which the law places on him. It applies to a case wh re facts are not in doubt but it is doubtful what provision of law applies to these facts. (*Davis, J.C. and Lobo, A.J.C.*) GHULAM HYDER IMAM BAKHSH ... 1938 Sind 63.

...*complainant*—

It ... the d... summ... sions vitiate the trial. (*Grille, J.*) RAHAT ALI *v.* MUHAMMAD MURAD. 10 R.N. 161=
172 I.C. 113=39 Cr.L.J. 62=
A.I.R. 1938 Nag. 103.

——S. 252 (1) and (2)—*Scope—Hearing of un*...

witnesses on the day fixed. The prosecution witnesses who have been bound over to appear by the Police are then examined. Undoubtedly, if it is necessary to adjourn the case, such witnesses still come under the category of "such evidence as may be produced in support of the prosecution" as they were produced on the date of hearing, but where the case is initiated on a complaint, the phrase "such evidence as may be produced in support of the prosecution" refers only to such witnesses as the complainant may bring with him and who have not been summoned by the Court. If on the day when the accused appears in answer to the summons, the complainant has no witnesses present with him, there is no evidence produced in support of the prosecution, and sub-s. (2) of S. 252 then comes into play. What this sub-section authorizes is what is done in every complaint case under another name: the filing of a list of witnesses whom the complainant desires shall be summoned. If the list is filed and summonses are issued in respect of the persons named therein, the first stage contemplated in S. 252 (1) passes, and the hearing of any unsummoned witnesses thereafter is a matter within the Court's discretion. (*Grille, J.*) RAHAT ALI *v.* MUHAMMAD MURAD 10 R.N. 161=
172 I.C. 113=39 Cr.L.J. 62=
A.I.R. 1938 Nag. 103.

——S. 288—*Medical officer examined before committing Magistrate—If must also be examined before Sessions Court.*

CR. P. CODE (1898), S. 307.

Where in a case of theft, the only evidence connecting the accused with the offence was that of a receiver of stolen property, the Sessions Judge in his charge to the Jury referred to the evidence and also to the fact that the witness was in all probability a receiver of stolen property. It was held that the failure to point out with sufficient force, the unsafety of relying on such evidence, which is very little different from that of an accomplices evidence, amounted to a misdirection. (*Horwill, J.*) KALLI KORAVAN, *In re.* (1938) M.W.N. 96= 47 L.W. 158=(1938) 1 M L J. 234.

——S. 307—*Duty of the High Court—Disagreement with the unanimous verdict of the Jury—Exercise of powers—Considerations.*

In disagreeing with the unanimous verdict of the Jury, the High Court has to consider whether the Jurors were entirely unreasonable in the conclusion arrived at by them or whether it was impossible for the Jurors to say that the guilt of the accused had been proved. The High Court does not exercise the power vested under S. 307, Cr. P. Code in setting aside the verdict of the Jury, unless it is perverse or patently wrong and is convinced that in giving effect to the same it would not meet the ends of justice. (*Guha and Lethbridge, JJ.*) EMPEROR v. NIBARESH MONDAL. 66 C.L.J. 351.

——Ss. 369 and 561-A—*Review—Inherent power of High Court.*

The High Court has no inherent power to alter or review a judgment in a criminal case. S. 561-A, Cr. P. Code, will therefore not confer such a power on the High Court. (*Pollock, J.*) LAXMANRAO PARASHRAM DESHMUKH v. EMPEROR. 10 R.N. 192= 172 I.C. 299=39 Cr.L.J. 116= A.I.R. 1938 Nag. 74.

——S. 439—*Quashing proceedings—Ground for—Groundless charge.*

No doubt the High Court ought not to interfere ordinarily by way of quashing a charge, but when all the necessary materials are available and the charge appears to be *prima facie* groundless, it is an obvious duty to interfere, without subjecting a person to the unnecessary harassment of a trial. (*Venkataramana Rao, J.*) RAMASWAMI MUDALIAR, *In re.* 47 L.W. 136.

——S. 439—*Scope—Order under S. 145—Finding as to possession—Interference.*

A finding of a Magistrate on the point of posession will not be ordinarily interfered with in revision; but where the Magistrate's finding is vitiated by his not keeping in view important facts, *e.g.*, the writ of delivery of possession issued by the Civil Court and the other circumstances of the case, the High Court will interfere even though the Magistrate commits no error of jurisdiction. (*Manohar Lall, J.*) BAHALI SINGH v. SAFAYAT GOP. A.I.R. 1938 Pat. 105.

——S. 471—*Order handing over accused to relatives on their furnishing security.*

Where a Magistrate found the accused person guilty under S. 326 Penal Code, but acquitted him under S. 84, Penal Code as the accused was incapable of understanding the nature of his act due to insanity and ordered him to be handed over to the care of his relatives on their furnishing a security for his good behaviour.

Held, that the order was in contravention of S. 471, Cr. P. Code, and the accused should, have been detained in safe custody in the lunatic asylum. (*Spargo, J.*) THE KING v. TUN KHIN. A.I.R. 1938 Rang. 96.

——S. 476-B—*Scope—Application under Ss. 193 and 211, I. P. Code—Magistrate declining to prosecute—Remedy—Power of District Magistrate to direct prosecution.*

Once an order has been passed by the Magistrate declining to take action under Ss. 211 and 193, that order can be displaced only by the order of the Appellate Court under S. 476-B, Cr. P. Code. The District Magistrate has no power to direct the prosecution to be commenced. If the trying Magistrare in making the complaint allows himself to be guided by the wishes of a superior executive officer acting in that capacity, he manifestly acts improperly and contrary to law. (*Fazl Ali, J.*) RAMDENI PATHAK v. EMPEROR. A.I.R. 1938 Pat. 145.

——Ss. 491 and 83—*Power of High Court—Quashing proceedings taken in pursuance of a warrant issued without Jurisdiction.*

Nasirabad is outside British India and therefore a Nasirabad Magistrate has no jurisdiction to issue a warrant under S. 83 for the arrest of a person residing in British India. Such a warrant therefore cannot be executed by a Magistrate in British India and proceedings taken in pursuance of such warrant can be quashed by the High Court under S. 491. (*Rupchand Bilaram, Ag.J.C. and Lobo, A.J.C.*) TAHILRAM v. EMPEROR. A.I.R. 1938 Sind 46.

——S. 494—*Consent of Court for withdrawal—Recording of reasons—If essential.*

Reasons for giving permission to withdraw a case are, no doubt, desirable but are not essential. The code makes no such requirement, and once the consent of the Court is given, it rests on the party applying to have this decision set aside to show that the consent was given in disregard of the judicial exercise of the discretion which the Magistrate had, to give his consent to the withdrawal. (*Grille, J.*) DATTATRAYA GOVINDRAO PAKODE v. EMPEROR. 10 R N. 167= 172 I.C. 130=39 Cr.L J. 65= A I R. 1938 Nag. 76.

——S. 495—*Application for withdrawal of prosecution—Power of Circle Inspector to present.*

It is clear from S. 495, Cr. P. Code, that an officer of the Police not below a certain rank which the Local Government is to prescribe, is entitled to conduct the prosecution, and is therefore, by the same section, entitled to make an application for withdrawal of the prosecution. Where the lowest rank prescribed by the Local Government is that of the Sub-Inspector, the appearance of a Circle Inspector, who is above that rank, in the case under the instructions of the District Superintendent of Police to apply for withdrawal is sufficient to enable him to present the application. (*Grille, J.*) DATTATRAYA GOVINDRAO PAKODE v. EMPEROR. 10 R.N. 167=172 I.C. 130= 39 Cr.L.J. 65=A.I.R. 1938 Nag. 76.

——Ss. 500 and 514—*Accused released under S. 500—Power of Court to restrict his movements—Order that accused should be kept in an Ashram—Surety, if bound by terms of bond.*

When a Court orders the release of an accused under S. 500. Cr. P. Code, it has no right or power to put any restrictions on the accused's movements. and obviously when an accused person is released on the surety ship of another, the intention is that the surety should have control over his movements. If the Court orders that the accused should be kept in an Ashram, the accused is not released within the meaning of S. 500, Cr. P. Code, and this being so, the surety is not bound by the terms of his bond. (*Zia-ul-Hasan, J.*) RAGHUBAR DAYAL v. EMPEROR. 172 I C. 862=1938 A.Cr C. 7= 1938 O.A. 75=1938 O.W.N. 46.

CR. P. CODE (1898), S. 514.

——S. 514—*Liability of sureties under—Bond by two sureties for total sum of Rs. 2 500—Order for payment of Rs. 1,500 by each—Legality.*

Where a bond is executed by two sureties jointly and severally undertaking to be liable for a total sum of Rs. 2,000, an order requiring each of them to pay Rs. 1,500 on forfeiture of the bond is illegal. Nor more than the total amount of the bond can be recovered from them together. (*Gruer, J.*) NAMDEO *v.* EMPEROR. 1938 N.L.J. 79.

——S. 514—*Proceedings under—Bond by sureties for party—Death of party—Enquiry into breach of conditions—Plea that main case* subjudice—*Sustainability.*

Where proceedings are started under S. 514, Cr. P. Code, are started on the ground that a bond has been forfeited, it is no answer to such [illegible] that the proceedings in respect [illegible] executed is still *subjudice*. whe[illegible] the executants of the bond are [illegible] death of that party terminates [illegible] that party is concerned, and the [illegible] enquiry as whether that person [illegible] tions of the bond. (*Gruer, J.*) [illegible]

1938 N.L.J. 79

——S. 514 (1)—*Compliance of—Proof of forfeiture of bond—Grounds of—Omission to record—If illegality.*

S. 514, Cr. P. Code says that the " [illegible] record the ground of proof of forfeitur[illegible] far payment of the penalty by the perso[illegible] bond. The omission to so record the grounds is, however, a defect which is curable by S. 537, Cr. P. C[illegible]

[illegible]

the omission to record the reason for his being so satisfied is a matter relating to the procedure and not to jurisdiction. It is not disobedience of an express provision as a mode of trial, and does not vitiate the proceedings in the absence of prejudice to the persons proceeded against. (*Gruer, J.*) NAMDEO *v* EMPEROR.

1938 N.L.J. 79

——S. 517—*Acquittal of accused— Forfeiture of property seized from him—Legality.*

S. 517, Cr. P. Code, confines the powers of confiscation to property "regarding which any offence appears to have been committed or which has been used for the commission of any offence". Where, therefore, an accused is acquitted by the Magistrate, an order forfeiting to Government property seized from his possession on the ground that it "has not been satisfactorily accounted for and is tainted with suspicion", is bad. (*Grille and Bose, JJ.*) SHALIGRAM *v.* EMPEROR.

10 R.N. 185 = 172 I.C. 213 = 39 Cr L J. 105 = A.I.R. 1938 Nag 52.

——S. 539 B—*Scope—Local investigation—Limits to powers of Court—Charge of cheating in respect of advertisement—Offer by accused to make demonstration in Court to test truth of advertisement—Refusal by Court—If justified.*

S. 539 B, Cr. P. Code, no doubt empowers the Court to make a local investigation, but it does not contemplate a procedure by which the Judge or magistrate has to all intents and purposes to put himself in the position of a witness in the case. A magistrate is therefore perfectly justified in refusing to accept an offer made by the accused, charged with the offence of cheating in respect of an advertisement inserted by him, to make a demonstration of a physical feat in Court, in order to test whether his advertisement was true or false. (*Fazl Ali and Rowland, JJ.*) AKHIL KISHORE RAM *v.* EMPEROR. 1938 P.W.N. 93.

CRIMINAL TRIAL.

CRIMINAL TRIAL—*Benefit of doubt—Duty of Court—Charge under S. 302, Penal Code—Prosecution proving knowledge—Conviction—Proper course.*

It is the duty of a Judge to make up his mind upon the facts of the case before him, and if there is any real doubt as to the facts, then he must give the accused the benefit of that doubt, not by finding him guilty, even in the alternative, of the offence in respect of which the reasonable doubt exists, but by acquitting him of that offence. He should remember that the burden lies on the prosecution to prove the guilt of the accused. If in a case of murder, the prosecution has failed to prove the intention which is necessary in order that an accused [illegible]

[illegible] tive. In a case of murder, where intention is one of the essential elements of the offence, it is always necessary that there should be a definite finding as to whether the necessary guilty intention is or is not present, and when it [illegible] the evidence of the prose[illegible] accused [illegible] and he [illegible] n if he is to be convicted of the charge of culpable homicide not amounting to murder. Where only one blow with a [illegible]

Held, that there was a reasonable doubt as to intention of the accused and the offence fell more under S. 304, Part 2, than under S. 302 or S. 304 Part 1. (*Davis J.C. and Lobo, A.J.C.*) GHULAM HYDER INAM BAKHSH *v.* EMPEROR.

A.I.R. 1938 Sind 63.

——*Case and counter case—Statements of witnesses who are accused in the counter case—If evidence.*

It is wrong to say that the statements of witnesses are not evidence merely because they happen to be the statements of persons who are the accused in a counter case. (*Burn and Mockett, JJ.*) RAHIMAN KHAN SAHIB *v.* EMPEROR. (1938) M W N. 31 = 47 L.W. 149.

——*Duty of Court as regards defence of poor accused*

With regard to the defence of prisoners who are too poor to instruct lawyers on their own account, those whose duty it is to select lawyers to defend at the expense of the Crown should not treat the selection as a mattar of patronage for the benefit the lawyer so appointed. The selection should be made from among young men of marked ability; and where the persons actually appointed do their work very badly and conspicuous opportunities for cross-examination and obvious arguments are entirely ignored, the trial Judge should remember that he has duty not only to prosecution but to defence. He has the diary in front of him, and should use his greater experience to cross examine the witness when he sees that the defence lawyer is incompetent. He should not do this unnecessarily, but only when it is desirable in the interest of justice. (*Courtney-Terrell, C.J. and Manohar Lall, J.*) DARPAN POTDARIN *v.* EMPEROR. A.I.R. 1938 Pat. 153.

CRIMINAL TRIAL.

——*Evidence—Evidence of children—Conviction on —Propriety.*

The evidence of children unless immediately available and unless received before any possibility of coaching is eliminated is notoriously dangerous and it is unsafe to convict on the evidence of a child. (*Courtney-Terrell, C.J. and Manohar, Lall, J.*) DARPAN POTDARIN *v.* EMPEROR. **A.I.R. 1938 Pat. 153.**

——*Sentence—Several taking part in brutal murder —Duty to discriminate.*

Where several persons took part in a murder which was premeditated, deliberate, cruel and was ruthless and brutal in its nature, all of them may Justly be condemned to die. In cases where many persons are involved Courts should hesitate to pass sentences of death on all, and try to discriminate. Infliction of several sentences of death in one and the same case, is apt to fail of the effect which such sentences would otherwise have. (*Guha and Lethbridge, JJ.*) EMPEROR *v.* NIBARESH MONDAL. **66 C.L.J. 351.**

CRIMINAL TRIBES ACT, S. 23—*Applicability—Previous conviction under S. 411, I. P. Code.*

S. 23 of the Criminal Tribes Act, is inapplicable to a case where a member of a criminal tribe had been previously convicted under S. 411, I. P. Code as an offence under that section does not fall within the purview of Sch. I of the Act. (*Abdul Rashid, J.*) MUKHALYA *v.* EMPEROR. **40 P.L.R. 54.**

CROWN—*Prerogative to assign or alter sources of irrigation—Nature and extent of—Declaration in respect of—Form—Penal cess—When could be levied—Improper levy—Remedy.*

While government is entitled to supply water from such source as it thinks proper, this right is subject to the condition that the ryot who is entitled to get water for his registered wet fields gets his accustomed supply of water. A declaration that a person is entitled to take water from a particular sluice only so long as the government does not make an efficient alternative provision, is quite in accordance with law. Penal Cess was not intended by the legislature to be allowed to be levied in cases where the ryot is only exercising his undoubted rights: Assuming that a penal cess was not illegal when it was levied and as such a refund of the cess paid could not be ordered, the ryot would nevertheless be entitled to damages, if the levy was found to be improper. (*Pandrang Row, J.*) SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* MUNIYAPPAN CHETTI. **1938 M.W.N. 194.**

CUSTOM—*Customary right—Easement—Distinction between.*

A customary right is not an easement properly so called. An easement proper belongs to a determinate person or persons in respect of his or their land. A congeries of persons like the inhabitants of a locality, unless incorporated as a determinate Juridical person, cannot claim an easement. A customary right belongs to no individual in particular. Easements are, so to speak, private rights belonging to particular persons, while customary rights are public rights annexed to the place in general. (*Biswas, J.*) HARI SADAN DE *v.* RADHIKA PRASAD PANDIT. **66 C.L.J. 270=A.I.R. 1938 Cal. 202.**

——*Customary right—Village pathway—Customary easement—Proof of.*

Persons claiming a customary easement have not only to prove the elements required by S. 26 of the limitation Act, but also something more, namely, that the custom set up was ancient, continuous peaceable, reasonable, certain and compulsory. Where pathway is claimed as a village pathway, and not as a public pathway, it is necessary to show that the user was of the pathway as a village pathway. It must be shown to have been used by the inhabitants of the village concerned as such and not as members of the general public. (*Biswas, J.*) HARI SADAN DE *v.* RADHIKA PRASAD PANDIT. **66 C.L.J. 270=A.I.R. 1938 Cal. 202.**

DECREE.

——**(Punjab)**—*Alienation—Necessity—Enquiry by alienee—Sufficiency.*

The onus lies on the alienee to prove either that there was legal necessity in fact which would justify the alienation, or that he made a proper and *bona fide* enquiry into the alleged necessity and satisfied himself as to the existence of such necessity. If he fails to prove that there was a necessity in fact, alienation may still be upheld if he proves that he made enquiry as to the existence of the alleged necessity, and that the facts represented to him were such as, if true, would have justified the transaction. If he discharges this burden, he is not bound to see that the money paid by him is actually applied by the alienor to meet the necessity. (*Sir Shadi Lal.*) ATMA RAM *v.* THAKUR SADHU SINGH. **172 I.C. 1004=1938 O.W.N. 196=A.I.R. 1938 P.C. 77 (P.C.).**

——**(Punjab)**—*Alienation—Powers of—Ancestral property—Sanda Jats and agriculturists of Mianwali District.*

Among Sanda Jats and the agriculturists of Mianwali District, generally, a male proprietor has unrestricted power of alienation in respect of ancestral property and such property can be attached and temporarily alienated for realization of his unsecured debts after his death. (*Tek Chand and Abdul Rashid, J.*) MOHAMMAD NAWAZ *v.* KAURA RAM. **A.I.R. 1938 Lah. 166.**

——**(Punjab)** — *Alienation — Validity — Agriculturist unable to manage cultivation and indebted, selling land to non-agriculturist with sanction of Deputy Commissioner.*

Where an agriculturist who was not able to manage the cultivation, was very much indebted and not even able to pay the land revenue, sold the land to a non-agriculturist with the sanction of the Deputy Commissioner.

Held, that the sale was an act of good management and could not be attacked by his sons. (*Sir Shadi Lal.*) ATMA RAM *v.* THAKUR SADHU SINGH. **172 I.C. 1004=1938 O.W.N. 196=A.I.R. 1938 P.C. 77 (P.C.).**

——**(Punjab)**—*Ancestral land—Ancestral and non-ancestral proportion of land not distinguishable—Whole, if non-ancestral.*

If a Court is unable to find what proportion of land is ancestral and which is non-ancestral the whole must be held to be non-ancestral. 42 P.R. 1910 (P.C.) and 60 I.C. 520, Rel. on. (*Dalip Singh and Skemp, JJ.*) LABH SINGH *v.* MST. JASSO. **A.I.R. 1938 Lah. 180.**

DECREE—*Setting aside—Judgment passed without jurisdiction—Right of suit.*

A separate suit is maintainable for setting aside a decreee on the ground that the Court passing had no jurisdiction to pass it. (*Addison and Din Mohammad, JJ.*) INTIZAMIA COMMITTEE *v.* CENTRAL BANK OF INDIA, LTD **A.I.R. 1938 Lah. 129.**

——*Setting aside—Right of—Person not party to decree.*

No person who is not a party to a decree can claim to have it set aside on the ground of fraud or collusion. All that he can claim is that the decree may not affect his rights. (*Addison and Din Mohammad, JJ.*) INTIZAMIA COMMITTEE *v.* CENTRAL BANK OF INDIA, LTD. **A.I.R. 1938 Lah. 129.**

DEED—*Consideration—Plea of absence of—Right to plead—Suit for possession by vendee under sale deed—Defendant in possession without ti... consideration—If open.*

A defendant in possession of title should not be allowed to plea for a sale-deed on the basis of wh for possession or any other defence which might be open to the vendor. (*Barlee and Macklin, JJ.*) VITHABAI v. MALHAR. 4**8** Bom.L.R. 147.

——*Construction — Settlement — Powers conferred under.*

Under a deed of settlement, *R*, a female, was constituted a tenant for life of certain villages which she was expressly precluded from burdening or tra her death, the villages and the entire prop become the property of *S*. *R* was given over the movables. There we which stood mortgaged to th regarding which it had been gagors got these properties rede *R* realized the amount due suit then she would be entitled to spend the principal and interest in any way she liked but *R* was not to have the power to transfer these mortgagee rights. *R* accepted very sm mortgagor

Held, tl ment. (*L* SHANKAR

DIVORC

furnishing security for alimony made four years after decree—Legality—Power of Court to vacate that order.

Under S. 37 of the Divorce Act the power to make any order on the husband to secure a gross sum or annual income for the wife can only be exercised on the passing of the decree. An order directing the husband to furnish security made four years after the decree for judicial separation is therefore without jurisdiction

RITCHSON. 42 C.W.N. 317.

——S. 37—*Power of Court to order furnishing of security for alimony—Extent of.*

Under S. 37 of the Divorce Act, the Court has power to make an order on the husband to secure a gross sum or annual income for the wife. In addition it has also the power to order him to pay to the wife such monthly

(*Panckridge, J.*) RITCHSON v. RITCHSON. 42 C

EASEMENT—Customary right—Distinction between. *See* CUSTOM—CUSTOMARY RIGHT. 66 C.L.J. 270.

——*Light and air—Injunction—When to be granted.*

Even though a right of easement of light and air is established, a person is not entitled to an injunction unless the disturbance of his easement appreciably and materially affects his enjoyment of the building in respect of which the easement is claimed. (*Rupchand Bilaram, Ag. J. C. and Lobo, A. J. C.*) HUKOMAL LAKHMI CHAND v. TARACHAND TOPANDAS A.I.R. 1

——*Natural right—Right to discha land on lower level.*

ESTOPPEL.

has, as ship of adjacent *Ali, J.*)

Pat 73.

EASEMENTS ACT (V OF 1882), S. 15—*Joint party wall—Windows or apertures in—Easement of light and air—If can be acquired by prescription.*

An easement of light and air through apertures or windows in a wall cannot be acquired by prescription, when the wall in question is a joint wall belonging to both the parties, because it is the essence of an ease- not belong- *Barlee and* NKAR. 115.

ped.

Though estoppel is described as a mere rule of evidence, it may have the effect of creating substantive

used due precautions to avert the risk. The detriment may entitle the innocent third person either to prosecute or to defend a claim. His identity may be ascertainable only by the event, in the sense that he has turned out to be the member of the general public actually reached and affected by the conduct, negligence, representation or ostensible authority. *English case law reviewed.* Bank to a merchant on the pledge of rail- llowing the usual practice, the railway ded over back to the merchant for the of clearing goods represented by the railway receipts from the Port Trust and storing them in the bank's godowns. The bank did not put its stamps on the railway receipts. The merchant fraudulently pledged the same railway receipts to bank *B* and obtained a second advance. Thereupon bank *A* brought against bank *B* an action for conversion. Bank *B* raised a plea of estoppel against bank *A*.

Held, that the plea of estoppel could not be availed of. Bank *A* did not owe any duty to bank *B* in the matter. There was no relationship of contract or agency. *A* which had to any body of the goods. things; there was no question of arming the merchant with them. The railway receipt, though a document of title, was in form merely an authority to take delivery of the goods and the possession of such a document contained no representation that the holder had any implied authority or right to dispose of the goods. It was at the best an ambiguous document. Its possession no more conveyed a representation that the merchant was entitled to dispose of the property than the actual possession of the goods them-

Bank *A* therefore was entitled to rely on the rule of law that no one could pass a better title than he possessed,

Held further, that the failure of bank *A* to place its stamps would make no difference. It was neither the practice nor was there any duty as between the two banks to adopt such a practice. (*Lord Wright.*) MERCANTILE BANK OF INDIA *v.* CENTRAL BANK OF INDIA. **172 I.C. 745=42 C.W.N. 321= 1938 O.L.R. 68 (2)=1938 O.W.N. 206= A.I.R. 1938 P. C. 52=(1938) 1 M.L.J. 268 (P.C.).**

——*Suit in ejectment of non-occupancy tenant—Description of tenant as occupancy tenant—If can operate as estoppel.*

In a suit to eject a tenant as a non-occupancy tenant, the mere description of such a tenant as an occupancy tenant would not constitute an estoppel as against the landlord. (*Darling, S. M. and Bomford, J. M.*) MACKINNON *v.* SAMPAT KUMAR SINHA. **1938 R.D. 4=1938 A.W.R. 16 (B.R.).**

EVIDENCE—*Child witness—Unsworn testimony—Admissibility—Oaths Act, S. 13.*

In the case of an unsworn testimony of a young child, that evidence is admissible, S. 13 of the Oaths Act expressly provides for cases in which the provisions of Ss. 5 and 6 of that Act have not been carried out. (*Burn and Mockett, JJ.*) DASI VIRAYA *v.* EMPEROR. **47 L.W. 161=(1938) M.W.N. 90.= 1938 1 M.L.J. 289.**

——*Value of—Proof of religion—Entry in heading of deposition sheet of witness.*

The question was whether a certain person was a Burmese Buddhist. In a certain case the person was examined as a witness and the entry in the heading of the deposition sheet showed that he was a Burmese Buddhist.

Held, that the entry being merely in the heading was of no probative effect and much importance could not be attached to such entry. (*Baguley and Sharpe, JJ.*) MA TIN *v.* MA E NYUN. **A.I.R. 1938 Rang. 81.**

——*Witness—Plaintiff calling defendant as his witness—Practice condemned.*

Where the plaintiff refrained from giving evidence on his own behalf and adopted instead the tactics of calling the defendant as a witness for the plaintiff, with the usual result that important features of his case were denied by his own witness, their Lordships condemned this practice and approved of the course taken by the High Court in treating the plaintiff as a person who put the defendant forward as a witness of truth. (*Sir George Rankin.*) SHATRUGAN DAS *v.* BAWA SHAM DAS. **172 I.C. 633=1938 O.L.R. 42= 47 L.W. 124=1938 A.L.R. 66=4 B.R. 238= (1938) O.W.N. 48=A.I.R. 1938 P.C. 59 (P.C.).**

EVIDENCE ACT (I OF 1872), S. 24—*Extra judicial confession—Confession before Lambardars—Value of.*

There is reason to suspect that confessions are often wrung out of Villagers by Lambardars and other persons in authority by putting them to very severe examination during investigation; and there is also grave reason to suspect that in some cases something more severe than questioning may be adopted to obtain a false confession. It is the suspicion that this kind of treatment is accorded to suspects that makes Courts very loath to act upon extra judicial confessions, even where there is nothing on the record to show that the case is false. (*Young, C. J. and Monroe, J.*) SHORAN *v.* EMPEROR. **18 Lah. 794.**

——**S. 25**—*Applicability—Confession to Excise Officers.*

As S. 25 of the Evidence Act refers only to a police officer, a Court should not extend it to other classes of

officers merely on grounds of similarity of functions. The restrictive provisions of S. 25 should not be applied to Excise officers. (*Horwill, J.*) PUBLIC PROSECUTOR *v.* MARIMUTHU GOUNDAN. **(1938) M.W N. 95= (1938) 1 M.L.J. 238.**

——**S. 30**—*Confession of co-accused—Evidentiary value.*

It is not quite clear as to what is the exact meaning of "tainted evidence"; whether it means that the person giving the evidence is tainted morally; or whether it means merely that he is a person on whose word reliance cannot be placed. As regards an approver, there is the fear that he is giving evidence in order to save his skin and therefore that he is liable to make statements which are not true if he thinks they will be for his benefit. But as regards the confession of a co-accused, one cannot call this, tainted evidence, for the same reason. A person making a confession does so deliberately and after having been warned solemnly by the Magistrate of the consequences of making a confession and knowledge that he may be convicted thereon, if he still persists in his purpose and makes a confession, the statements that he makes cannot be considered to be tainted statements unless it be that they are tainted because he is an immoral person who has committed a criminal offence. But all immoral persons are not necessarily and always liars. But it is not to be supposed that because the confession is admissible, therefore, it must be believed. In such case it has to be considered whether the confession is a true one, whether there are any circumstances which suggest that it is false or that some of the statements made therein are also false. The Court may take the confession of a co-accused person into consideration against the other co-accused; that is to say, the Court can only treat a confession as lending assurance to other evidence against a co-accused. (*Mackney, J.*) NGA MYA *v.* EMPEROR. **A.I.R. 1938 Rang. 92.**

——**S. 30**—*Retracted confession—Value of, against co-accused.*

A retracted confession may be valuable evidence against the accused making the confession but it is of very little value against a co-accused. (*Abdul Rashid, J.*) SINGHA *v.* EMPEROR. **40 P.L.R. 58.**

——**S. 32 (1)**—*Dying declaration by signs of hand and head—Duty of officer recording.*

Where a victim, in a serious condition, is unable to speak, on being questioned regarding assailants, makes a dying declaration by signs of hand and head only, the person recording the dying declaration in order that the same may be admissible in evidence must record the precise nature of the sings which the injured person is stated to have made. It is not his function to record merely his interpretation of the signs, which should be left to the Tribunal. (*Courtney-Terrell, C. J. and Manohar Lall, J.*) DARPAN POTDARIN *v.* EMPEROR. **A.I.R. 1938 Pat. 153.**

——**S. 76**—*Copy of talukdhari Sanad not sealed—Other formalities carried out—Copy, if uncertified.*

Undoubtedly under S. 76 of the Evidence Act a copy of a talukdari sanad to be certified should be sealed whenever the keeper of the records of the Government of India is authorised by law to make use of a seal. But if there is no evidence to the effect that he is so authorised, the Court cannot make such a presumption when other necessary formalities have been duly carried out. Accordingly a copy of a sanad which complies with other formalities but is not sealed cannot be treated as uncertified and is admissible in evidence. (*Zia-ul-Hasan and Hamilton, JJ.*) SRI RAM *v.* MAHOMED-

EVIDENCE ACT (1872), S. 90.

ABDUL RAHIM KHAN. 172 I.C. 882=1938 O.L.R. 44=1938 O.A. 96=1938 O.W.N. 67.

——Ss. 90 and 114—*Certified copy of registered will produced—Power of Court to presume valid execution of will from proved facts.*

Apart from S. 90 of the Evidence Act, the Court can make a presumption of fact about the valid execution of a will from a certified copy of the will obtained from the Registration Office, if such presumption is justified by the proved facts and circumstances of the case. (*Zia-ul-Hasan and Hamilton, JJ.*) SRI RAM *v.* MAHOMED ABDUL RAHIM KHAN. 172 I.C. 882=19[illegible]

——[illegible]

for wa[illegible] *tion—Maintainability—Loan and note part of same transaction—If precludes suit on loan.*

Although a loan and a promissory note for the loan form part of the same transaction, a suit will lie on the original consideration. If there is a loan, that itself gives a cause of action, and the fact that there is a loan can never be a term of the contract contained in the promissory note, it is therefore open to the creditor to prove that there was a loan independently of S.91 of the Evidence Act. It does not ma[illegible] made at the same time as the [illegible] the evidence of it or whether [illegible] and therefore inadmissible in evidence. (*Rangnekar, J.*) SOMABHAI *v.* KALYANBHAI. 40 Bom L R. 174.

——S. 92—*Document—Recital of fact—Whether* [illegible]

[illegible] recitals of facts mentioned in the document cannot be contradicted by evidence. Where a particular document [illegible]

Evidence of the absence or failure of consideration for a document could always be adduced under proviso (1) of S. 92, even if the document had mentioned any consideration. (*Abdur Rahman, J.*) MAHALAKSHMI AMMA *v.* KRISHNA HOLLA. (1938) 1 M.L.J. 236.

——S. 92 Prov. (1)—*Kabuliyat settling two* [illegible] *of land at certain rate—Separate oral agreement* [illegible] *one of them was given rent free—Admissibility.*

Where under a Kabuliyat two *hals* of land were settled with a tenant at a certain rate, a separate oral [illegible]

[illegible] *to represent institution in suit—Proof of the minutes of the meeting of Managing Committee—If sufficient to discharge burden.*

Where the question is whether plaintiff is authorized by the Managing Committee of an institution to institute a suit on its behalf, and the proof of the minutes of the meeting of the Managing Committee constituting such due authority is available, it is sufficient to discharge any burden on the plaintiff under S. 106. (*Lord Thankerton.*) SUNDER SINGH *v.* SUNDER SINGH. 172 I.C. 993=47 L.W. 239=A.I.R. 1938 P.C. 73 (P.C.).

EVIDENCE ACT (1872), S. 115.

——S. 108—*Scope—Presumption under—Extent of—Date of death—Presumption as to.*

There is no presumption under S. 108, Evidence Act, that a person who has not been heard of for a period of more than seven years died at the end of the first seven years or at any particular date. The only presumption is that such person at the date of the suit in which the question arises. (*Barlee and Macklin, JJ.*) VITHABAI *v.* MALHAR. 40 Bom L.R. 147.

——S. 110—*Applicability—Madras Land Encroachment Act—Case under—Presumption of title—Value of.*

S. 110. no doubt. enacts that title is to be pre[illegible] This is a rebuttable [illegible] presumptions, must [illegible] e title is proved or assumed, the presumption created by S. 110 can no longer apply. Madras Land Encroachment Act, S. 2 declares, subject to a saving clause, that the Government is the owner of certain kinds of property including the beds of tanks. There is no conflict between S. 110, Evidence Act, and this provision. The title of the Government being statutorily declared, the rule of presumption enacted by S. 110 is not brought into play. But [illegible]

A.I.R. 1938 Mad. 193.

——S. 110—*Onus under—When discharged.*

The onus laid on a party by S. 110 of the Evidence [illegible] by his showing that the possession [illegible] her party rests on a basis inconsistent [illegible] property. (*Lord Normand.*) THE [illegible]AL BOARD, AHMEDABAD *v.* SECRE[illegible] 172 I C. 981=1938 O.A. 78=1938 O.L.R. 83=1938 O.W N. 90=A.I.R. 1938 P.C. 87 (P.C.).

——S. 114, Ill (a)—*Stolen property recovered from* [illegible]*used three weeks after burglary—If sufficient evid*[illegible]*e for conviction under S.* 411, *I. P. Code.*

Evidence of recovery of stolen property from the house of the accused about three weeks after the commission of the burglary is sufficient for his conviction under S. 411, I. P. Code. (*Abdul Rashid, J.*) SINGHA *v.* EMPEROR. 40 P.L.R. 58.

——S. 114, Ill. (b)—*Evidence of approver—Corro-* [illegible]

[illegible] to be evidence connecting the accused in every detail with the particular crime. Evidence is only required [illegible]d with the crime. [illegible]ecting him with the [illegible] the most powerful [illegible]ver that one could [illegible] MT. KHUSHALIA 40 P.L.R. 61.

——S. 115—Representation—Hindu joint family—Unauthorised sale by son during temporary absence of father—Subsequent return of father and consent to mutation in favour of alienee—Effect—Father, if estopped from challenging sale. *See* HINDU LAW—ALIENATION. 16 Mys L J. 32=42 Mys.H.C.R. 669.

——S 115—*Representation—When raises estoppel.*

No case of estoppel can be established by a party if it is not shown that any action of his was induced by any representation or conduct of the other party. (*Lord Normand.*) THE DISTRICT LOCAL BOARD, AHMEDA-

BAD *v.* SECRETARY OF STATE. 172 I.C. 981= 1938 O.A. 78=1938 O.L.R. 83=1938 O.W.N. 90= A.I.R. 1938 P.C. 87 (P.C.).

——S. 115—*Scope of.*

The law of estoppel which S. 115, Evidence Act, enacts is the same as the English law. (*Lord Wright.*) MERCANTILE BANK OF INDIA *v.* CENTRAL BANK OF INDIA. 172 I.C. 745=42 C.W.N. 321= 1938 O.L.R. 68 (2)=1938 O.W.N. 206= A.I.R. 1938 P.C. 52=(1938) 1 M.L.J. 268 (P.C.).

EXECUTION—*Executing Court—Powers of—Jurisdiction of Court that passed decree—Enquiry into.*

An executing Court must be able to decide whether a decree exists at all and therefore where the Court has no inherent jurisdiction to pass the so-called decree, the decree has no real existence in law and the executing Court within those narrow limits can decide whether the decree was passed by a Court which, for lack of inherent jurisdiction, could not pass such a decree; for, that point settles the question as to whether there is an existing decree upon which the executing Court can take action. A.I.R. 1925 C. 907 (F.B.) Foll. (*Addison and Din Mohammad, JJ.*) INTIZAMIA COMMITTEE *v.* CENTRAL BANK OF INDIA, LTD. A.I.R. 1938 Lah. 129.

——*Revival—Execution case dismissed on part satisfaction—One of attached properties not sold by mistake of Court officer—Right of decree-holder to review execution case.*

Where in execution of a money decree 8 lots of immovable properties were attached but by mistake on the part of Nazir only 7 out of 8 lots were actually sold and the execution case was dismissed on part satisfaction, on a subsequent application by the decree-holder for reviving the execution case in order to sell the property of lot No. 8.

Held, that having regard to the fact that the 8th property had been attached and there was no order made directing removal of attachment, there was no legal bar to the decree-holder being allowed to revive that execution case.

Held further, that the mistake being on the part of the Court's officer, it was for the Court to remedy that mistake by treating the subsequent application as a continuation of the previous execution case. (*S. K. Ghose, J.*) DURGA DAS CHAKRABURTTY *v.* KULA CHANDRA CHAKRABURTTY. 42 C.W.N. 286.

——*Sale in—Decree-holder and auction-purchaser—Respective rights of* inter se—*Judgment-debtor having no saleable interest—Suit by purchaser against decree-holder—Maintainability—Cause of action.*

Fazl Ali, J.—Before a party can be said to have a right of action it must be shown that he has a cause of action. A decree-holder can by no stretch of reasoning be said to be the vendor of the auction-purchaser; there is no privity of contract between them, and their respective rights cannot be dealt with as if they were parties to a private sale. It cannot be said that the decree-holder offers an unqualified guarantee as to the good title of the judgment-debtor. The auction purchaser cannot therefore have any right of action against the decree-holder, if it transpires that the judgment-debtor has no saleable interest in the property sold. (*Fazl Ali and Rowland, JJ.*) PALI RAM *v.* LAHERIA SARAI, CENTRAL CO-OPERATIVE BANK, LTD. 19 Pat.L.T. 80=A.I.R. 1938 Pat. 150.

GOVERNMENT OF INDIA ACT (1915), S. 30—*Contract under—Conditions of validity—Form of—Formal deed or indenture—Necessity—Contract by correspondence—Requirements of validity.*

There is no justification for holding that a contract in order that it may comply with S. 30 of the Government of India Act must be by deed, *i.e.*, under seal. There is no such provision in S. 30; the section does not require a formal document in the nature of an indenture or deed. The contract under S. 30 must, in order to be binding, be made on behalf and in the name of the Secretary of State far India in Council by the local Government and executed by the proper officer authorised by the Governor-General in Council. A contract in the form of letters, complying with the provisions of S. 30 and signed by the proper officer, would be a contract complying with the terms of S. 30. But it must be plain that the correspondence is carried on on behalf of and in the name of the Secretary of State, and that the contract as finally concluded by correspondence is executed by a person authorised by resolution in that behalf. Where the correspondence does not show that, but only amounts to the fact that the Collector is prepared to recommend to Government to sanction a proposal, which if sanctioned would be made on behalf of and in the name of the Secretary of State in Council, there is no binding agreement under S. 30 which can be specificially enforced. (*Beaumont, C.J. and Blackwell, J.*) SECRETARY OF STATE *v.* BHAGWANDAS GOVERDHANDAS. 40 Bom.L.R. 19.

GRANT—*Construction—Alienable estate—Use of words "and assigns"—Effect of.*

Where a grant of land expressly uses the words "and assigns" and it does not purport to make a *maufi* grants but makes an out and out grant, the intention of the grant is to confer an alienable estate upon the grantee. When there is nothing ambiguous about the grant, it would not be right to go behind it and beyond it into the past to see what the terms were upon which the land was held before the grant, so far as the question of alienability is concerned. (*Stone, C.J. and Bose, J.*) LAL CHAND *v.* DHANOO. 10 R.N. 226= 172 I.C. 580=A.I.R. 1938 Nag. 95.

——*Construction—Conflicting descriptions—Which to prevail.*

Where there are two conflicting descriptions of the subject-matter of a grant or two conflicting parts of the same description, that which is the more certain and stable and the least likely to have been mistaken or to have been inserted inadvertently must prevail, if it sufficiently identifies the subject-matter. Preference ought to be given to that element of the description of the subject-matter which is most consistent with the intention of the parties to be collected from other parts of the deed, illumined, if necessary, by the surrounding circumstances and subsequent conduct of the parties. (*Niyogi, J.*) UMRAO BAPU *v.* RAMKRISHNA BAPU. 10 R.N. 235=172 I.C. 678= A.I.R. 1938 Nag. 93.

——*Construction—Crown grant of village—Irrigation tanks—If pass—Presumption.*

The Government cannot be presumed in making a grant to include in it communal property, *i.e.*, what the villagers own in common. Where tanks were primarily intended for irrigation purposes and were used as irrigation sources, the mere fact that the villagers sometimes used the water for other purposes, such as for drinking, for bathing or for washing cattle, does not suffice to create any rights of ownership in them. The true position in regard to irrigation tanks is that they do not belong to the community as such the rights of irrigation, appertaining as they do, to the lands irrigated; such rights therefore as the owners of these lands possess, are in the nature of easements. Such tanks not being public or communal porambokes there is nothing to prevent their passing under the wide terms of a grant. Moreover where the tank or channel if wholly within the limits of the inam, it must be held to pass under the

GRANT.

grant. (*Venkatasubba Rao and Abdur Rahman, JJ.*) APPA RAO *v.* SECRETARY OF STATE.
A.I.R. 1938 Mad. 193.

——*Construction—Service grant—Resumability—Grant of office remunerated by share in income of lands or grant of land burdened with service—Nadgowda watan—Grant of office of gumasta hereditarily—Grantee given right to manage watan lands and to take one-fourth share of income—Effect of—Resumability.*

Grants of office to be remunerated by a share in the income of lands are always resumable unless the grantee can show that they have specially conditioned otherwise so as to prevent their resumability. The plaintiff claimed that his ancestors were the gumasthas of the Nadgowda watandars (ancestors of the descendants) and that under a grant or sanad made by the latter certain lands had been granted to his ancestors by the ancestors of the defendants for the gumasthagiri service performed in the past and to be performed in the future and he relied on three documents or sanads as the basis of his title. The first sanad of the year 1791, which was the original grant, recited that the father of the grantee had exerted himself very much for the grantor's watan and had rendered very great service and that therefore the watan of gumasta had been conferred on him, that the grantor would continue the post of watan gumasta to the grantee without break so long as the sun and the moon endure, and after referring to the fact that a separate sanad had been granted for one-half chavar land out of
grantee for the maintenance of
sanad stated "you should take
take one-fourth having given [illegible]
crediting the leasehold, share produce or cash, rent of all the inam lands......we should continue hereditarily the gumasta watan which is bestowed on you by us with pleasure. No one of our descendants is entitled

the gift of one and half chavar of la
that the grantee, after excluding the
the grantor three-fourths share in
inam lands, and that the grantee sh
remaining one fourth, concluded by sa
continue as above the gumasthaship to

fourths and your share for watan gumastaship is one-fourth and is with you in all the villages since long.

and you should take your one-fourth share. . . In the above manner, you should make vahiwat of the watan for all times till the sun and the moon endure. . . .

Held, on a construction of the documents, that the three sanads read together did not confer anything more than the office of gumasta and provide that the office was to be remunerated by a one-fourth share in the income of the watan lands, and as such was clearly resumable, there being no grant of land at all burdened

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with service. The grant being one of an office only would be resumable whether it was for past and future services or for future services only. (*Wadia, J.*) HANMANT *v.* GURUNATH. 40 Bom.L.R. 88.

——Construction—Sheri lands--Grant by Government to member of joint Hindu family—Grant *prima facie* in name of individual member and not for benefit of family—If joint family property or grantee's separate property. *See* HINDU LAW—JOINT FAMILY.
40 Bom.L.R. 118.

——*Construction—Subsequent conduct of grantor—Agraharam—Open use of tank bed by agraharamdars—Government not collecting assessment—Inference—Admission of grantee's title to tank-bed.*

Certain tanks situated in an agraharam ceased to be used for purpose of irrigation and the tank-beds were openly cultivated by the Agraharamdars. The Government collected cesses, but forbore from collecting assessment.

Held, that collecting cesses but forbearing to collect assessment almost amounted to an admission on Government's part of the Agraharamdar's title to the tank beds whether the Government so intended it or not. (*Venkatasubba Rao and Abdur Rahman, JJ.*) APPA RAO *v.* SECRETARY OF STATE. A.I.R. 1938 Mad. 193.

——*Inam—Rights under—Extent of—Evidence—Grant by pre-British Government—Inam title-deed—Value of original grant as evidence.*

The law undoubtedly is that after cession of territory

free grants of the previous Governments, though in practice they did recognize them. But when the original sanad is produced and the inam title-deed does not curtail or limit the right conferred by its terms, the original grant [illegible] what has been
inam enquiry.
, *JJ.*) APPA
1938 Mad. 193.
can be invoked
source for all

make a change later on. A lost grant can only be presumed, if at all, as a matter of fact when all the circum-

——*Occupancy holding becoming a grove—Effect of—Disappearance of grove—Grove-holder's status—Transferee of grove plot—Position and rights of.*

Occupancy rights lapse in any plot of an occupancy holding which becomes a grove: the occupancy rights therein are superseded by grove rights. When the grove disappears, the grove-holder becomes a non-occupancy tenant in the plot; the former occupancy rights are not revived therein. The transferee of a

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a part of an occupancy holding, acquires grove rights but they are extinguished when the grove disappears. He then becomes merely a sub-tenant or trespasser or at best a non-occupancy tenant. Though the original occupancy tenant might have managed to retain his occupancy rights in such land, that would not entitle his transferee to attempt to establish a claim to the same rights. (*Darling, S.M.*) BANWARI LAL *v.* ABID HUSAIN. **1938 A.W.R. 37 (B.R.).**

——*Transfer—Prohibition in the* wazib-ul-arz—*Transfer in spite of—If illegal—Rights of vendee.*

Where there is a transfer of a grove to a co-sharer, in spite of a prohibition against such a transfer contained in the *wajab-ul-arz*, it is not illegal as not being contrary to law. But the vendee does not thereby become full proprietor of the grove as he is not the sole Zamindar. He is only entitled to remain a grove-holder. The effect would be that on a partition of the village, only that part which represents his share in the whole area of tenant's groves will be included in his *path.* (*Darling, S.M. and Bomford, J. M.*) BRINDABAN *v.* CHANDRA SHEKHAR. **1938 R.D. 10 = 1938 A.W.R. 9. (B.R.).**

GUARDIAN AND WARD — Debt incurred by mother—Creditors rights — Subrogation—Nature and extent of. *See* MINOR — DEBT INCURRED BY MOTHER. **1938 M W.N. 103 = (1938) 1 M.L.J. 181.**

GUARDIANS AND WARDS ACT (VIII OF 1890), S. 4 (5) (b) (ii)—"For the time being ordinarily resides"—Interpretation. *See* GUARDIANS AND WARDS ACT, SS 12, 25 AND 4 (5) (*b*) (*ii*). **40 P.L.R. 64.**

——**Ss. 12 and 25**—*Applicability—Application by appointed guardian for custody of minor.*

The Court can entertain an application by a guardian appointed by it for the custody of the minor under the provisions of Ss. 12 and 25 of the Guardians and Wards Act. So long as the custody of a minor is not actually made over to the guardian appointed by Court, the proceeding for the appointment of the guardian does not terminate and the applicability of S. 12 is not barred. There is another way of looking at the matter. A minor who is not delivered to the guardian after he has been appointed by a competent court, can be treated as having left or been removed from the custody of the guardian under S. 25 (1) of the Act. (*Addison and Din Mohammad, JJ.*) MT. NAZIR BEGUM *v.* GHULAM QADIR KHAN. **40 P.L.R, 64.**

——**Ss. 12, 25 and 4, (5) (b) (ii)**—*Application by appointed guardian for custody of minor—Minor removed from jurisdiction of Court—Court, if can entertain application.*

The Court has jurisdiction to entertain an application made to it by a guardian appointed by it for the custody of the minor under Ss. 12 (1) and 25 of the Guardians and Wards Act, although the minor has been removed out of its jurisdiction. To place a restricted meaning on the words "for the time being ordinarily resides" in S. 4 (5) (*b*) (*ii*) so as to interpret them to mean where the minor actually is at the time of the application would be tantamount to rendering nugatory all the provisions of the Act and to making the law helpless against the machinations of recalcitrant persons who do not propose to part with the minor in favour of the appointed guardian. (*Addison and Din Mohammad, JJ.*) MT. NAZIR BEGUM *v.* GHULAM QADIR KHAN. **40 P.L.R. 64.**

——**Ss. 25 and 12**—Applicability—Application by appointed guardian for custody of minor. *See* GUARDIANS AND WARDS ACT, SS. 12 AND 25. **40 P.L.R. 64.**

GUARDIANS AND WARDS ACT (1890), S. 41.

——**Ss. 25, 12 and 4 (5) (b) (ii)**—Application by appointed guardian for custody of minor—Minor removed from jurisdiction of Court—Court, if can entertain application. *See* GUARDIANS AND WARDS ACT. SS. 12, 25 AND 4 (5) (*b*) (*ii*). **40 P.L.R. 64.**

——**Ss. 30 and 31**—*Scope—Sanction to guardian to mortgage ward's property for purpose of discharging decree debt—Mortgage by guardian for amount advanced—Person advancing money on faith of sanction—Duty to see to the application of money—Bulk of loan applied to purpose sanctioned—Balance applied for purpose not sanctioned—Creditors right to claim whole amount of loan—Proof of necessity.*

Where a guardian of a minor appointed under the Guardian and Wards Act obtains the sanction of the Court authorising him to execute a mortgage of the minor's property and to borrow a certain amount for the purpose of paying of a mortgage decree against the estate, and executes a mortgage for the amount authorised by Court, and no fraud or underhand dealing is alleged, the person who lends money to the guardian and takes a mortgage from the guardian is entitled to rely upon the sanction itself for the validity of the transaction. The lender is not bound to go behind the order of the Court sanctioning the mortgage, is entitled to rely upon it, and if he acts *bona fide*, he is not bound to see to the application of the money or any part of it. The circumstance that the guardian does not subsequently apply the money in its entirety for the purpose for which he borrows it is irrelevant. If the guardian applies the bulk of the money borrowed for the purpose sanctioned by the Court, but applies a small part of it for different purpose which is not sanctioned, it would still be open to the creditor who has advanced the money to establish that there was legal necessity for that amount also when he has paid the whole amount of the consideration on the faith of the sanction, and the amount advanced does not exceed the amount sanctioned by the Court, he is entitled to claim the whole amount advanced by him as a mortgagee. (*Wassoodew and Thakor, JJ.*) VINAYAK *v.* SHANTABAI. **40 Bom.L.R. 180.**

——**S. 31**—*Holding of enquiry—If essential—Application by guardian for permission mentioning one debt and sale-deed purporting to pay off different debt—Sale made for higher sum than that proposed—Interest of minor, if prejudiced.*

S. 31 of the Guardians and Wards Act does not make the holding of any enquiry by Court essential. The fact that the guardian mentioned one debt in the application for permission for sale but the sale-deed purports to have been executed to pay off totally different debts, and the fact that the sale was actually made for a higher sum than that proposed do not show that the interests of the minor were prejudiced in any manner by the sale. (*Zia-ul-Hasan and Smith, JJ.*) SUNDAR LAL *v.* GUR SARAN LAL. **10 R.O. 187 = 172 I.C. 637 = 1938 O.A. 34 = 1938 O L.R. 14 = 1938 O.W.N. 104.**

——**S. 41 (3) and (4)**—*Discharge of guardian—Discretion—If unfettered—If revisable.*

When the *quandom* guardian has complied with the directions of the Court under sub-S. (3), the Court has full discretion in the matter under sub-S. (4) of the Guardians and Wards Act to discharge him, if it thinks fit. In exercising such discretion the Judge is exercising a Jurisdiction vested in him and as such it cannot be interfered with in revision. (*Leach, C.J., Varadachariar and Mockett, JJ.*) RAMACHANDRAN *v.* BALASUBRAMANIA AYYAR. **1938 M.W.N. 188 = (1938) 1 M.L.J. 285 (F.B.).**

——**S. 41 (4)**—*Discharge of guardian—Course to be adopted.*

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was sufficient reason to keep open the question of the guardian's liability or to exercise its power under S. 41

street and before mosque. *See* RELIGIOUS PROCESSION. 1938 M.W.N. 119.

HINDU LAW—Adoption— Widow—Absence of

confined to agnates of husband. *See* HINDU LAW—ADOPTION—WIDOW—MADRAS PRESIDENCY.
A.I.R. 1938 P.C. 34.

———*Adoption—Widow—Authority given by will—Suggestion as to boy to be adopted—Executors to remain in possession during minority of the adopted boy—Refusal of widow to adopt—Widow, if entitled to possession of properties—Will, if creates a trust in favour of the executors.*

Where a Hindu widow was directed by the will of her husband to adopt a particular boy and if he was not available any other suitable boy, and where the further appointed executors to be in possession of properties during the minority of the adopted and the widow refused to adopt,

Held, that a Hindu widow could not be compelled to adopt however strong the direction of her husband might be, and there was no deprive her of her interest in the property on the ground that she might change her mind subsequently. The contingency provided for in the will not having occurred the testator should be regarded as intestate and the widow would be entitled to receive the properties as on intestacy,

Held further, that the will did not create a trust in

association of wife in an act of adoption by the husband—If an indication of an implied authority to make a second adoption—Assent of kinsmen—If refers only to agnates of husband—Absence of Sapindas—Power of widow to adopt of her own volition.

Under the interpretation of the Mitakshara law, as generally accepted in the Madras Presidency an adoption by a widow would be valid only if made

to constitute umstantial evidence of a cogent character. Where there is nothing to show that the husband ever contemplated a second adoption, or that he was prepared to leave the 'selection of another boy' to his wife, the mere association of the wife in an adoption by the husband is no indication of d adoption

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BALASUBRAMANYA PANDYA TEVAR. 47 L.W. 110=
72 I.C. 724=1938 O.L.R. 61=
1938 O.A. 54=1938 A.L.R. 77=
A.I.R. 1938 P.C. 34 (P.C.).

applied to the case of a sale by a Hindu father in which questions of Hindu law would arise. A proof of Rs. 2,375 only out of a consideration of Rs. 4,000 is not ient to support a sale, so as to entitle the vendor to ssion of the family property sold as against the (*Wort and Manohar Lall, JJ.*) JUTHAN RAM DUBEY *v.* RAMAN RAM TEWARI. 1938 P.W.N. 75.

———*Alienation—Father—Sale by—Validity—Proof of consideration—Duty of alienee—Legal necessity and antecedent debt—Distinction, if any—Necessity to prove bulk of consideration in each case.*

There is no justification for making any distinction between a consideration for an alienation by way of sale by a Hindu father as for legal necessity, and a consideration which is of the nature of an antecedent debt. The question in all cases is this: whether the consideration is of such a character as to support the transaction.

other also. (*Wort and Manohar Lall, JJ.*) JUTHAN RAM DUBEY *v.* RAMAN RAM TEWARI.
1938 P.W.N. 75.

———*Alienation—Guardian—Alienation by—Validity—Benefit to the estate—Meaning of—Speculative and imprudent alienation effected under duress and undue influence—If can be upheld.*

The power of a guardian or the manager for an infant heir to charge the minor's estate is a limited and ...ghtly in case of e words benefit ıe estate from litigation—the deterioration and similar circumstances, in other words, what is meant is, toward off effectively danger to the estate. A transaction which might in certain circumstances be attacked as a fraudulent preference, the purpose of the alienation being to put the property beyond the reach of creditors, cannot be said to be of that nature. But

kar Lall, JJ.) NRISHINGA CHARAN NANDI CHOUDHURY *v.* ASHUTOSH DEO GHATWAL.
19 Pat.L.T. 35.

———*Alienation—Guardian—Powers of—Person not acting as guardian or intermeddling in estate—Acting as self-appointed guardian in one transaction only—Position of—*De facto *guardian—Alienation by—Validity.*

in the absence of proof that he has acted as guardian of the minor's estate or intermeddled therein. A person who over many years has never intermeddled or acted as a guardian cannot come forward and claim to be a guardian *de facto* and authorised to alienate property on behalf of a minor, and whether *de facto* or *ad hoc*, the validity of the alienation by the guardian must be judged by considerations as to whether the alienation is for the necessity and benefit of the estate.

Manohar Lal, J.—A father-in-law can never be the legal guardian of his minor daughter-in law, especially when the husband of the minor girl is of age and of mature understanding; nor is the position of such an unauthorized guardian improved by describing him as a *de facto* guardian, so as to clothe him with any legal power to dispose of the property of the minor. A transfer by him is wholly unauthorised, and the question of benefit to the estate is beside the point, more particularly when the minor repudiates it as soon as it comes to her knowledge. (*Wort and Manohar Lall, JJ.*) NRISHINGHA CHARAN NANDI CHOUDHURY *v.* ASHUTOSH DEO GHATWAL. **10 Pat.L.T. 35.**

———*Alienation — Junior member — Powers of—Father temporarily absent abroad—Sale by son—Absence of necessity—Validity—Subsequent return of father—Change of patta of lands in alienee's name at father's instance—Effect of—If acquiescence or ratification—If estops father from challenging alienation—Evidence Act, S. 115—Transfer of Property Regulation, S. 54.*

Property belonging to a joint family is ordinarily managed by the father or other senior member for the time being for the family. The father is, in all cases naturally, and in the case of minor sons, necessarily, the manager of the joint family property. A younger member of a joint family such as a son, is authorised to deal with the family property only in exceptional or extraordinary circumstances, such as, reason of distress, calamity affecting the whole family, the support of the family, or the absence of the father in a remote country. But the temporary absence of the father from the locality for a short time is not sufficient to clothe the son with the powers of a manager to deal with the family property, when there is nothing to show that he is in any remote country, or that his whereabouts are not known or that his return within a reasonable time is out of question or not anticipated. And when there is no evidence of any pressure on the estate or urgent necessity an alienation of family property by way of sale by a son cannot be binding and valid as against the share of the father or any member other than the alienor. The fact that the father after his return home gets the patta of the properties transferred in the name of the alienee cannot give the alienee any title, because title to land cannot be transferred by mere admission in view of the Transfer of Property Regulation which requires a registered document for that purpose. Nor can the act of the father in transferring the patta be taken as an acquiescence in or ratification of the alienation so as to estop him from challenging the alienation. The change of patta cannot be regarded as a representation by the father which affects the alienee in anyway, and on which the appellant can be said to have acted. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) SIDDAPPA *v.* LINGAPPA **16 Mys. L.J. 32=42 Mys.H.C.R. 669.**

———Alienation—Widow—Alienation by—Validity—Consent of next reversioner—Effect of. *See* HINDU LAW—FAMILY ARRANGEMENT. **1938 P.W.N. 125.**

———*Debts—Father's personal debt not charged on family property—Son's liability—Pious obligation—When arises—Debt contracted by father prior to birth of son—Absence of necessity—Son's right to challenge creditor's right to recover from family property during father's life time—Law in Mysore.*

A Hindu son in Mysore is entitled to challenge a debt contracted by his father, when it is a mere personal debt and when it is contracted for purposes not binding on the family, although the debt may have been contracted by the father before the son's birth. Under the Hindu Law in Mysore a son is not under any pious obligation to pay his father's debts during his father's lifetime. When such a personal debt of the father not charged on the family property is sought to be recovered from the family property, the son can resist the claim on the ground that the debt is not binding on him or his share of the family property, though it was contracted before his birth. But after the death of the father is dead, the pious obligation of the son would come in and the matter would be defferent. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) THIPPANNA *v.* RUDRANNA. **16 Mys.L.J. 47=42 Mys.H.C.R. 684.**

———*Family arrangement—Declaratory suit by reversioners—Compromise arrived at in suit—If binds reversioner not party to it.*

A family arrangement can be arrived at so as to be binding on a reversioner not party to the suit brought by other reversioners, declaratory in its nature, to set aside or challenge a gift by the limited owner. Whether such arrangement can be binding on such reversioner depends on the circumstances of each case. A.I.R. 1936 All. 507 (F.B.), Diss. A Hindu died leaving behind him his sister, mother and two cousins who were the then reversioners. The mother gifted the property to the sister and thereupon the two cousins brought a suit for declaration challenging the gift. In that suit, a compromise was arrived at between the two reversioners, the mother and sister whereby each got one-third share in the property. This was before the Hindu Law of Inheritance (Amendment) Act II of 1929 came into force. The sister thus got a share in the property left by her brother at a time when she would not have been entitled to it at all. After the Act came into force, the sister and the sister's son were recognized as heirs and the sister's son then brought a suit to set aside the compromise.

Held, that inasmuch as all the possible near heirs of the deceased were parties to the reversioners' suit and the compromise was entered into *bona fide* by the plaintiff's mother and grandmother, and further that as it was really an act of prudence on the part of the plaintiff's mother to enter into such compromise at a time when no one contemplated that an Act would be passed making the plaintiff a nearer heir than the suing reversioners, the compromise under such circumstances could well be described as a family settlement or arrangement binding on the plaintiff. (*Dalip Singh and Skemp, JJ.*) MADAN LAL *v.* DIVAN CHAND. **A.I.R. 1938 Lah. 163.**

———*Family arrangement—Dispute between widow and brother of last male-holder—Ekrarnama executed by widow, brother and daughter of deceased—Validity as against daughter—Right of latter to impeach as invalid after widow's death—Alienation by widow—Consent of reversioner—Effect.*

On the death of one *D*, a Hindu, his widow applied for mutation of her name as regards one-half of the property which formed the ancestral property of the family and prayed that her name should be mutated as regards the absolute ownership of his separate property. This was ordered, but the order was afterwards set aside on the application of the other members of the family, who were not parties so the order. Shortly afterwards an ekrarnama was executed by the widow, her daughter by *D* (plaintiff), and *R*, the brother of *D*.

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Under that document it was arranged that *R* should be entitled to a half-share in all the properties, that the widow should enjoy the other half-share for her lifetime, and that after the death of the widow, the plaintiff was to take a four anna share of the latter and *R*, the other four anna share. The plaintiff subsequently sued for a declaration that the property was the exclusive estate of her father *D*, and that she was entitled to the same on the death of her mother and for possession; and she impeached the ekrarnama as not binding on her on the ground that she was no party to any dispute, and that she had at the time only a *spes successionis*.

Held, (1) that the arrangement, which was a family arrangement, and into which the plaintiff deliberately entered as a major with full understanding of its contents was binding on the plaintiff who was the next reversioner and who received immediate benefit from it, and the plaintiff could not be allowed to go back upon that arrangement; (2) that even [illegible] regarded not as a family arra[illegible] regarded as an alienation by the [illegible] who, as next reversioner, had [illegible] was bound by that transaction. [illegible] *Lall, JJ.*) RAMPEYARI KUER *v.* RAMDHANI SINGH. 1938 P.W.N. 125.

——*Inheritance—Step-sister's son—Position of.*

The position of a step sister's (that is, half-sister's) son is the same as that of a sister's son in the line of heirs. When the half-sister's son is regarded in the [illegible] there can be [illegible] relationship [illegible] and that the [illegible] qually. The succession to the uncle has to be traced eventually through the grandfather, that is, the father of the propositus—and though the sons of a full sister may exclude those of a half-sister as between themselves, there seems to be no reason in principle why such sons should be excluded from the list of heirs altogether. 14 N.L.R. 82, Foll. (*Stone, C.J. and Bose, J.*) SHANKAR *v.* RAGHOBA. 172 I.C. 858= A.I.R. 1938 Nag. 97.

——*Joint family—Alienation—Setting aside—Long lapse of time—Value of recitals in conveyance—F[illegible] sumption to fill in details—Permissibility.*

Where an alienation made by a step-mother over [illegible] years ago is questioned on the ground of want of ne[illegible]sity and where there is no evidence at all except the recital in the conveyance,

Held, that in such a case, recitals could be taken into consideration and further it was open to the Court to make presumptions to fill in details which have been obliterated by time. (*Leach, C.J. and Venkataramana Rao, J.*) VENKAYAMMA *v.* SITARAMARAJU. [illegible]

——*Joint family property—Coparcen[illegible] by excluding other[illegible] that coparcener—So[illegible] by birth.*

[illegible]

sons at birth therefore obtain right of coparceners in it

with him. (*Barlee and Macklin, JJ.*) SURESHCHANDRA *v.* BAI ISHWARI. 40 Bom L.R. 127.

——*Joint family—Business—Trade — Agricultural operations—If trade.*

Mere agricultural operations cannot be regarded as a trade. They may become so, if run on modern commercial lines in connexion with a properly established business, but, to term the ordinary agricultural operations of a village in the Central Provinces a trade is to stretch the normal meaning of that word beyond permissible limits. (*Vivian Bose, J.*) SADASHEO BALAJI *v.* HIRALAL RAMGOPAL. A.I.R. 1938 Nag. 65.

——*Joint family—Father—Decree against—Execution against sons as legal representatives.*

A coparcener leaves no estate in the coparcenary property on his death, and under the Hindu Law, a surviving coparcener, even though a son, does not get his property by succession as his heir. A coparcener does [illegible] another coparcener [illegible] t debtor does [illegible] But if the [illegible] amily during [illegible] son, though joint with him, cannot represent the estate of the joint family which was represented by his deceased father and is not a person who in law represents the estate of the deceased person. (*Ganga Nath, J.*) GYAN DATT *v.* SADA NAND LALL. 1938 A.L.J. 56= 1938 A.W.R. 58 (H.C.).

——*Joint family—Father's alienation—Immorality of father—When can absolve family from liability—Advances to head of family business—Duty of lender.*

Mere proof of immorality of the father of a joint Hindu family will not absolve the family from liability. It must be further shown that there is some connection between the debt and immorality. The duty of a lender to enquire is the same in all cases and applies also to cases of loans to head of a family having trade as its business. While a lender has not got to see to the application of the money, he is put on enquiry and he must satisfy himself that the loan is necessary. The fact that the lender is dead and, therefore, cannot state what enquiries he made does not relieve his heirs from [illegible]

——*Joint family—Joint property—Grant of sheri lands to member of family—Patta mentioning grantee individually—If joint property or separate property of grantee—Absence of allegation of payment of consideration from family or of throwing into common stock—Subsequent enlargement of interest by grant of full occupancy rights to heirs of grantee—Right of family* [illegible]

the joint family must depend upon the terms of the [illegible] t initially [illegible] perty, and [illegible] embers of [illegible] n paid to [illegible] from the [illegible] property, [illegible] operty of [illegible] int family [illegible] other co- [illegible] when it is not suggested that the consideration for the grant has

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proceeded from the common chest or that the lands granted were thrown into hotchpot or treated as part of the joint family property, and then the patta granted to the grantee clearly shows on the face of it that it is granted to the member for himself and not as representing the family or for the benefit of the family, the family cannot claim the property as belonging to it. If the heirs of the grantee subsequently enlarge the nature of the tenure by reason of a resolution of the Government transferring the lands on full occupancy tenure, the heirs so getting full occupancy tenure cannot be treated as holding the property in a fiduciary capacity and for the benefit of the family, within the meaning of S. 90 of the Trusts Act, read with Ill. (*b*) to that section (*Rangnekar, J.*) DATTATRAYA SITARAM *v.* SHANKAR.

40 Bom.L.R. 118.

——*Joint family—Presumption of jointness—Presumption as to.*

In the case of Hindus, there is a presumption of jointness but there is no presumption that the resulting joint family has any joint property. Once however it is established that such a family has property, the presumption is that all property held by any member is held as a member of the family and not as an individual. (*Stone, C.J.*) SHER MOHAMAD KHAN *v.* RAMRATAN GANESHIRAM TELI. **A.I.R. 1938 Nag. 87.**

——*Joint family—Self-acquisition—Onus of proof—Existence of joint property and proof of substantial ancestral nucleus—Effect of.*

Where the existence of joint property and a substantial ancestral nucleus is proved, the burden shifts on to the person claiming self acquisitions to show how he acquired self-acquisitions or moneys of his own out of which he acquired the property. If that nucleus has been proved to be so small that it cannot have been the means leading to the acquisition in question, or where such income is shown to have been employed in other ways, then the fair inference will be that the acquisition is acquired apart from it, *i.e.*, as self-acquired. This does not mean that the nucleus must be of such a kind or amount to so much property or money that it can directly be turned into the property in question. If the acquirer is shown to be a businessman deriving his money from business and he is shown to have succeeded to and carried on the family business, that alone will fix his subsequent acquisition with the character of joint family property unless he proves the converse or at least the family business is trivial and can be fairly ignored. (*Stone, C.J.*) SHER MOHAMAD KHAN *v.* RAMRATAN GANESHIRAM TELI. **A.I.R. 1938 Nag. 87.**

——*Joint family—Self-acquisition—Throwing into the common stock—Burden of proof — Existence of small nucleus—Effect—Presumption, if any.*

A Government servant on a pay of about Rs. 60 a month, got at a partition with his brother a sum of about Rs. 2,630. He thereafter acquired considerable properties. He did not keep separate accounts of his income and of that from the ancestral property. There was nothing to show that any portion of the income from the ancestral funds went towards the purchase of those properties. On a contention by the son that the properties so acquired were joint family properties inasmuch as they were acquired with the nucleus of the ancestral funds.

Held, that the mere proof by the son that his father had a nucleus of ancestral property would not by itself shift the burden on to the other side of proving that the subsequently acquired properties were acquired with his private earnings. To shift the burden it would have to be further proved that the ancestral property was such, that by its means, the subsequently acquired properties might have been purchased.

Held, further, that the presumption was against blending. (*Madhavan Nair and King, JJ.*) VYTHIANATHA IYER *v.* VARADARAJA IYER.

1938 M.W.N. 138=(1938) 1 M.L.J. 216.

——*Maintenance—Right to—Nature—Alteration in rate on ground of changed circumstances—Right to—Procedure—Suit—Necessity—Plea in defence to suit for maintenance—If open—Change of rate as regards arrears—Power of Court to grant.*

The right to maintenance under the Hindu Law does not depend on contract, but is a peculiar right, and the rate of maintenance though fixed by agreement of parties or by a decree of Court, may be varied or altered by Courts whenever a change in the circumstances would justify an alteration in the rate. It is of course possible for any party to contract himself or herself out of the right to claim an alteration in the rate, but for that purpose there must be an express agreement to be bound by the agreement and not to claim variation of its terms under any change of circumstances. A clause in a deed of maintenance that "maintenance is to be paid for life" at a particular rate cannot be held to be a release of the right of any party to claim an alteration of the rate on the ground of a change in circumstances. Where the rate has been fixed by an agreement and not by a decree of Court, it is not necessary that there should be a suit by the party claiming an alteration for the purpose; the party bound to pay maintenance can get the rate altered in suit by the other party for maintenance. When the rate has been fixed by a decree, the proper procedure to get the rate altered is by way of a suit, unless the decree itself provides for a modification of its terms, in which case an application will lie for that purpose in execution. Further an alteration in the rate can be granted not merely from the date on which the plea is raised, but in respect of arrears of maintenance as well. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) NANJAMMA *v.* VISWANATHIAH.

16 Mys.L.J. 63=42 Mys.H.C.R. 699.

——*Marriage—Forms of—Presumption as to—*Asura *form—Essentials.*

So far as Madras Presidency is concerned, all marriages among Hindus are presumed to be in the *Brahma* form unless it is proved that they were in the *Asura* form. In other words it is the party who alleges that a marriage was in the *Asura* form to prove that the bride price was in fact paid in respect of such a marriage by the bridegroom or his people, to the bride's father. Customary presents made to a bride's parents would not necessarily amount to payment of a bride price. The expenditure by the bridegroom and his people of considerable sums in respect a marriage, cannot obviously convert the marriage which is otherwise in *Brahma* form into one which is in the *Asura* form. (*Pandrang Rao and Abdur Rahman, JJ.*) SIVANAGALINGAM PILLAI *v.* AMBALAVANA PILLAI.

1938 M.W.N. 161.

——*Partition— Evidence of—Factors to be taken into consideration—Question of fact.*

The conduct of the parties concerned must be looked at, in order to arrive at what constituted the true test of separation of property,—the intention of the different members of the family to become separate owners. The question is one of pure fact. (*Guha and Bartley, JJ.*) PRATUL CHANDRA BHADURI *v.* PURNA CHANDRA BHADURI. **66 C.L.J. 324.**

——*Partition—Presumption of completeness—Partial partition—Onus.*

HINDU LAW.

Once a partition is admitted or proved, the presumption of law is that it is a complete partition, and the burden is on the party who says that the partition was partial to prove it. (*Rangnekar, J.*) DATTATRAYA SITARAM *v.* SHANKAR. 40 Bom.L.R. 118.

———*Partition — Proof of — Entry in record-of-rights.*

Under the Mitakshara School of Hindu Law, the partition of the joint estate consists in defining the shares of the coparceners in the joint property, and it is not necessary that there should be an actual division of the property by metes and bounds. The definition of shares may be proved *inter alia* by an entry in the record-of-rights showing the share of each member of the family. Such an entry will be evidence of the severance of the joint status. (*Sir Shadi Lal.*) (ANURAGO KUER *v.* DARSHAN RAUT. 172 I C. 977 = 1938 O.L.R. 87 = 47 L.W 225 = 1938 O.W.N. 201 = A.I.R. 1938 P.C. 65 (P.C).

———*Partition—Separation of one member—Effect the status of other members—Circumstances to be ta into consideration.*

After the separation of some of the members joint Hindu family, the remaining coparceners may continue to be coparceners and to enjoy as member a joint family, what remained after the separatio partition of the family property. Whether they done so, is a question of intention and one of fact; the conduct of the parties was to be looked at, and inference has to be drawn from the way in which the income out of the family properties was enjoyed after one or more of the co-owners had separated from others. (*Guha and Bartley, JJ.*) PRATUL CHANDRA BHADURI *v.* PURNA CHANDRA BHADURI. 66 C.L.J. 324.

———*Religious endowment—Devolution of office—Trust—Creation by will—Appointment of trustee—No provision for succession—If confers heritable trusteeship.*

Where a testator by his will founded a religious trust and appointed one of his sons to carry out its objects and provided that in case he did not properly perform the charities, leading citizens should intervene and manage it properly and further declared that none of his three sons shall have any right to the property dedicated to the said charities, it was

Held, that in appointing one of the sons to the office of trustee, though no provision was made for the succession after that son's death, the testator must be held to have prescribed a line of succession in that son and his heirs. The appointment amounted to a grant of a heritable trusteeship. (*Madhavan Nair and Stodart, JJ.*) RAMACHAR *v.* VENKATA ROW.

———*Religious*
Validity—Possessi

A mahant has
necessity) to create an interest in property appertaining to the math which will continue during his own life, or to put it perhaps more accurately, which will continue

versioner.

Where the nearest reversioners have precluded themselves in some way by their own act or conduct from challenging the alienation made by the widow, persons who are the next in the line of reversion after them can

HINDU LAW OF INH. (AMEND.) ACT (1929), S. 2.

prosecute a declaratory suit. Of course, if the nearest reversioners or any of them happen to outline the remote reversioners when the reversion opens out the declaration will not affect their rights. (*Stone, C. J. and Bose, J.*) SHANKAR *v.* RAGHOBA. 172 I.C. 858 = A.I.R. 1938 Nag. 97.

———*Succession—Bandhu—Son's son's daughter's son of great grandfather of propositus.*

Under Hindu Law a son's son's daughter's son of the great grandfather of the propositus is a bandhu. (*Addison and Abdul Rashid, JJ.*) NARANJAN SINGH *v.* BAKHTAWAR SINGH. 40 P.L.R. 37.

———*Succession—Mitakshara Law—Atma bandhus—Precedence amongst—Test to be applied—Religious efficacy—When to be resorted to—Maternal uncle and father's sister's son—Preference.*

According to Mitakshara Law, atma bandhus have precedence in question of succession over pitri bandhus

172 I C. 724 = 47 L W. 110 = 1938 O W.N. 117 = 1938 O L R 61 = 1938 O.A. 54 = 1938 A.L R 77 = A.I.R. 1938 P.C. 34 (P.C.)

———*Widow—Alienation—Consent of presumptive reversioners—Actual reversioners, if bound.*

On a consideration of the relevant decisions it was held to be quite clear that the actual reversioners are not bound absolutely by the action of the presumptive reversioners and that the consent of the presumptive reversioners to an alienation merely gave rise to a presumption that the transaction was one which was occasioned by necessity; and that it was open to the actual reversioners to rebut the presumption if they could.

Held, further, that a conveyance of a portion of the estate by a Hindu widow jointly with the nearest reversioner did not in itself create an indefeasible title. (*Leach, C. J. and Pandrang Row, J.*) RAMAMURTHY *v.* BHIMASANKARARAO. 1938 M.W.N. 166 = (1938) 1 M L.J. 296.

HINDU LAW OF INHERITANCE (AMENDMENT) ACT (II OF 1929)—*Scope and effect.*

The Act merely alters the order of succession but does not alter the date on which the succession opens out. It is clear the question about the order of succession is ... opens out, and so if ... come into force, the ...ly. (*Stone, C. J. and* ...A.
172 I.C. 858 = A.I.R. 1938 Nag. 97.

———S. 2—*Sister—If includes half-sister.*

The word 'sister' in S. 2 of the Act includes half sister. ...alf blood and the son of ... the class referred to as ...es not, however, follow ...n of a sister of the full- ... the half-blood the two ...'one, C. J. and Bose, J.) 172 I.C. 858 = A.I.R. 1938 Nag. 97.

———S. 2—"*Sister*"—*If includes half-sister.*

The term "sister" in S. 2 of the Hindu Law of Inheritance Amendment Act (II of 1929) includes a half sister (that is to say, a sister by the same father).

LIMITATION ACT (1908), S. 14.

Lal and Dalip Singh, JJ.) RISALDAR ALI SHAN KHAN *v.* AHMAD NAWAZ KHAN. **40 P.L.R. 92.**

——**S. 14**—*Applicability — Party not described as plaintiff or applicant in previous proceedings—Right to exclusion of time.*

The mere fact that an award was presented in Court by the arbitrator on the request of the party is not sufficient to warrant the holding that the person who seeks to enforce the award by process of the Court is not the claimant but the arbitrator. Nor can the rules framed by the Court under the Arbitration Act requiring parties to arbitration proceedings being styled as respondent 1 and respondent 2 have the effect of changing their relative position of claimant or creditor or debtor respectively into any other position. S. 14, nowhere lays down that before a plaintiff or applicant may claim exemption under this section he should have been described as plaintiff or applicant in the previous proceedings. All that is required of him to prove is that he prosecuted the previous civil proceedings in good faith, and if he proves that he may avail himself of S. 14, even though he was not described as a plaintiff or as an applicant in the previous proceedings. Where an award was made under the Arbitrarion Act in favour of the plaintiff, and the arbitrator on being requested by the plaintiff filed the award in the Court and upon that Court holding that it had no jurisdiction to entertain the award the plaintiff presented the award in another Court.

Held, that the time taken in the former Court for ascertaining whether it had jurisdiction to entertain the award or not, should be excluded, as so long as that Court was determining upon the question whether the award should be taken off the file on the plea of jurisdiction or not, the award was enforceable as a decree. No proceedings could be taken in any other Court for the purpose of enforcing the award. That being so, limitation remained "in suspense" so long as the award was capable of being enforced by execution proceedings and the plaintiff was *bona fide* litigating for his rights in a Court of justice. (*Rupchand Bilaram, Ag. J.C. and Dadiba C. Mehta, A.J.C.*) AILDAS MADHOWDAS *v.* SOBHOMAL PURSOOMAL. **A.I.R. 1938 Sind 50.**

——**S. 19**—*Acknowledgment — Essentials—Endorsement by debtor acknowledging correctness of account—Sufficiency.*

An acknowledgment for the purposes of S. 19, Limitation Act, need not necessarily contain a promise to pay, or amount to a promise to pay. The endorsement made by the debtor acknowledging the correctness of an account which showed him a debtor to the extent stated is a clear acknowledgment of the debt, with the ordinary implication of a promise to pay, and this is sufficient for the purposes of S. 19. (*Dhavle, J.*) RAMPRABHA OJHA *v.* BISHUNATH OJHA. **A.I.R. 1938 Pat. 139.**

——**S. 19**—*Recital in sale deed as to liability under a mortgage—Admission of execution before Registrar—Effect—If an acknowledgment saving limitation.*

Where in a sale deed it was recited that the property was conveyed as part payment towards the principal amount due to the vendee on an earlier mortgage and it was so endorsed, and where further the executant appeared before the Registrar and admitted execution of the same, on a question whether there was thereby an acknowledgment of the mortgage debt.

Held, that the appearance before the Registrar and acknowledgment of the execution of the sale deed amounted to an admission not only of execution of the deed in question but also of all matters set out in the deed itself. The acknowledgment in writing before the Registrar is an acknowledgment which could be availed of to save limitation. (*Gentle, J.*) BALASUBRAMANIA CHETTY *v.* MANICKA CHETTIAR. **1938 M.W.N. 113.**

LIMITATION ACT (1908), Art. 58.

——**S. 20**—*Payment under—If to be actual payment.*

It is unnecessary under S. 20 that money should actually pass as a settlement of account may be as effectual as a real payment. A transaction whereby the parties agree that an amount previously due by the creditor to the debtor shall be treated as amount paid by the latter to the former, is in substance identical with a transaction where the debtor receives actual payment and pays the amount back to the creditor and gives a fresh period of limitation from such date. (*Dhavle, J.*) RAMPRABHA OJHA *v.* BISHUNATH OJHA. **A.I.R. 1938 Pat. 139.**

——**S. 20 (2)**—*Applicability—Mortgagor in possession as tenant of mortgagee—Receipt of rent by mortgagee—If amounts to payment of interest as such under Sub-S. (1), to S. 20.*

Where a mortgagor is left in possession of part of the mortgaged property as tenant of the mortgagee, the receipt of rent and profit by the mortgagee should be considered as payments of interest as such within the meaning of Sub-S. (1) to S. 20 of the Limitation Act. (*Niamatullah, Ag. C.J. and Verma, J.*) RAM KUMAR *v.* MAHPAL SINGH. **1938 A.W.R. 27 (H.C.) = 1938 R.D. 230 = 1938 A.L.J. 18.**

——**Art. 36**—*Applicability—Person making false statement as to habitability of certain house and dissuading people from taking it on rent—Liability to owner—Suit for damages—Limitation.*

Where a person dissuades other persons from taking a certain building on rent by making false statements as to habitability and safety of the building, the person so representing is liable in tort, the tort being analogous to slander of title and falling within the broader description of injurious falsehood. The action is one for misfeasance independent of contract and Art. 36 applies to such action. (*Stone, C.J. and Vivian Bose, J.*) HARGOVIND DULLABH JIWAN *v.* KIKABHAI RAHIMTULLAH. **A.I.R. 1938 Nag. 84.**

——**Arts. 57 and 58**—*Applicability—Lender transferring to borrower cheque drawn by another person and endorsed in his favour.*

Art. 58 applies to a case in which the lender draws his own cheque and gives it to the borrower. It does not govern a suit in which he transfers to the borrower a cheque which had been drawn by another person and endorsed in his favour by the payee. Such a suit comes within the ambit of Art. 57 only. (*Sir Shadi Lal.*) MANMOHAN DAS *v.* BALDEO NARAIN TANDON. **172 I.C. 978 = 1938 A.W.R. 30 (P.C.) = 1938 O.L.R. 90 = 1938 A.L.J. 148 = 47 L.W. 234 = 1938 O.W.N. 203 = A.I.R. 1938 P.C. 66 (P.C.).**

——**Art. 58**—*Payment of cheque—What amounts to.*

A cheque is paid under Art. 58 when it is cashed by the lender's bankers, for it is only then that the lender's money passes into the hands of the borrower and the loan is made by the former to the latter. The mere handing over of a cheque by the lender to the borrower does not amount to a payment of the cheque. Nor does the period prescribed by Art. 58 begin to run against the lender when the cheque received by the borrower is given by him to his own bank and the amount is credited to him by the bank. (*Sir Shadi Lal.*) MANMOHAN DAS *v.* BALDEO NARAIN TANDON. **172 I.C. 978 = 1938 A.W.R. 30 (P.C.) = 1938 O.L.R. 90 = 1938 A.L.J. 148 = 47 L.W. 234 = 1938 O.W.N. 203 = A.I.R. 1938 P.C. 66 (P.C.).**

LIMITATION ACT (1908), Art. 62.

——Art. 62—*Applicability.*

Art. 62 governs cases where a definite sum of money has been received by the defendant and which the law says he must hold for the use of the plaintiff, and is not applicable to cases where the defendant is asked to account for properties a managing or collecting tl ance. (*Coldstream and* KAUR *v.* SHAHDEV SINGH.

A.I.R. 1938 Lah. 139.

——Art. 91—*Applicability—Deed requiring to be set aside before relief could be given—Name of deed if material.*

A widow had an eight annas share in the property of her deceased husband, the other eight annas belonging to the brother of her husband. She executed a deed described as a deed of relinquishment whereby she conveyed her eight annas interest to her husband's brother. The husband's brother executed a mortgage of the 16 annas interest thus obtained by the deed. The property was sold in execution of the mortgage decree. The widow brought a suit for declaration that her title to hold her share in the properties be found and she be restored to possession.

Held, that it was necessary for her to have the deed set aside before she was entitled to the relief asked for. Whether deed was called a deed of relinquishment or

——Art. 109—*Starting point—Date of receipt of profits or date of accrual of cause of action to recover profits.*

The terms of Art. 109 of the Limitation Act are per-

Sen, J.) DULLABHBHAI *v.* GULABBHAI.

40 Bom.L.R. 100.

——Art. 115—Applicability—Suit for terminal tax. *See* LIMITATION ACT, ARTS. 120 AND 115.

A.I.R. 1938 Sind 48.

——Art. 120—*Starting point—Repudiation of title—Suit for declaration—Cause of action—When arises—Overt act of defendant—If necessary.*

There is nothing in law wh a person's right is denied, he bring a suit for declaration. able to hold that a bare repud without even an overt act, wo him to bring a declaratory s right to elect as to when be m cating his right, when there denials. True, a mere contir action does not give rise to

a "continuing oint during the

on which act he chooses to found his cause of action, and when he does so, it is with reference to the parti-

LIMITATION ACT (1908), Art. 135.

cular infringement he alleges that the limitation should be reckoned. (*Venkatasubba Rao and Abdur Rahman, JJ.*) APPA RAO *v.* SECRETARY OF STATE.

A.I.R. 1938 Mad. 193.

——Art. 120—*Suit by co-tenant for accounts—* mita-

that where a defendant is a co-tenant of property with the plaintiff, he can bar the latter's subsisting right to ask him for accounts by merely denying that the plaintiff is a co-tenant. So long as the defendant is a co-tenant with the plaintiff, the latter has a right to ask for accounts. His right accrues continually as income comes into the co-tenant's hands. But this right is continually barred by Art. 120 when the account sought is more tha VIDYA

——Arts 120 and 115—*Suit for terminal tax—Article applicable.*

A suit for recovery of terminal tax is governed by Art 120 and not by Art. 115 (*Rupchand Bilaram, Ag.J.C. and Lobo, A J.C.*) LARKANA MUNICIPALITY *v.* KALOOMAL PAMOOMAL.

A.I.R. 1938 Sind 48.

——Arts. 120, 48, 49 and 62—*Widows of deceased* *filing suit for rendition of accounts against*

specific sum, as the amount recoverable could not be exactly known, for the person in possession was entitled to deduct his expenses of management even if the widows were in a position to state the exact amount of the surviving co-

48, 49 and 62, ap-) VIDYA WANTI

A.I.R. 1938 Lah. 139.

——Art. 134—*Nature and scope of—Onus of proving facts relevant to applicability of article—Usufructuary mortgage—Subsequent sale by mortgagor—Mortgagee's representative, mortgaging same property along with that of his own—Suit by vendee from mortgagor—Art. 134, if applies.*

A close perusal of Art. 134 of the Limitation Act ith the sion of tran- Since e onus ions of t. 144, im the person er and gagee's g with person altogether, but actual possession was in the hands of a receiver appointed in another proceeding. In a suit by

——Art 135—*Mortgage deed—Default* *Starting point.*

LIMITATION ACT (1908), Art. 138.

Where according to the terms of a mortgage deed the mortgagee is entitled to obtain possession of the mortgaged property in default of payment of interest, and the mortgagor fails to pay interest in the very first year after the mortgage, the cause of action for a suit for possession accrues in that year. The fact that interest was paid and accepted by the mortgagee in certain subsequent years cannot by itself be held to be sufficient to show that the default was condoned and the parties were restored to their original position. (*Bhide, J.*) GAJJAN *v.* KISHORI LAL. **40 P.L.R. 48.**

——**Art. 138**—*Cause of action—Mortgage—Decree for sale—Purchase by mortgagee in execution—Absence of delivery of possession—Mortgagor and lessee under him continuing in possession—Mortgagee-purchaser selling rights to another—Suit by latter for possession—Limitation—Starting point—Proof of subsisting title and possession within* 12 *years—Necessity.*

On 22-9-1890, the ancestors of the defendants-first-party executed a mortgage bond in favour of *G* for Rs. 4,350. It was a simple mortgage and the security given was certain shares in two villages. On 23-6-1903, the mortgagors who were in possession executed a lease in favour of *A*, the defendant-second-party, of certain shares in the villages, excluding the area in dispute, which area was stated in the lease as having been already in possession of *A* in *kasht* right at a rental of Rs. 175-5-0 per year. On 15-9-1903, the mortgagee brought a suit for his mortgage debt, got a decree for Rs. 17,000 in June, 1904, and after several attempts at execution ultimately brought the property to sale on 30—5—1914. The sons of the mortgagee purchased the property at the sale for a sum of Rs. 40,966, which was the total amount due under the mortgage decree. The sons of *G* however, did not get delivery of possession, and the mortgagors-judgment-debtors continued in possession. On 22—5—1926, the heirs of the execution purchasers sold their rights to the plaintiff by means of three *kebalas*. Plaintiff having failed to obtain peaceful possession of the property sued for possession, but he did not implead the lessee. *A*, as a party to that suit. A decree for possession was made in favour of the plaintiff as against the defendants-first-party and symbolical possession was delivered in execution on 8—10—1927. Plaintiff again failed to get possession of the lands in suit as well as the other lands, and on 12—11—1929, he commenced the present action for a partition of the lands.

Held, (1) that the suit was really a suit for possession in the guise of a suit for a partition, and the plaintiff must therefore prove his subsisting title and possession within 12 years; (2) that the cause of action accrued to the plaintiff or his predecessors-in-title on 30—5—1914, and that cause of action could never be enlarged by anything which happened subsequently; and (3) that the plaintiff having failed to institute a suit for ejectment of the trespasser or the lessee (even if the lease be regarded as unauthorised) within 12 years of the date of the cause of action, the suit was hopelessly barred by limitation. (*Manohar Lall and Chatterji, JJ.*) RAMASRAY PRASAD CHOUDHARY *v.* C. G. ATKINS. **19 Pat.L.T. 95.**

——**Art. 139**—Applicability—Suit in ejectment of tenant, in Malabar, continuing in possession after determination of tenancy. *See* MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT, S. 5 (2). **47 L.W. 236.**

——**Art. 142**—*Applicability—Burden of proof.*

Where the plaintiff's case was that he was in possession till a particular date and that he was driven out of possession on that date, there can be no doubt that Art. 142 applies to the case. In such a case although the title of the plaintiff's title is proved, the onus is on the plaintiff to show that he was in possession within 12 years of the suit. The onus is not on the defendant to show that the plaintiff lost his title by adverse possession on the part of the defendant. (*M. C. Ghose and R. C. Mitter, JJ.*) RAMENDRA PROSAD BASU *v.* BARADA PROSAD BASU. **66 C.L.J. 359= A.I.R. 1938 Cal. 206.**

LIMITATION ACT (1908), Art. 144.

——**Arts, 142 and 144**—*Applicability—Suit based on possession and dispossession—Article applicable—Onus of proof—Defendant—When to prove adverse possession.*

Arts. 142 and 144 apply to two different sets of circumstsnces. Art. 142 is restricted to a suit based on the plaintiff's prior possession lost by dispossession, and in order to bring the suit under the article, the plaintiff must allege prior possession and dispossession by the defendant within 12 years. The burden of proof is on him, and if he fails to discharge the onus, the defendant is not called upon to set up his adverse possession. The article makes no reference to the defendant or his possession. That is done under Art. 144, which is a residuary article and which applies only if no other article applies. Art. 144 applies only when there is no allegation in the plaint that the plaintiff had been in possession and has been dispossessed. It applies when the suit is based on the ground that the plaintiff is the owner of the property and the defendant is a trespasser having no right to remain in possession.

Quaere.—Whether the last of several but independent trespassers can defeat the owner's title although he himself has been in possession for only a few days before the date? (*Rangnekar, J.*) NARU SHIDU *v.* KRISHNA. **40 Bom.L.R. 166.**

——**Art. 142**—Burden of proof. *See* LIMITATION ACT, ART. 142—APPLICABILITY. **66 C.L.J. 359=A.I.R. 1938 Cal. 206.**

——**Arts. 142 and 144**—*Property belonging to wakf—Alienation by trustee—Suit for recovery of possession—Defendants found not to be tenants—Limitation applicable—Adverse possession, when commences.*

Where a trustee or manager of a religious endowment grants a tenancy of property belonging to the trust in excess of his powers, the alienation is good for the alienor's tenure of office, and the alienee's adverse possession commences under Art. 144 of the Limitation Act only from the cessation of office of the alienating trustee. But where the trustee in effecting the alienation by way of sale purports to deal with the trust property as his own, his act amounts to a repudiation of the trust and the possession of the vendee will be adverse from the date of the alienation. Where in a suit for recovery of possession of property belonging to a Mahomedan *Thaikkal* the case set up by the plaintiff Mutawalli was that the defendants were his tenants, but the Court held that the tenancy was not proved, and though at the trial the defendants did not appear and adduce evidence, the plaintiff's witnesses themselves deposed that the properties were never to their knowledge in possession of the plaintiff.

Held, that the suit was governed by Art. 142 and not by Art. 144 and that it should be dismissed as plaintiff had not proved his possession within the statutory period. (*Venkatasubba Rao and Abdur Rahman, JJ.*) ALAM KHAN SAHIB *v.* KARUPPANNASWAMI NADAN. **47 L.W. 165=1938 M.W.N. 105= (1938) 1 M.L.J. 113.**

——**Art. 144**—Applicability—Suit alleging possession and dispossession—Onus of proof—Adverse possession of defendant—When to be set up and proved. *See*

LIMITATION ACT (1908), Art. 182.

LIMITATION ACT, ARTS. 142 AND 144.
40 Bom.L R. 166.

——Art. 182—*Construction—Rule as to.*

The provisions of Art. 182 should receive a fair and not too technical a construction. Its language ought not to be strained in favour of the judgment debtor who has not paid his debt and the words should be liberally interpreted in favour of the decree-holder. (*Venkata subba Rao and Abdur Rahman, JJ*) ANNAPURNAMMA *v.* VENKAMMA. 1938 M.W.N. 191=(1938) 1 M.L.J. 135.

——Art. 182—*Scope of—Difference between para. (5) and the rest of the paragraphs.*

While all the paragraphs in Art. 182 excepting para. (5) deal with the question of what is the time from which limitation begins to run in the case of a first application for execution, para. (5) alone deals with the case of subsequent applications. The wording of para. [illegible]

[illegible]

1938 A.W.R. 115 (H.C.)=1938 A.L.J. 117.

——Art. 182 (1)—*Date of the decree—Copy of decree through Court's mistake bearing date on which it was drawn up instead of date of judgment—Application for execution made within limitation from former date—If barred.*

A decree-holder was supplied with a copy of a decree which through the mistake of the Court bore the date on which it was drawn up instead of the date on which the judgment was pronounced. He made an application for execution which was within limitation from the date of the decree as stated in the copy of the decree but was beyond limitation from the date which the decree ought to bear, *i.e.*, the date of judgment.

Held, that the decree holder was misled by the copy of the decree and should not be prejudiced by the Court's mistake. The [illegible] time-barred. (*Agarwala* [illegible] AZIZ FATMA. [illegible]

——Art. 182 (2)—[illegible] *ciently stamped—Dismis*[illegible]

Where an appeal is pre[illegible] and is duly registered as an appeal and numbered as such but subsequently rejected after notice to the parties and after hearing them, the time for execution begins to run from the date of the order of the appellate Court. (*Fazl Ali and Rowland, JJ.*) KRISHNA KANT PRASAD *v.* RADHEY SINGH. A.I R. 1938 Pat. 79.

——Art. 182 (5)—*Application in accordance with law—Death of decree-holder—Execution application preferred by third party—Joint right of applicant and widow of decree-holder alleged—Widow asserting her sole right—If can operate as step in-aid of execution.*

On the death of a decree-holder a nephew of his alleging that the decree amount belonged jointly to his uncle and himself, filed an execution petition praying that both he and the widow of the decree-holder should be brought on record as the legal representatives and [illegible]

[illegible] in-aid of further execution (*Venkatasubba Rao and Abdur Rahman, JJ.*) ANNAPURNAMMA *v.* VENKAMMA. 1938 M.W.N. 191=(1938) 1 M.L.J. 135.

MAD. ESTATES LAND ACT (1908). S. 3.

——Art. 182 (5)—"In accordance with law"—Certificate of non-satisfaction under O. 21, R. 6 (*b*), C. P. Code—Mistake in as to number of suit and names of judgment-debtors—Omission of decree-holder to correct—Application for execution in transferee Court—If not in accordance with law. *See* C. P. CODE, O. 21, R. 6 (*b*). 1938 P W N. 73.

——Art. 182 (5)—*Step-in-aid—Application for payment of money deposited.*

Where one of the instalments due has been deposited in Court an application by the decree-holder to withdraw the money is a step in aid of execution. (*Bennet, A. C. J. and Ganga Nath J.*) LATAFAT ALI KHAN *v.* KALYAN MAL. 1938 A.W.R 115 (H.C)=1938 A.L.J. 117.

MADRAS COURT OF WARDS ACT (I OF 1902), S. 34—*Confirmation—When can be given.*

The Proviso to S. 34 fixes no time within which confir[illegible] Hence the confirmation given to [illegible]roperty after the death of the [illegible] Wards had given up possession [illegible]ent. (*Sir George Lowndes.*) [illegible]NDYA THALAIVAR *v* SUBBIA TEVAR 172 I C 724=47 L W. 110=1938 O.W.N. 117=1938 O L.R 61=1938 O.A. 54=1938 A.L R. 77=A I R. 1938 P.C. 34 (P.C.).

MADRAS DISTRICT MUNICIPALITIES ACT (V OF 1920), Sch. IV, R. 13—*Revision of tax—Compliance of requirement of rule as to communication of order and direction to pay—If condition precedent to taking distress proceedings for non payment of tax.*

When a revision is preferred against an assessment to house-tax, R. 13 of Sch. IV of the District Municipalities Act requires that the chairman should communicate the orders passed thereon to the assessee and also direct him to pay the amount fixed in revision. The obligation of fixing the tax on revision was on the Municipality and no duty was cast on he assessee to fix for himself, the amount he had to pay. It is also a condition pre- [illegible]

MADRAS ESTATES LAND ACT (I of 1908, as amended by Act XVIII of 1936), S. 3 (2) (d)—*Lands in a shrotriem—Suit for rent for period before the coming into force of the Amending Act—Stay under S. 127 of Act VIII of 1934—Effect of the coming into force of the Amending Act of 1936—Act XVIII of 1936 S. 13.*

A suit for rent for the years 1920-1922 in respect of land in a shrotriem was decreed and Letters Patent appeals preferred against the decree was stayed under S 127 of Act VIII of 1934. On a question as to the effect of the coming into force of the Amending Act XVIII of 1936 on such an appeal,

Held, that to the categories that under the 1908 Act were estates, was added, as it were, another category by the amendment of the S. 3 (2) (*d*), and the words should [illegible]

[illegible] triem in question must be deemed to have always and throughout been an estate and as such the plaints should be returned for presentation to the proper Court *i.e.*, the

MAD. ESTATES LAND ACT (1908), S. 3.

revenue Court. (*Venkatasubba Rao and Abdur Rahman, JJ.*) KONDAPPA NAIDU *v.* MAHALAKSHMAMMA.
1938 M.W.N. 102=(1938) 1 M.L.J. 206.

——Ss. 3 (11), 24 and 30—*Charges for water taken without permission of landlord—If rent—Suit to recover—Nature of—Proper forum—If an enhancement of rent.*

A claim by a landlord against a tenant for charges for water taken by him without permission for the purpose of raising wet crops on dry lands, is to be deemed to be rent within the meaning of the definition of 'rent' in S. 3 (11) of the Madras Estates Land Act as such a suit in respect of such charges must be treated as a suit for rent and not a suit in tort. The Civil Court is closed to a plaintiff in such a case and the claim could only be enforced by proceedings instituted under S. 77 of the Act. The fact that a plaintiff sought to recover something extra for water taken by his tenants does not mean that he was suing for enhanced rent within the meaning of S. 24 of the Act. (*Leach. C. J., Varadachariar and Mockett, JJ.*) VENKATARAJU GARU *v.* MAHARAJA OF PITHAPURAM. 47 L.W. 245=
1938 M.W N. 180=(1938) 1 M L.J. 256 (F.B).

——S. 30—*Scope and applicability of.*

It is only in respect of advantages which might be said to have brought about a new *state* of things that proceedings under S. 30 were contemplated and not for temporary advantages which at his option the tenant might have enjoyed by the use of the landlord's water in a manner which he had no right to do. (Varadachariar, J.) (*Leach, C. J. Varadachariar and Mockett, JJ.*) VENKATARAJU GARU *v.* MAHARAJA OF PITHAPURAM.
47 L W. 245=(1938) M W.N. 180=
(1938) 1 M.L J. 256 (F.B.).

——S. 42 (2)—*Application under — Alteration of rent retrospectively—Propriety.*

S. 42 of the Madras Estates Land Act, is a special piece of legislation involving an invasion of accrued rights. Construing the section strictly, as it ought to be, no retrospective effect could have been intended. The notion that the rent which has been acquiesced in, can be abruptly altered with retrospective effect seems repugnant to every legal conception. (*Venkatasubba Rao and Abdur Rahman JJ.*) SATYANARAYANA *v.* KRISHNAMRAJU. 47 L.W. 179=1938 M.W.N. 174=
(1938) 1 M.L.J. 204.

MADRAS HINDU RELIGIOUS ENDOWMENTS ACT (II OF 1927), S. 73—*Scope of—Suit to establish a righ to be a co-trustee and for a scheme—Recognition of a system of rotation—Proper procedure.*

On a contention that in a private suit for the office of trustee the plaintiff can obtain a decree settling a scheme, so long as the scheme involves only the method in which the plaintiff is to enjoy the office along with existing trustees.

Held, that to prescribe a scheme by which the existing trustees should be deprived of their office, if only for a time is not within the competance of a Civil Court in its ordinary Jurisdiction. A trustee could be removed only by a suit under S. 73 of the Hindu Religious Endowments Act. The court however will recoginze and enforce a system of rotation which by the consent of co trustees has been in existence for many years. But where no system of rotation exists the only course open to a co-trustee who wishes to have one established is to proceed under the provisions of the Hindu Religious Endowments Act, in the case of a religious institution and under S. 92, C P. Code, in the case of other charitable trusts. (*Madhavan Nair and Stodart JJ.*) RAMACHAR *v.* VENKATA ROW. (1938) M W N. 175.

MADRAS IRRIGATION CESS ACT (VII OF 1865), S. 1 (b)—Penal cess—Levy—Rules as to—

MAD. VILLAGE COURTS ACT (1889), S. 15.

remedy for improper levy. *See* CROWN—PREROGATIVE TO ASSIGN OR ALTER SOURCES OF IRRIGATION.
(1938) M.W.N. 194.

——S. 1 (b)—*Penal water rate, when can be levied —User of water with permission, if without due authority.*

A penal water rate can be levied under the Irrigation Cess Act only where the wet land is irrigated by using without due authority the water from any source different from or in addition to that which has been assigned by the revenue authorities as a source of irrigation of such land. Where the user of water has been with the permission of Public Works Department, and has gone on for a period over 40 years and the penal water rate has been levied in respect of such a user which merely continued in the particular fasli in question and where the permission or authority is not shown to have been withdrawn or revoked, such a user during the fasli in question must be deemed to have been with due authority and till such authority is withdrawn or revoked, the user cannot be penalised. (*Pandrang Row and Abdur Rahman, JJ.*) NARAYANASWAMI PILLAI *v.* SECRETARY OF STATE. 47 L.W. 199=
(1938) M.W.N. 97.

MADRAS LAND ENCROACHMENT ACT, S. 2—Scope of—If controls Evidence Act, S. 110. *See* EVIDENCE ACT, S. 100. A.I.R. 1938 Mad. 193.

MADRAS LOCAL BOARDS ACT (XIV of 1920), S. 88—*Ancient — Grant—Payment to zamindari of kattubadi cess—Inference that grant was by zamindar and not by ruling power—If justified.*

In the case of ancient grants which originated at a time when the proprietary rights of the ruling power and of the local chieftains were not kept separate and distinct, it should not inevitably be drawn as an inference that, where a certain village is liable to a payment to the zamindari of what is called kattubadi, the grant was made by the zamindar not by the ruling power. (*Stodart, J.*) RAJA OF VIZIANAGARAM *v.* ANNAPURNAMMA.
A.I.R. 1938 Mad. 219.

——S. 88—*Inam lands not included in assets of zamindari—Inamdar—Liability to zamindar for cess.*

The scheme of the Local Boards Act is that when the inam lands have not been included in the assets of the zamindari, the inamdar is himself a landholder holding directly under the Government. But if the assets include the inam lands as well, he has no direct relation with the Government but the Government collects the cess from the landholder and the landholder reimburses him self from the inamdar treating him as an intermediate landholder. (*Stodart, J.*) RAJA OF VIZIANAGARAM *v.* ANNAPURNAMMA. A.I.R. 1938 Mad. 219.

MADRAS VILLAGE COURTS ACT, (I of 1889), Ss. 15, 21 and 73—*Jurisdiction of Village Courts—Requisites of Civil Procedure Code cannot apply where special tribunal has been given jurisdiction.*

Under S. 15 of the Madras Village Courts Act (I of 1889) only suits which are filed against persons who either reside within the local limits of their jurisdiction at the time of the commencement of the suit or carry on business or personally work for gain within their limits can be entertained by Village Courts. Where a suit was filed in a Village Court at the village of *D* and the defendant in his written statement questioned its jurisdiction and moved by a separate application to the District Munsiff under S. 21 of the Act to withdraw the suit from the Village Court, but before the said application was heard the suit was heard *ex parte* and disposed of in favour of the plaintiff and therefore the defendant applied once again to the District Munsiff for setting aside the decree under S. 73, on the questions whether

MAHOMEDAN LAW.

the Village Court had jurisdiction and whether the dismissal of the application to set aside the decision was proper.

Held, (1) that the bare statement that the cause of

Civil Procedure applied. But where a specia
different from the ordinary Courts of the land
brought into being by an Act one should
specific grounds given in that Act which wo
jurisdiction on that tribunal. (2) That the order dismissing the application of the petitioner under S. 73 was improper and therefore should be set aside. (*Abdur Rahman, J.*) KRISHNA CHETT

MAHOMEDAN LAW—*Applic*
procedure.

Even where Mahomedan law applies to the subject matter, the Courts in British India are governed by their own method and procedure and do not apply those rules of the Mahomedan law which are described as "provisions which go only to the remedy, *ad lites ordinationem*, being matters purely of procedure as to array of parties, production of evidence, *res judicata*, and review of judgment, etc. (*Sir George Rankin.*) SABIR HUSSAIN *v.* FARZAND HASAN. 42 C W N. 353= 1938 A.W.R. (P.C.) 32=1938 A L.J. 141= 173 I.C. 1=47 L W 227= A.I.R. 1938 P C 80 (P.C.).

——*Dower—Shia law—Father contracting marriage of his minor son—Liability for dower.*

The doctrine as to Shia law of dower laid down in Shuraya-ul-Islam, that where the father contracts his infant son in marriage and the son has not independent means of his own, the father is liable for the dower, cannot be required to conform to a particular feature of the general law nor should it be interpreted in the light of it. Moreover the doctrine is a substantive rule of law and cannot be described as a canon of interpretation or construction or a rule of evidence. To a doctrine which enlarges the right of the wife or improves her security in respect of dower, an important purpose must be attributed and it would only mutilate the substantive law laid down by the Suraya if its rule as to the liability of the husband's father were to be ignored. (56 A. 401= A.I.R. 1934 All. 52=151 I.C. 304, Reversed.) In the event of the death of the husband's father, his heirs are liable for the dower in proportion to their respective

of a marriage, acknowledgment is recognised by the Mahomedan Law as a means whereby marriage of parents or legitimate descent may be established matter of substantive law. But where illegitimac proved beyond doubt by reason of the marriage of the parents being either disproved or found to be unlawful
a child of that marriage car
acknowledgment. In particula
tion, adultery or incest can nev
kind of acknowledgment by tl
and R. C. Mitter, JJ.)
BADARANNESSA. 42 C.W.N. 272.

MAHOMEDAN LAW.

——*Pre emption—Ceremonies—*Talab-i-ishad—*Invocation of witnesses—If essential.*

In order to establish a right of pre-emption the Mahomedan Law requires that the ceremonies connected

——*Succession—Impartible estate—Holder leaving will in favour of wife and daughter—Daughter predeceasing mother—Collaterals, if excluded by mother.*

will in
impar-
mother,
and no particular custom is proved and the rule of primogeniture is held not to apply, collaterals who come in as residuaries do not get anything which may be left till after the mother as sharer has had her share. The estate being impartible, the necessary result is that the mother's share under the Mahomedan Law is increased to the whole and she is the heir of her daughter to the whole estate. (*Zia-ul-Hasan and Hamilton, JJ.*) SRI RAM *v.* MAHOMED ABDUL RAHIM KHAN. 172 I.C. 882=1938 O.L.R. 44=1938 O.A. 96= 1938 O.W.N. 67.

——*Wakf—Creation of—Provision in will for holy places and for the poor after extinction of legatee's family—If creates wakf.*

A Mahomedan will directed the legatee and his heirs to pay yearly a certain sum to the spiritual preceptor of the testatrix and a certain sum for fatihas, and stated that this arrangement should continue as long as the descendants of the legatee survived and after that the Government should take the estate under its management and after making the above mentioned payments should pay one third of the profits to Mecca, one third to Madina and one third to poor Mahomedans of Oudh.

Held, that the payments to the spiritual preceptor and for fatihas at the most might be a charge on the estate but they could not be construed as a wakf, and that the provision for the holy places and for the poor being contingent on there being no descendant of the legatee left to utilize the profits of the estate for purely personal and temporal purposes, the gift was illusory and according to Mahomedan Law no wakf was created (*Zia ul Hasan and Hamilton, JJ.*) SRI RAM *v.* MAHOMED ABDUL

and there has never been any attempt by any one to use

MAHOMEDAN LAW.

——*Wakf—Sajjada Nashin—Alienation of share in offerings—Successor, if bound.*

The right of a Sajjada Nashin to receive a share of the offerings is a right attached to the office and each successive incumbent of that office is entitled to receive that share as long as he holds the office. Hence aliena tion made by a Sajjada Nashin of his share in the offerings cannot bind his successors. (*Sir Shadi Lal.*) ALTAF HUSSAIN *v.* DIWAN SYED ALI RASUL ALI KHAN. **172 I.C. 985=1938 O.L.R. 92=47 L.W. 221=A.I.R. 1938 P.C. 71 (P.C.).**

——*Wakf—Sajjada Nishin—Right to articles presented for use of tomb.*

The qabarposhes, as well as gold or silver vessels or implements presented for the use of the tomb must be kept by the tomb committee on behalf of the tomb; and neither the Sajjada Nashin nor the Khadims are entitled to participate in those offerings. (*Sir Shadi Lal.*) ALTAF HUSSAIN *v.* DIWAN SYED ALI RASUL ALI KHAN. **172 I.C. 985=1938 O.L.R. 92=47 L.W. 221=A.I.R. 1938 P.C. 71 (P.C.).**

——*Will—Life estate—If can be created.*

Under Mahomedan Law a life estate can be created when immediately followed by an absolute estate. (*Zia-ul-Hasan and Hamilton, JJ.*) SRI RAM *v.* MAHOMED ABDUL RAHIM KHAN. **172 I.C. 882=1938 O.L.R. 44=1938 O.A. 96=1938 O.W.N. 67.**

MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT (I OF 1900), S. 5 (2)—*Scope of —If can override general law of limitation—Suit in ejectment 12 years after determination of tenancy—If not barred by Art. 139 of the Limitation Act—Decree for possession in favour of melcharthdar in prior suit —Subsequent suit by jenmi in ejectment*—Res judicata.

In a suit brought by a Jenmi and a melcharthdar against a tenant a decree was passed directing possession to be delivered to the Melcharthdar on his depositing a certain amount for payment to the tenant, which as it was not executed the tenant continues in possession. Where a successor of the Jenmi brought a suit more than 12 years after the decree in the prior suit, for ejectment of the tenant, on a plea that it was barred by Art. 139 of the Limitation Act and by *Res judicata.*

Held, that the suit was not barred by Art. 139 as under S. 5 (2) of Malabar compensation for Tenants Improvements Act a tenant continuing in possession after determination of tenancy held possession during such continuance as a tenant subject to the terms of the lease.

Held further, that there could be no bar of *res judicata* in such a case as there neither in fact was, nor in law could be a decree in favour of the Jenmi in the prior suit. (*Venkatasubba Rao and Abdur Rahman, JJ.*) GOVINDAN *v.* DE'SILVA. **47 L.W. 236.**

MALICIOUS PROSECUTION—"*Prosecution*"—*Absence of evidence showing that statements made by defendant led to prosecution—Effect.*

Inasmuch as in India prosecution is not private, an action for malicious prosecution will lie against even a private individual, if he is proved to have given information to the authorities which naturally leads to prosecution. In absence of evidence to show that the statements made by the defendant before the police were directly and primarily responsible for the prosecution of the plaintiff, the action for malicious prosecution must fail. (*Fazl Ali, J.*) NARAIN PANDE *v.* GAYA RAI. **A.I.R. 1938 Pat. 147.**

MINOR—*Contract by guardian—Liability of minor under.*

The rule that a minor is not personally liable on the contract entered into on his behalf by his guardian is subject to two exceptions: (1) Where the contract is for necessaries supplied to or on behalf of the minor or money advanced for such supplies; and (2) when the liability is such to which the minor is liable under the personal law to which he is subject. In these two cases a decree can be passed against the estate of the minor. (*Vivian Bose and Puranik, JJ.*) SADASHEO BALAJI *v.* SHANKAR GOVIND. **A.I.R. 1938 Nag. 68.**

——*Contract by guardian—Liability under—Ratification—What amounts to.*

For a valid ratification by a major of a transaction entered into during his minority, there must be after majority and after the late minor has acquired full knowledge of the nature and effect of the transaction, some promise or other act which shows an intentional acknowledgment of his liability for the act done on his behalf during his minority. (*Vivian Bose and Puranik, JJ.*) SADASHEO BALAJI *v.* SHANKAR GOVIND. **A.I.R. 1938 Nag. 68.**

——*Contract by guardian—Money borrowed for payment of rent due—Liability of minor.*

Where a guardian of a minor borrows money for the payment of rent due to lambardar which the minor was bound to pay, the minor is liable under the transaction, as the guardian can do what the minor would himself do. (*Vivian Bose, J.*) SADASHEO BALAJI *v* HIRALAL RAMGOPAL. **A.I.R. 1938 Nag. 65.**

——*Debt incurred by mother—Decree thereon—Binding on the estate—Creditor's rights—Subrogation—Nature and extent of.*

Where a debt is incurred by a mother and a decree passed thereon are binding upon the estate, there can be no doubt that a creditor of the mother can claim to be subrogated to her right against the estate of the minors. It arises from the principle, that the widow herself has a right of recourse against the estate, and that a creditor of hers may be put in her place against the assets, that is to say, that he has a right to the benefit of the indemnity or lien which the mother has got against the estate. (*Venkatasubba Rao and Abdur Rahman, JJ.*) NATESA NATTAR *v.* MANIKKA NATTAR. **47 L.W. 175=1938 M.W.N. 103=(1938) 1 M.L.J 181.**

——*Decree against—Gross neglect of guardian—Minor represented by father as guardian—Suit to avoid—Competency—Decree in connection with property—Property in minor's possession—Suit for mere declaration of invalidity of decree—If lies—Specific Relief Act, S. 42.*

It is clear law that a minor has a right to sue to void a decree which is obtained against him owing to gross negligence of his guardian, and this rule would apply whether the guardian in question be a guardian *ad litem* appointed by the Court, friend, or even the Hindu Law guardian, *i.e.*, his father. But a suit for a mere declaration that the decree is void as against the minor cannot be maintained, when the decree is in connection with property which is not in the plaintiff's possession. He must also ask for possession of the property if the property is in the defendant's possession, or for an injunction to prevent the defendant from interfering with his rights in the property, (*Barlee and Macklin, JJ.*) SURESHCHANDRA *v.* BAI ISHWARI. **40 Bom.L.R. 127.**

——*Guardian* ad litem—*Gross Negligence—Omission to put forward proper defence.*

There can be no doubt that a guardian of a minor, who neglects to put forward a defence which saves a valuable property of the minor from alienation, is guilty

MORTGAGE.

of gross neglience. (*Addison and Din M*
GHULAM AHMAD *v.* NAND LAL.

date of sale and on the 15th day ...
... decree holder immediately on

RAMCHANDRA MAHOTRAO *v.* RAMCHANDRA GUJABA.
A.I.R. 1938 Nag. 54.

to enforce whole charge against the rest.

The mortgagor is obviously bound to ... and when the interests of third parties do ... and when the mortgagee has not obtained ... the mortgage security for himself, then it ... the mortgage money is enforcible against every portion of the mortgaged property, and the mere fact that a portion of it happens to be excluded from the mortgage security by operation of law cannot affect the mortgagee's right to enforce his whole charge against the rest.' (*Bose, J.*) DAULATRAM *v.* PANNA.
10 R.N. 224=172 I C. 565= A.I.R. 1938 Nag. 79.

——*Sub-mortgage — Original mortg... maintain suit.*

Where an original mortgagee creates ... over some of the mortgaged property and brings a suit on his mortgage against the mortgagor to which the sub-mortgagee refuses for some reason or other to be joined ...

...alive—Test.

the first deed, only an eight pies share was mortgaged by the second deed, that the second mortgage was usufructuary while the first was simple and that no mention was made in the second mortgage deed of an intention to

MYS. C. P. CODE REG. (1911) O. 34 R. 1.

MUSSALMAN WAKF ACT (XLII OF 1923), Ss. 3, 5 and 10—*Enquiry—Scope of—Right to mutwalliship ... —If to be determined.*

... Act either ... ate that it ... the Court ...d to in the ... as to the ... right to ... leaving the ... the Act is ... preventive ... by persons ...rwala, J.)
NANHE SHAH *v.* ABDUL HASAN.
A.I R. 1938 Pat. 137.

MUSSALMAN WAKF VALIDATING ACTS OF ... *ed before* 1930—*If*

... Act of 1913 had no ... the later Act of ... akfs created before 1913 and ... title, obligation or ... was not affected. A mortgage ... cannot, therefore, be affected by ... (...*asan and Hamilton, JJ.*) SRI ... DUL RAHIM KHAN.
... 1938 O.L.R. 44=1938 O A. 96= 1938 O.W.N. 67.

MUTATION—*Decision in mutation proceedings — Possession in pursuance of—Subsequent declaratory decree of Civil Court in favour of another—Effect—If can justify order of correction.*

Where a person is in possession after the decision of a mutation case in his favour, the opposite party who ... declaratory ... e apply ... possession could only be put out of possession by a decree of *dakhl* given by a Revenue Court. (*Darling, S.M. and Bomford, J.M.*) NARAIN SINGH *v.* MST. KUNJI KUNWAR. 1938 A.W.R. 61 (B.R.).

... CODE, REGU... 103—*Suit to set* ... *O. 21, R. 97— ...Right to.*

... applicant under O. 21, R. 97, C. P. Code, can be recovered by him in the suit which he subsequently institutes under O. 21, ... the adverse order on his application ... (*Abdul Ghani and Singaravelu* ...) NAGAPPA *v.* RAMAPPA.
... Mys L J. 43=42 Mys.H.C.R. 693.

... —*Scope and object of—Mortgage suit ... laiming title paramount—Joinder of ... retion and power of Court—Limits to.*

... e that to a mortgage suit a person ... paramount title is not a necessary ... not absolute or inflexible. In certain ... ly be proper but even desirable to ... son as a party. O. 34, R. 1, C. P. Code, the object of which is to define the scope of a mortgage suit, pure and simple, merely lays down who are the necessary parties to such a suit; it does not expressly prohibit the addition of party claiming

MYS. C. P. CODE REG. (1911), O. 44, R. 1.

adverse title. The rule, further, is a rule of convenience, and the matter is one of discretion with the Court so long as no question of jurisdiction is involved. The Code, as amended in 1911, makes ample provision for vesting abundant discretion in the Court as regards the frame of suits and the joinder of parties and causes of action. (*Shankaranarayana Rao, Offg. C.J. and Singaravelu Mudaliar, J.*) DODDA PUTTE GOWDA *v.* LINGE GOWDA. **16 Mys. L.J. 54 = 42 Mys. H.C.R. 739.**

——**O. 44, R. 1, proviso**—*Objection that decree not contrary to law or erroneous or unjust—When to be taken—Right of respondent to raise at hearing after notice.*

Even after an application for leave to appeal *in forma pauperis* has been admitted by the appellate Court, it is open to the respondent when he appears before the Court in answer to the notice issued to him, to raise the question covered by the proviso to O. 44, R. 1, C.P. Code, and to ask the Court to consider whether the decree appealed from is or is not contrary to law, etc. (*Shankaranarayana Rao Offg. C.J. and Singaravelu Mudaliar, J.*) SHANKARAPPA *v.* VENKATARAMANAPPA. **42 Mys. H.C.R. 730.**

MYSORE TRANSFER OF PROPERTY REGULATION (IV OF 1918), S. 6 (g)—*Scope—Family pension or Pallegar pension—Transferability—Presumption against—If any—Burden of proof.*

A family pension or a Pallegar pension cannot be presumed to be non-transferable as falling under S. 6 (*g*), T. P. Regulation. A mere admission that the person who draws the pension is a Pallegar does not necessarily lead to the inference that it is a political pension. It must be shown that the pension falls under any of the heads of pension detailed in S. 6 (*g*), T. P. Regulation before a transfer of it or a part of it can be impeached. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) SANKARAPPA *v.* VENKATANARAYANASWAMY. **42 Mys. H.C.R. 715.**

——**S. 6 (h)**—*Scope—Pension—Power-of-attorney in favour of creditor—Agent authorised to draw out pension and to appropriate part towards debt and to pay balance over to principal—Validity of—If opposed to S. 6 (h)—Agreement not to revoke power until discharge of debt—Validity—Contract Act, S. 202—Applicability.*

The term "transfer" includes not only alienations amounting to a divestiture of the transferor's rights, but also such limited and restricted alienations as are allowed by law. It implies the making over of possession or control, an alienation of property or some interest therein made as between living persons. It is necessarily something more than a mere agreement to transfer. A power-of-attorney executed by a person who is entitled to a pension in favour of his creditor authorising the latter to draw it out from the Treasury as his agent and to appropriate a portion of it towards his commission and debt and to pay the balance over to the executant every month does not operate as a transfer of the pension falling under S. 6 (*h*) of the T.P. Regulation. The pension is drawn as the pension of the executant of the power-of-attorney. The fact that there is an agreement to the effect that the executant of the power-of-attorney will not cancel the power or draw the pension himself or empower any others to do so as long as the debt of the power agent is discharged, will not make it a transfer of the pension. Though the power-of-attorney be held to be an equitable assignment of the money after it is drawn from the treasury, it is not a legal assignment or a transfer of property falling under S. 6 (*h*). After the money is drawn, it loses its character as a pension, and the agent who has got an interest in it—to appropriate a portion of the money towards his debt—is like a manager appointed to carry out the directions of the principal; and under S. 202 of the Contract Act, the agency cannot be terminated by the pensioner. The arrangement cannot be regarded as in any way contravening S. 6 (*h*) of the T. P. Regulation. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) SANKARAPPA *v.* VENKATANARAYANASWAMY. **42 Mys. H.C.R. 715.**

——**S. 54**—Effect of—Sale of Hindu joint family property by son—Father absent abroad—Subsequent return and consent to change of patta—If sufficient to convey father's rights. *See* HINDU LAW—ALIENATION. **16 Mys. L.J. 32 = 42 Mys. H.C.R. 669.**

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), S. 66—*Applicability—Hundi payable on certain day on which it is drawn—Presentment after three days of date—If unreasonable delay.*

Where a hundi which is not made payable at a specified period after date or sight thereof but purports to have been drawn on a certain day and is made payable on the same day, the hundi is not governed by S. 66 and must be presented to the drawee within reasonable time. A vendee firm sent a hundi drawn at Peshawar for a certain amount payable at Bombay on a certain date on which it purported to have been drawn in part payment of the unpaid purchase-money. The hundi reached vendor firm two days before the date on which it was made payable. The vendor presented it to the drawee three days after the fixed date but the hundi could not be cashed due to the insolvency of the drawee,

Held, that there was no unreasonable delay in presentment and therefore the vendee firm was not discharged from paying the amount of hundi to the vendor firm. (*Tek Chand and Abdul Rashid, JJ.*) HARNAM SINGH *v.* NIKKA RAM. **A.I.R. 1938 Lah. 183.**

NORTH WESTERN PROVINCES RENT ACT (XII OF 1881), S. 8—*Scope—Tenant dying during currency of Act XII of* 1881—*Widow succeeding and completing 12 years begun by husband—Right of occupancy—Death of widow after Act of* 1926—*Right of daughter's son not co-sharing in cultivation with grandfather—Right of.*

If a widow tenant inherits from her husband, and completes a period of twelve years begun by her husband under the N.W.P. Rent Act of 1881, she becomes an occupancy tenant with the right of occupancy in her own right. On her death her heirs and not the heirs of her husband succeed to her. S. 8 of the Rent Act of 1881 does not give any respective rights to her husband predeceasing her, and a daughter's son who is an heir of the original tenant and who does not even allege co-sharing with him cannot succeed on the death of the widow under S. 24 of the Tenancy Act, 1926, which would apply to the case, when the widow dies during the currency of the latter Act. (*Darling, S.M. and Bomford, J.M.*) RAM DAYAL *v.* BINDESHWARI PRASAD **1938 R.D. 121 = 1938 A.W.R. 72 (B.R.).**

OATHS ACT (X OF 1873), S. 11—*When comes into operation.*

The provisions of S. 11 of the Oaths Act, can only be attracted after the oath has been taken in accordance with the agreement arrived at between parties as mentioned in Ss. 9 and 10 of the Act. (*Pandrang Row and Abdur Rahman, JJ.*) VALLI AMMAL *v.* ARUNACHALA MOOPANNAR. **1938 M.W.N. 110.**

——**S. 12**—*Applicability—Challenger refusing to abide by his agreement and to co-operate in the taking of the oath—Procedure to be followed.*

OATHS ACT (1873), S. 13.

A challenger should not be permitted to resile after his offer has been accepted by the other party unless ... Court by ... is no ... allowed ... reason. ... ould be an extension of the provisions of S. 12 in a manner which is not justifiable. Where the challenger who was to light the camphor in accordance with the offer made by him, has refused to perform that which he had undertaken to do, he should be taken to have waived that condition. The Court can order any Commissioner to light the camphor but should see that it is extinguished by the other party when taking the oath. (*Pandrang Row and Abdur Rahman, JJ.*) VALLI AMMAL *v.* ARUNACHALA MOOPANNAR. 1938 M.W.N. 110.

——S. 13—Scope of. *See* EVIDENCE—CHILD WITNESS. (1938) M.W.N. 90=(1938) 1 M.L.J. 289.

OU...

of ...

The holders of primogeniture sanads who elected for inclusion in list II must be deemed to have rejected, as they were entitled to, the rule of succession laid down in their sanads in favour of the rule of succession which characterises estates included in List II. (*Zia-ul-Hasan and Hamilton, JJ.*) SRI RAM *v.* MAHOMED ABDUL RAHIM KHAN. 172 I.C. 882=1938 O... 1938 O.A. 96=1938 O...

——S. 12—*Will creating series of* ... *Validity—T. P. Act, S.* 14.

Where a will and a codicil create a series of life estates in perpetuity, the disposition of property is invalid under S. 12 of the Oudh Estates Act as well as under S. 14 of the T. P. Act. (*Zia-ul-Hasan and Hamilton, JJ.*) SRI RAM *v.* MAHOMED ABDUL RAHIM KHAN. 172 I.C. 882=1938 O.L.R. 44=1938 O.A. 96=1938 O.W.N. 67.

——S. 13 A (1) and (2)—*Person mentioned in, being legatee—His rights and powers—Rule of succession.*

S. 7 g... of S. 13 ... the sam... tate subject to the ... s of succession as ... *Hamilton, JJ.*) SRI RAM *v.* MAHOMED ABDUL RAHIM KHAN. 172 I.C. 882=1938 O.L.R. 44=1938 O.A. 96=1938 O.W.N. 67.

OUDH RENT ACT (XXII OF 1886), S. 39—*Assessment to wet rate—Holding becoming wet since last settlement—Fair and equitable rate, if can be applied.*

Where an assessment to wet rates is contested on the ground that the lands were originally recorded as dry in the settlement records and that it could not be disturbed till the next revision of settlement.

Held, that in as much as a notice of enhancement issued under S. 39 of the Oudh Rent Act could be contested on the ground that the enhancement claimed is in excess of the fair and equitable rate payable by statutory tenants for the same class of soil, it follows that where it is admitted that the holding had become entirely wet ...

OUDH RENT ACT (1886), S. 127.

——S. 48—*Widow of statutory tenant recorded as heir in presence of sons—Zamindar's right to sue widow alone for ejectment.*

Where the widow of a statutory tenant is recorded on his death as his heir, although he has left sons, the Zamindar can bring a suit for ejectment against the widow alone as heir of the statutory tenant and obtain a decree against her (*Darling, S. M and Bomford, J. M.*) SURAJ BUX SINGH *v.* RAM KUAR. 1938 O.W.N. 30=1938 R.D 55=1938 A.W.R. 28 (B.R.).

——S. 67 (1) (b)—*Notice of ejectment—Parties to be named—Duty of Zamindar.*

In a notice of ejectment under S. 67 (1) (*b*) of the Oudh Rent Act, it is only necessary for the Zamindars to include in the notice the tenant or tenants whose names are actually recorded in the *khatauni*. It is not necessary to include the other relatives of the recorded tenant and a notice is not bad because the other ... e tenant are not included ... *Bomford, J. M.*) BAJ... MATA BHIKH. 1938 R.D. 136=1938 A.W.R. 74 (B.R.).

——S. 67 (1) (b)—*Notice of ejectment—Plot found to be grove-land—If to be excluded.*

Where a plot is found to be grove-land by the Courts, and there are found to be enough trees on the plot as ... BHIKH. 1938 R.D. 136=1938 A.W.R. 74 (B.R.).

——S. 108 (4) and (10)—*Tenant ejected for failure to satisfy decree for rent—Amount of decree subsequently reduced in appeal—Tenant applying to be restored to possession—Proper remedy—C. P. Code, Ss.* 144 *and* 151.

Where a tenant was ejected by a suit under S. 108 (4) read with S. 61 of the Oudh Rent Act for failure to satisfy the decree for arrears of rent, but after the ejectment the amount of the decree was reduced in ... of the appel... holding to be ... P. Code. His remedy lies by way of a suit under S. 108 (10) of the Oudh Rent Act. (*Darling, S. M.*) KEDAR NATH *v.* BIRENDRA BIKRAM SINGH. 1938 R.D. 173=1938 O.W.N. 150.

——S. 127—*Suit under—Defendant making claim to proprietary right—Party to be referred to Civil Court.*

If a party makes a claim to proprietary right and it appears that it is a *bona fide* claim, which has been asserted successfully for sometime, then it is for the opposite party to go to the Civil Court to establish the title they claim and they must not rely on S. 127 of the Oudh Rent Act. Where, therefore, in a suit under S. 127 of the Act, it appears that the defendants have accepted without demur the entries in three settlements which give the proprietary title in the suit land to the plaintiff and record them as mere grove-holders or as tenants without fixation of rent, and the defendants fail to prove that they have on any occasion asserted any proprietary ... their claim to proprietary rights in ... *ma facie, bona fide* and it is for them ... Court, if they wish to be regarded as ... *ling S. M. and Bomford, J. M.*) ... *v.* SURAJ NARAIN. ... A.W.R. 26 (B.R.)=1938 R.D. 39=1938 O.W.N. 33.

PARDANASHIN LADY—*Deed by—Burden of proof—Proof of independent advice—If necessary.*

In an action by an old pardanashin lady to set aside a deed of gift executed by her in favour of the defendant, it is for the defendant to discharge the onus of showing that the plaintiff really understood and intended to execute the deed of gift, but it is not necessary to prove independent advice. (*Lord Maugham.*) SIKANDAR BEGAM *v.* ZULFIKAR WALI KHAN.

172 I.C. 720 = 42 C.W.N. 332 = 1938 O.L.R. 66 = 1938 A.L.R. 90 = 1938 A.W.R. 28 (P.C.) = 47 L.W. 214 = 1938 O.W.N. 97 = A.I.R. 1938 P.C. 38 (P.C.).

———*Promissory note by—Rule applicable.*

The fact that the executant of a promissory note is a pardanashin lady ceases to be of importance once it is established that the granting of the promissory note was her free and intelligent act and that she "knew what she was doing and did what she wanted to." (*Lord Macmillan.*) GAJRAJ KUAR *v.* RUDRA PARTAB NARAIN SINGH. **172 I.C. 631 = 1938 O.L.R. 41 = 47 L.W. 123 = 1938 A.L.R. 69 = 1938 O.A. 121 = 4 B.R. 247 = 1938 O.W.N. 39 (P.C.).**

PARSI MARRIAGE AND DIVORCE ACT (III OF 1936), Ss. 2 (2) and 39—*"Court"—Interlocutory applications—Jurisdiction of Judge alone to deal with without delegates.*

There is a distinct cleavage of functions under the Parsi Marriage and Divorce Act between the presiding Judge of the Court and the delegates who are appointed to aid him in the adjudication of cases. The word "Court" is promiscuously used throughout the Act, but it cannot be read as including the delegates in all cases. Some confusion has crept into the Act by the use of the word "Court" promiscuously, but under the cleavage of functions under the Act, the word must be read in its context in order to determine whether it includes both the Judge and the delegates or the Judge alone. All interlocutory applications, such as those under S. 39, are correctly dealt with by the Judge sitting alone, and an order passed in such applications by the Parsi Matrimonial Judge sitting alone without the delegates cannot be said to be a nullity. (*Wadia, J.*) SHAVAKSHA *v.* MEHERBAI. **40 Bom.L.R. 50.**

———**S. 39**— Jurisdiction— "Court" —Application under—Jurisdiction to hear—Judge alone or Judge sitting with delegates. *See* PARSI MARRIAGE AND DIVORCE ACT, SS. 2 (2) AND 39. **40 Bom.L.R. 50.**

———**S. 40**—*Construction—Personal order for permanent alimony—Re-marriage of wife—Effect—Recission of order—If a matter of course—Discretion of Court.*

A personal order for permanent alimony not secured by any charge on the husband's property falls under Cl. (*b*) and not under Cl. (*a*) of sub-section (1) of S. 40 of the Parsi Marriage and Divorce Act. The Condition "while she remains chaste and unmarried" is inserted in Cl. (*a*) and not Cl. (*b*). Therefore, though in the case of a secured alimony the order would cease to operate on the wife's remarriage, in the case of a personal order no such result would follow unless the order contains a provision that it is to cease to operate on her remarriage. It cannot be held that a re marriage is, by itself, a change in circumstances which entitles the husband of the previous marriage in all cases to obtain an order of recission of alimony under S. 40 (2), through it may be regarded as one of the circumstances under which, in a proper case, the order of alimony may be varied or even rescinded. That would depend on the circumstances of each case and it remains a matter of discretion for the Court. (*Divatia and Wassoodew, JJ.*) NADIRSHAW *v.* MANEKBAI. **40 Bom.L.R. 195.**

PENAL CODE (1860), S. 337.

PENAL CODE (XLV OF 1860), S. 75—*Previous convictions—Sentence—Considerations.*

More severe sentences than might normally be given may be given if there are previous convictions. But sentences ought to be inflicted with some regard to the nature of the offence, and also they must be tempered with humanity. (*Young, C. J. and Abdul Rashid, J.*) ALLAH DITTA *v.* EMPEROR. **40 P.L.R. 118.**

———**S. 100**—*Person tortured during police investigation—Right of self-defence.*

A person who is mercilessly tortured and beaten by the police during an investigation of a crime and who has every reason to think that he might either be killed or suffer grievous hurt, is justified even to the extent of killing in the exercise of his right of self-defence. (*Young, C. J. and Abdul Rahid, J.*) KIROO *v.* EMPEROR. **40 P.L.R. 104.**

———**S. 193**—*Onus of proof.*

In a prosecution under S. 193 it is incumbent on the prosecution to show first that the statement made by the accused was false, and secondly that they knew it or believed it to be false or did not believe it to be true at the time they made the statement. (*Fazl Ali, J.*) RAMDENI PATHAK *v.* EMPEROR. **A.I.R. 1938 Pat. 145.**

———**S. 235**—*Offence under—Facts to be proved to sustain the charge.*

An offence under S. 235 of the Penal Code cannot be made out unless the prosecution proves not only the possession of the instrument or material but also that such a possession was with the intention of using the same for the purpose of counterfeiting coin or with the knowledge and belief that it was intended to be used for the purpose. If the prosecution fails to prove the necessary *mens rea*, a person cannot be convicted under the section by a mere proof of physical possession of an instrument or material. (*Venkataramana Rao, J.*) MORSAN *v.* EMPEROR. **1938 M.W.N. 89 = 47 L.W. 173.**

———**S. 300, Exc. IV**—*Applicability—Fight ensuing upon a sudden quarrel—Stabbing in the heat of passion—Proper sentence.*

Where it is clear that the accused stabbed the deceased in the heat of passion in a fight ensuing upon a sudden quarrel, almost all the elements of Exc. IV to S. 300, Penal Code, are present in the evidence. But where it does not appear that the appellant did not take undue advantage and did not act in a cruel or unusual manner, it cannot be said that Exc. IV to S. 300 applies. The proper sentence to pass in such a case, is one of transportation for life. (*Burn and Mockett, JJ.*) RAHIMAN KHAN SAHIB *v.* EMPEROR. **1938 M.W.N. 31 = 47 L.W. 149.**

———**Ss. 302 and 304**—Applicability—Charge under S. 302—Prosecution not proving intention but proving knowledge required by S. 304, Part 2—Proper cause. *See* CRIMINAL TRIAL—BENEFIT OF DOUBT. **A.I.R. 1938 Sind 63.**

———**S. 302**—*Proof of offence—Blood-stains on clothes—Evidentiary value of.*

Villagers often have blood-stains on their clothes. Their occupation is of such a nature as to render this inevitable. The existence of a few small blood-stains on a man's shirt or *dhoti* is not enough to found a conviction on in itself, though it is important corroborative evidence when the accused is directly implicated by other evidence or circumstances. (*Grille and Bose, JJ.*) SHALIGRAM *v.* EMPEROR. **10 R.N. 185 = 39 Cr.L.J. 105 = 172 I.C. 213 = A.I.R. 1938 Nag. 52.**

———**S. 337**—*"Rashly and negligently"—Driver of motor faced by sudden emergency and having to make*

PENAL CODE (1860), S. 353.

quick decision—Accident caused by act of pedestrian—

has to make a quick decision how best to avoid a colli-

...not excessive, he pulls up the car and, by swerving, nearly succeeds in avoiding the pedestrian, but owing to the stick of the pedestrian being knocked by the mudguard, the pedestrian is thrown clear and gets injuries the accident is due to the pedestrian himself, rashness or negligence cannot be legally inferred so as to render the driver liable to conviction under S. 337, I. P. Code. To do so would be taking an unduly strict view of the duties of a motorist. (*Gruer, J.*) MADHORAO *v.* EMPEROR. **1938 N.L.J. 44.**

——S. 353—*Resistance to warrant under S. 88, Cr. P. Code—Absence of proclamation under S. 87, Cr. P. Code—Conviction under S. 353, if justified.*

When once a warrant is issued under S. 88, Cr. P. Code, the mere fact that a proclamation under S. 87 had not already been issued, would not justify the conclusion, that those who went to execute the warrant were not acting in execution of their duty as public servants. All that is necessary to justify a conviction under S. 353 of the Penal Code is that the person against whom an assault is made or criminal force is used should be a public servant in the execution of his duty as such public servant. (*Allsop, J.*) SHIB CHARAN *v.* EMPEROR. **1938 A.W.R. 124 (H.C.).**

——S. 409—*Applicability—Trust—When created—Existence as to—Test.*

The existence or non existence of a trust in particular case does not depend upon the use of

to receive certain interest on the money advanced and also a commission on sales effected by the acc... sale proceeds of the goods sold were to be pai... complainant's firm. As soon as the goods w...

goods were purchased or the goods after they had been purchased were not the property of the complainant's firm entrusted to the accused as his agent. Therefore there could be no offence under S. 409 in the event of any default in payment of the sale proceeds by the accused. (...) KARAMALI MANJI *v.* EMPEROR. **A.I.R. 1938 ...**

——S. 420—*Applicability—Seller of char... mantras—Advertisement assuring public that objects achievable by reciting* mantra *without hardship or preparation—Person acting on assurance and purchasing* mantra*—Direction to read* mantra *and to look at moon unwinking for fifteen minutes—Persons purchasing unable to do so—Offence of cheating—If committed.*

Petitioner in his own name and under thirteen other aliases carried on a business of selling charms and incantations which he advertised in a number of newspaper in several Provinces of India and despatched by

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value payable post to persons answering the advertisements. The advertisement was to the effect that certain ... achieved by repeating a *mantra* seven ... was no need of undergoing an hardship for making it effective, that it was effective without pre-

mantra should be read seven times, and then the person reading it should look at the moon for fifteen minutes without shutting up his eyes even for a forment, etc. Some of the victims who were the complainants in the cases said that had they known of the condition precedent to the using of the *mantra*, they would never sent for it, and the same was accepted by the Courts in evidence against the accused.

Held, that the advertisement gave a definite assurance that there was no necessity for either hardship or preparation, but that the condition referred to was contrary to that assurance, because the feat of looking at the moon unwinking for fifteen minutes was, if not impossible, at any rate, beyond the powers of ordinary human beings except by long training and preparation, and that the complainants having acted on the assurance of the petitioner, the accused was guilty of the offence of cheating, and was liable to conviction. (*Fazl Ali and Rowland, JJ.*) AKHIL KISHORE RAM *v.* EMPEROR. **1938 P.W.N. 93.**

——S. 447—"*Possession*"*—Order under S. 144, Cr. P. Code—Relevancy.*

Where a person was restrained from doing a particular act on a paricular land by an order under S. 144, Cr. P. Code, although that order may not be taken into consideration for establishing the possession of the complainant in a trial for an offence under S. 447, Penal ... at person, it ... *fides* of the (*Agarwala*, ... OR. **A.I.R. 1938 Pat. 131.**

—S 499, Exc. 9—*Statement in answer to requisi... by investigating officer under S. 161, Cr. P. ...—Privileged occasion—If covered by Exc. 9 to S. ... Penal Code.*

Where the alleged defamatory statement was made in answer to the requisition by the investigating officer

47 L.W. 136.

PLEDGE.—*See* CONTRACT ACT, SS. 172 TO 178.

POSSESSION—*Long enjoyment—Presumption of lawful origin of title—Nature and extent.*

The presumption of a lawful origin in support of proprietary rights long and quietly enjoyed is not a branch ...

In those cases the question is independent of such factors as length of time, the presence of recitals, or the production of the deed, the doctrine being invoked where there is a failure of evidence owing to lapse of time. (*Venkatasubba Rao and Abdur Rahman, JJ.*) ALAM KHAN SAHI... 4...

POWER OF ATTORNEY—*Construction—Rules of ...—Young girl executing power of ... of*

PRINCIPAL AND AGENT—*Broker—Authority to deal with securities.*

Stock-brokers in the ordinary course of business are employed to sell, to buy and to raise money upon as well as to keep in custody the securities of their customers and accordingly it is a reasonable assumption that the broker has full authority to deal with the securities. (*Lord Wright.*) MERCANTILE BANK OF INDIA *v.* CENTRAL BANK OF INDIA. **172 I.C. 745= 42 C.W.N. 321=1938 O.L.R. 68 (2)= 1938 O.W.N. 206=A.I.R. 1938 P.C. 52= (1938) 1 M.L.J. 268 (P.C.).**

PRIVY COUNCIL—*Concurrent findings of fact—Courts below not influenced by same considerations—Interference.*

It may be that the Courts below, in arriving at the same result upon the evidence on a question of fact, have not been influenced by precisely the same considerations, but that circumstance would not furnish any ground for disregarding the rule forbidding a fresh examination of facts for disturbing concurrent findings by the Courts below, which has been usually followed by the Board. (*Sir Shadi Lal.*) BENGAL NAGPUR RAILWAY CO., LTD. *v.* RUTTANJI RAMJI. **173 I.C. 15= A.I.R. 1938 P.C. 67 (P.C.).**

PROCESSION. *See* RELIGIOUS PROCESSION.

PROMISSORY NOTE—*Right to sue— One of several promissees—If can sue alone.*

One of several promises under a promissory note is not entitled to sue alone without joining the other promisees, either as plaintiffs or defendants. (*Smith, J.*) RAM SINGH *v.* RADHA KRISHNA. **172 I.C. 542=1938 O.L.R. 13= 1938 O.A. 46=10 R.O. 184=1938 O.W.N. 148= A.I.R. 1938 Oudh 61.**

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 4 (2)—*Scope—Decretal debt declared to be fictitious by Insolvency Court—Decree, if can be executed.*

The scope of S. 4 (2) is not limited to the insolvency proceedings only. According to it the decision of the Insolvency Court is final for all purposes. Hence, a decretal debt which has been declared by an Insolvency Court to be fictitious in proceedings on an application by the judgment-debtor for being declared insolvent to which the decree-holder was also a party cannot be recovered by an execution of that decree. The decision of the Insolvency Court is tantamount to a declaration that the decree was non-existent and the finding is binding on the judgment-debtor as well as on the creditor even though the insolvency proceedings have been dismissed. (*Bhide, J.*) SADHU RAM *v.* KISHORI LAL. **A.I.R. 1938 Lah. 148.**

——**Ss. 20 and 56 (2) (b)**—*Applicability—Order of adjudication—Appointment of receiver—Adjudication set aside on appeal—Effect—If makes receiver* interim *receiver—Right to remuneration—If lost.*

Proceedings following an adjudication order are not invalidated merely because that order is set aside afterwards on appeal; and when a receiver has been appointed on adjudication, he is entitled to be paid his remuneration notwithstanding the setting aside of the adjudication order. Nor would the fact that the appointment is determined by the appellate Court's decision reversing the order of adjudication change the order of appointment of receiver under S. 56 into one under S. 20 or make him an *interim* receiver. The receiver in consequently entitled to his remuneration under S. 56 (2) (*b*) of the Act. (*Bose, J.*) LAXMAN PRASAD *v.* GOVIND PRASAD. **1938 N.L.J. 40.**

——**S. 21 (2)**—Security bond required under—Stamp. *See* STAMP ACT SCH. I, ARTS. 40 AND 57. **47 L.W. 154=(1938) 1 M.L.J. 159 (F.B.).**

PROV. S. C. C. ACT (1887), S. 25.

——**S. 28 (5)**—*Tenancy holding—Decree for arrears of rent in respect of—Ejectment in execution, if barred.*

As the tenancy holding is not a property with which the Insolvency Court or the Official Receiver can deal, there can be no bar to the taking out of the ejectment proceedings in execution of a decree for arrears of rent in respect of such a holding. (*Ganga Nath, J.*) KASHI-NATH RAO JOSHI *v.* MURTA. **1938 A.L.J. 134.**

——**S. 49**—*If lays down the only method of proving a debt.*

S. 49 does not lay down a mandatory method of proving a debt. It merely lays down one of the modes in which a debt may be proved. (*Courtney Terrell, C. J. and Manohar Lall, J.*) BHUDERMULL *v.* HAJI MAHOMED. **A.I.R. 1938 Pat. 65.**

——**S. 56**—*Procedure—Appointment of pleader appearing for party as receiver—Justification of.*

It is objectionable to appoint as Receiver a pleader who represents a party in the proceedings by allowing him to throw up his brief in the middle of the case except in special circumstances appearing on the record justifying such a procedure. (*Bose, J.*) LAXMAN PRASAD *v.* GOVIND PRASAD. **1938 N.L.J. 40.**

——**S. 56 (2) (b)**—Applicability—Receiver appointed on adjudication—Adjudication order set aside on appeal—Effect on status and rights of receiver—If makes receiver *interim* receiver—Right to remuneration—If lost. *See* PROVINCIAL INSOLVENCY ACT, SS. 20 AND 56 (2) (*b*). **1938 N.L.J. 40.**

——**Ss. 56 (2) (b) and 79 (2) (a)**—*Nagpur Insolvency Rules, R. 13—Relative Scope of—Receiver appointed on adjudication—Reversal of order of adjudication on appeal before completion of realisations or distribution—Source of payment—Absence of direction in order of appointment—Effect—Remuneration of receiver—Amount of—Amount fixed by order or* quantum meruit.

Where an order is passed under S. 56 (2) (*b*) of the Provincial Insolvency Act fixing as his remuneration Rs. 150 per month or 5 per cent. of the assets realised up to a maximum of Rs. 200 a month, without any direction as to the source from which the money is to be paid, the order must naturally be construed in the light of the section, clause 2 (*b*) of which provides for payment out of the assets of the insolvent read with rule 13 of the Nagpur Insolvency Rules framed under S. 79 (2) (*a*). R. 13 contemplates that the remuneration is to come out of the assets of the estate and that it is not payable until there has been either realisation or distribution. Where, however, the order of adjudication is set aside on appeal before the receiver has completed the realisations or begun the distribution, it is not possible to ascertain how much he should be paid, and the contigency contemplated by R. 13 of the Insolvency Rules cannot arise at all. In such a case all that the Receiver can claim is a *quantum meruit*, which ordinarily is only 5 per cent. of the assets realised by him actually. (*Bose, J.*) LAXMAN PRASAD *v.* GOVIND PRASAD. **1938 N.L.J. 40.**

——**S. 79 (2) (a)**—Nagpur Insolvency Rules, R. 13—Scope—If controls S. 56 (2) (*b*). *See* PROVINCIAL INSOLVENCY ACT, SS. 56 (2) (*b*) AND 79 (2) (*a*). **1938 N L.J. 40.**

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), S. 25—*Interference—Grounds—Construction of agreement in trial regularly conduction—High Court's powers to interfere on merits.*

S. 25 of the Provincial Small Cause Courts Act ought not to be construed as giving parties a right of appeal on points of law. The object of S. 25 is to enable the High Court to see that there has been no

PROV. S. C. C. ACT (1887), Sch. II, Art. 13.

miscarriage of justice, that the decision was given according to law. Wherever the High Court comes to

of ... is ... uld be *C.J.)*

...R. 125.

—— **Sch. II, Art. 13**—*Scope—Claim for interest only due on arrears of rent—Jurisdiction of Small Cause Court.*

The dues contemplated by Art. ... Small Cause Court Act must be " ... from the interest in the immovable property and cannot include "dues" which are indirectly connected with something arising out of an interest in the immovable property. Interest on arrears of rent is really damages for default in payment of rent in time and it is not a

PUBLIC GAMBLING ACT (III OF 1 ...

Public place—Meaning of—Grove, if a p ...

If the public have access to a place with ... refused or otherwise interfered with, th ... public place, irrespective of the fact wheth... have a right to go there or not. Gro... villages are open to any body to sit in, ... normally no interference with anybody who wishes to have access to such groves. Where the accused were gambling on the edge of a grove, a few paces away from a public pathway, which is not shown to have been enclosed in any way or that the public were excluded from it, the place was held to ... the meaning of the Act. ... BALLU SINGH.

—— **S. 13**—*Seizure of money, if Justified under—Money found on the phar—Disposal—Cr. P. Code, S. 517.*

S. 13 of the Public gambling Act does not Justify the seizure of money. Money is not an instrument of gambling within the meaning of the Section. ... trate has authority to confiscate the mone... Cr. P. Code, where it is found on the p... not possible to say to which of the accuse... It is an order for the disposal of the ... custody of a Court or produced before it ... EMPEROR *v.* BALLU SINGH.

1938 A.W.R ...

1938 A.L.J. ...

PUNJAB ALIENATION OF LAND ACT (XIII OF 1900), S. 2 (3)—*'Land'—Plot situate within municipal limits and in midst of abadi and not cultivated* ...

PUNJAB TENANCY ACT (1887), S. 77.

A plot of land which is situate within the municipal limits and is in the midst of the abadi and which has not been cultivated for several years is not 'land' as defined in the Punjab Alienation of Land Act. (*Tek Chand, J.*) MAGHI MAL *v.* MOHAMMAD ALI

40 P.L.R. 57.

Financial Commissioner or declaration by the Local Government. (*Coldstream and Din Mohammad, JJ.*) INDAR RAM *v.* LILA DHAR. A I R. 1938 Lah. 152.

PUNJAB LAWS ACT (IV OF 1872), S 5—*Person asserting that he is ruled by custom—Burden of proof.*

In all cases under the (Punjab Laws) Act it lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so

contrary, it is only when the custom is established that it is to be the rule of decision. (*Tek Chand and Abdul Rashid, JJ.*) MOHAMMAD NAWAZ *v.* KAURA RAM.

A.I.R. 1938 Lah. 166.

PUNJAB LIMITATION (CUSTOM) ACT (I OF ...

him... not ... No... ould ... or is ... other ... perty purchased. (*Addison and Din Mohammad, JJ.*) MOHAMMAD MALIK *v.* ALI MOHAMMAD.

40 P.L.R. 108

—— **Art. 1**—*Suit attacking will—Limitation.*

Alienation includes a testamentary disposition of pro...

Mohammad, JJ.) NAMAN *v.* UTTAM.

40 P.L.R 126 = A I.R. 1938 Lah. ...

PUNJAB SIKH GURDWARAS ACT (VIII OF 1925), S. 3 (1) and (3)—*Equitable ... applicant to implead.*

...

PUNJAB TENANCY ...

...

been abandoned by deceased tenant—Jurisdiction of Civil Court.

Suits by collaterals of the last occupancy tenant claiming possession on the ground that they had succeeded to the tenancy, the land having been occupied by the common ancestor and having been wrongfully taken possession of by the landlord, are not barred from jurisdiction of the Civil Court by S. 77 of the Tenancy Act, although one of the pleas raised by the defendant landlord is that the tenancy had been abandoned by the last occupancy tenant and the occupancy rights had, therefore, been extinguished. The question whether a deceased tenant had or had not abandoned his right does not come within the terms of S. 77 (3) and the plea can be tried by a Civil Court. (*Tek Chand, J.*) MULA *v.* ROSHAN.

40 P.L.R. 111.

RECEIVER—Appointment—Effect of—Property in possession of receiver—Suit for possession of—Sanction of Court—Necessity. *See* C. P. CODE, O. 40, R. 1.

19 Pat.L.T. 35.

———Appointment of pleader of party to proceedings—Propriety of procedure. *See* PROVINCIAL INSOLVENCY ACT S. 56. **1938 N.L.J. 40.**

REGISTRATION ACT (XVI OF 1908), S. 17 (1)—*Decree adjusting claim in execution—Creation of charge on immovable property not subject-matter of suit and worth more than Rs. 100—Registration—Original decree itself—If to be sent for registration—Copy of decree—If may be sent.*

A decree or order adjusting the claim of the judgment-creditor in execution of his decree, whereby a charge is created in his favour on immovable property, of the value of more than Rs. 100, not the subject-matter in suit, which is compulsorily registrable under S. 17 (1) of the Registration Act is not required to be sent to the Registrar for registration; a copy of such decree or order can be accepted for registration. There is nothing in the Act which prevents any party from applying that a true copy of the decree or order should be sent to the Registrar for being registered. The decree or order should always remain on the records of the Court. (*Rangnekar and Norman, JJ.*) VINAYAK *v.* PARSAPPA.

40 Bom.L.R. 160.

———**S 17 (2) (vi)**—*Compromise decree granting occupancy right—Registration.*

Under S. 17 (2) (*vi*) only those decrees are excluded which partake the character of the documents mentioned in Cls. (*b*) and (*c*) of sub S. (1). Hence a compromise decree granting occupancy rights is inadmissible if unregistered. (*Wort, J.*) SHEIKH GUHI SAUDAGAR *v.* BHUTNATH BANERJEE. **A.I.R. 1938 Pat. 140.**

———**S. 47**—*Document in respect of certain property requiring registration executed—Attachment of such property before registration—Effect.*

A deed of baimokasa in respect of certain property was executed which required registration; but before the deed was registered the property was attached and the document was subsequently registered.

Held, that the document prevailed against the attachment as the document when registered took effect from the date of execution. (*Fazl Ali and Rowland, JJ.*) FAIYAZUDDIN KHAN *v.* MT. ZAHUR BIBI.

A.I.R. 1938 Pat. 134.

———**S. 49**—*Compromise relating to immovable property—Unregistered deed—Admissibility.*

A deed of compromise relating to immovable property executed in the course of a suit and not recorded in the decree, is not admissible in evidence in the absence of registration. (*Dobson, F. C.*) RAM LAL *v.* MALAN DEVI. **40 P.L.R. 115.**

RELIGIOUS PROCESSION—*Right to conduct in public streets and before mosques—Limitations to exercise of such right.*

The law is well settled that any community can use a public street for processions attended with music, provided that they do not thereby cause a disturbance to any other community when assembled for prayer or worship. Where a decree entitled the Hindus to take processions through the public streets with music, etc., 'except during the hours of public congregational worship in the mosque' it was *held*, that the exception introduced was a proper one, but that it should have been limited to the neighbourhood of the mosque prescribing a certain radius with the mosque as the centre, within which area there should be no music during the prescribed time.

Held further, that though the prohibition of music before a mosque at all times, may be a practical solution of the ever recurring disputes between the two communities, it is not possible to give a judicial *imprimatur* to such a solution, as it would be inconsistent with the existing state of the law. (*Pandrang Row and Venkataramana Rao, JJ.*) RANGIAH CHETTY *v.* HASSUMIAH.

1938 M.W.N. 119.

RES JUDICATA. *See* C. P. CODE, S. 11.

REVENUE COURT—*Duty of—Intricate questions of civil law—Acceptance of registered will.*

It is not for Revenue Courts to go into intricate questions of civil law. Where a will has been found by the Registrar to be genuine, that is enough for the Revenue Courts to accept it.(*Darling, S.M. and Bomford, J.M.*) NARAIN SINGH *v.* KUNJI KUNWAR.

1938 A.W.R. 61 (B.R.).

SOCIETIES REGISTRATION ACT (1860), Ss. 3, and 19—*Presumption of proper registration.*

Presumption that an association is duly registered arises not on the certificate of registration granted by the Registrar under S. 3, but on the copies of the Rules and Regulations and Memorandum certified under S. 19, which constitutes them *prima facie* evidence of the matters therein contained. (*Lord Thankerton.*) SUNDER SINGH *v.* SUNDER SINGH. **172 I.C. 993=**

47 L.W. 239=A.I.R. 1938 P.C. 73 (P.C.).

SPECIFIC RELIEF ACT (I OF 1877), S. 42, Proviso—Scope—Minor—Decree against in respect of property—Gross negligence of guardian—Suit to declare decree void—Maintainability without prayer for possession or injunction. *See* MINOR—DECREE AGAINST.

40 Bom.L.R. 127.

———**S. 42, Proviso**—*Suit for mere declaration—Maintainability—Plaintiff claiming to be trustee and administrator of institution—Neither plaintiff nor defendant in possession or control of institution—Injunction against defendant—If further relief.*

Where the plaintiff claims to be a trustee and administrator of certain institution of which neither he nor defendant is in possession or control of the management, a suit for mere declaration under S. 42 is maintainable; and where it is not open to the plaintiff to pray for possession also as against the defendant, injunction against the defendant is further relief within the meaning of the Proviso to S. 42. (*Lord Thankerton.*) SUNDER SINGH *v.* SUNDER SINGH. **172 I.C. 993=**

47 L.W. 239=A.I.R. 1938 P.C. 73 (P.C.).

STAMP ACT (II OF 1899), S. 2 (15)—*Instrument of partition—'Preliminary decree' in partition suit—Strangers in possession also made parties—Directions as to division and as to payments of definite sums by parties inter se—Nature of decree.*

Where in a suit for partition of joint family property to which strangers in possession of certain items of property were also added, a preliminary decree was passed

STAMP ACT (1899), S. 35.

in which directions were given for the division of immovable property as also for the payment of spec sums as between parties *inter se.*

Held, that the decree was a final order of a C

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finally divide the whole of the joint family property quite immaterial. (*Burn and Lakshmana Rao, J*) SATYANANDAM *v.* NAMMAYYA. 47 L.W.

——Ss. 35 and 36—*Partition decree not engrossed on non-judicial stamp of proper value—Acting upon—Execution ordered—Objection at subsequent executions, if can be taken*

Where a partition decree falls strictly within the terms of S. 2 (15) of the Stamp Act, but which is not duly engrossed on non-judicial stamp of proper value, and which was in fact acted upon and execution also ordered, on a question whether the objection as to the absence of stamp could be raised at a later stage of execution

Held, that S. 36 of the Act did not preclude any such objection, for the section deals only with the admission of instruments in evidence and that the question before the Court was one of executing the decree and not of admitting it in evidence. The provision applicable is S. 35 of the Act which provides that such an instrument shall not be 'acted upon' and the only way in which such a decree can be acted upon is by execution. (*Burn and Lakshmana Rao, JJ.*) SATYANANDAM *v.* NAMMAYYA. 47 L.W. 51.

——Ss. 37 and 42 (2)—*Applicability—Partition decree, not stamped—Execution ordered—Subsequent stamping—Execution proceedings, if validated retrospectively.*

A partition decree was not duly stamped as required by the Stamp Act, but it was nevertheless acted upon and executions also were ordered. On an objection at a later

Held, that S. 37 of the Stamp Act, could be invoked as not one stamp of

on of law which could validate a decree of the kind in question, with retrospective effect and that S. 42 (2) of the Act in terms is not retrospective in its operation. (*Burn and Lakshmana Rao, JJ.*) SATYANANDAM *v.* NAMMAYYA. 47 L.W. 51.

——Art. 1— *Applicability — Acknowledgment of correctness af account—Stamp duty.*

An acknowledgment of the correctness of account does not require a stamp to be valid. (*Dhavle, J.*) RAMPRABHA OJHA *v.* BISHUNATH OJHA. A.I.R. 1938 Pat. 139.

——Sch. I, Arts. 40 and 57—*Applicability—Security bond required under S.* 21 (2) *of the Provincial Insolvency Act.*

A security bond executed by two sureties in favour of the sheristadar of a Court, as required by S. 21 (2) of the Provincial Insolvency Act, should be stamped under Art. 40 and not under Art. 57 of Sch. I of the Stamp Act. The word 'contract' used in Art. 57 means a contract as defined in S. 2 (*h*) of the Contract Act. A security

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SUCCESSION ACT (1925), S. 381.

having immovable property in British India—Succession to such property—Law applicable—Law of domicile

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be decided according to the law of domicile of the parties, but succession to immovable property in British India of a person deceased is, as provided by S. 5 of the Succession Act, regulated by law of British India, wherever such person may have had his domicile at the time of his death. The custom prevailing among Parsis resident in Baroda for a husband to divorce his wife by mutual *furgats* or releases, assuming it to be a valid custom, cannot be recognised as valid in British

——S. 295—Contentious proceedings under—Nature of—Form of decree—Appeal against order in such proceedings—Production of decree—Necessity. *See* C. P. CODE, O. 41, R. 1 AND S. 104. A.I.R. 1938 Sind 36 (F.B.).

——S. 301—*Scope of—Creation of permanent trust by will—Removal of trustee—Procedure—Application under S.* 301, *if appropriate.*

S. 301 of the Succession Act deals with the power move or discharge any Where an application ple for the removal of a person who is in the position of a trustee of a permanent trust created for the temple by a will, though styled an executor, it certainly is not a matter which

——S. 370—Mortgage, if a security. *See* SUCCESSION ACT, SS. 381, 370 AND 214. A.I.R. 1938 Pat. 68.

——Ss. 381, 370 and 214—*Mortgage—If a 'debt' or a 'security'—Succession certificate, if entitles one to sue on a mortgage in favour of his deceased brother.*

A mortgage is not a debt within the meaning of S. 381, and it is not a security within the provisions of S. 370. Where therefore a person brought a suit on a mortgage executed in favour of his deceased brother and produced a succession certificate.

Held, that the production of a succession certificate was not a sufficient title on which to sue on the mortgage.

Held further, that as the succession certificate was a

d his plaint e was

(*Wort* JJ.)

SUCCESSION ACT (1925), S. 387.

RAMU SINGH *v.* AGHORI SINGH. **A.I.R. 1938 Pat. 68.**

——**S. 387**—Succession certificate—Value in proving title. *See* U. P. LAND REVENUE ACT, S. 34. 1938 R.D. 42=1938 A.W.R. 21 (B.R.).

TORT—Slander of title—Damages—Liability for—False representation of habitability of house and safety—Dissuading of prospective renters—Actionability. *See* LIMITATION ACT, ART. 36. **A.I.R. 1938 Nag. 84.**

——*Trespass—Person procuring order under S. 133, Cr. P. Code—Liability of for trespass.*

Where the defendant brings a complaint before a Court, designed to secure an order directing the plaintiff to pull down his building, whereby the Court issues a conditional order under S. 133, giving the plaintiff the option either to do something or satisfy the Court that he need do nothing, at no time is the defendant using the Court as his agent to attack the plaintiff's property and it would be wrong in such circumstances to regard the complainant before a Magistrate in a matter subject to examination in the Criminal Courts as being a person who is trespassing against plaintiff. (*Stone, C. J. and Vivian Bose, J.*) HARGOVIND DULLABH JIWAN *v.* KIKABHAI RAHIMTULLAH. **A.I.R. 1938 Nag. 84.**

TRADE MARK—*Infringement—Colourable imitation—Facts to be considered.*

It is a question of fact in every case whether the defendant's mark is or is not a colourable imitation of the plaintiff's mark. The surrounding circumstances of each case will have to be considered. It is not only necessary to look at the difference or at the resemblance between two given marks, but it is necessary to compare the two marks as a whole and then come to a decision. (*Mehta, J.*) HIRANAND *v.* SARDAR MEHARSINGH. **A.I.R. 1938 Sind 38.**

——*Infringement—Intention to deceive—Inference—Close similarity.*

Fraud is to be presumed where the similarity is close and remains unexplained. An intention to deceive may be inferred from the circumstances of the case, though no case of actual deception is proved. (*Mehta, J.*) HIRANAND *v.* SARDAR MEHARSINGH. **A.I.R. 1938 Sind 38.**

——*Infringement—Passing off cases— Colourable imitation—Deception—Test.*

The question for decision as to whether an alleged colourable imitation has or has not deceived anybody is to be decided with reference to the ultimate purchaser. In passing off cases, the probability of misleading, not experts or persons who know the real facts, but ordinary or unwary customers, is the mischief to be guarded against. Non-deception of middlemen and vendors is immaterial. (*Mehta, J.*) HIRANAND *v.* SARDAR MEHARSINGH. **A.I.R. 1938 Sind 38.**

——*Infringement—Right to sue in respect of—Facts entitling.*

Mere damage is insufficient to support an action on the infringement of trade mark. The damage must be attributable to the passing off of other goods as plaintiff's goods. There may be damage and yet there may be no passing off. Thus a suit connot be entertained if it is brought by a person not entitled to an action to restrain a defendant from passing off goods as the goods of a third party. He can bring the action only when the representation is that the goods are his goods. (*C. Mehta, J.*) HIRANAND *v.* SARDAR MEHARSINGH. **A.I.R. 1938 Sind 38.**

——*Right to—Fraudulent user of abandoned trade mark of another—If confers any right.*

Even if an owner of a trade mark has abandoned or practically abandoned his rights to the trade mark, it does not give a person any exclusive right thereto simply because he was perhaps the first to rush into the market with an imitation of that trade mark. Where a person by imitating the trade mark of others has caused his goods to pass as those of others, he cannot be heard to say that he alone has a monpoly to imitate and deceive people. Even if he succeeds in proving that he was the first in the market with an imitation, and maintains that having established a reputation on that imitation he had a right to prevent others from taking advantage of his exertions, he cannot be given any protection in a Court of law. Even if user be established extending over a considerable period, it does not follow that a title to the trade mark is made out; for, if the user was fraudulent in its inception and is still calculated to deceive, the user gives no right. (*Mehta, J.*) HIRANAND *v.* SARDAR MEHARSINGH. **A.I.R. 1938 Sind 38.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 6—Scope—If controls S. 43—Duty of court to reconcile Ss. 6 and 43. *See* T.P.ACT, S. 43. **40 Bom.L.R. 147.**

——**S. 6 (a)**—*Relinquishment of interest in property by reversioner—Validity—His son, if estopped from claiming property.*

It is not competent to a person to relinquish his rights in property to which he is the than nearest reversionary hair, expectant upon the death of a widow in possession. His son is, therefore, not estopped from claiming the property by reason of the relinquishment. (*Lia-ul-Hasan and Hamilton, JJ.*) AHMAD HASAN KHAN *v.* RAM SINGH. **1938 O.L.R. 88=1938 O.A. 134=1938 O.W.N. 152.**

——**S. 43**—*Applicability—Transfer of estate as full owner by person having only* spes successionis—*Subsequent acquisition by transferor of full rights—Such rights—If pass—S. 6—Effect of.*

Where in the case of a sale an erroneous representation is made by the transferor that he is the full owner of the estate sold (though in fact be merely has *spes successionis*), then if the transferor happens later to obtain the real interest, the previous transfer can operate on that interest. It is the duty of the courts to reconcile S. 43 with S. 6, if possible, and the operation of S. 6 must be confined to cases in which the transfer purports to be that of *spes successionis*, or where the transferee knows that the transferor has no more to give. (*Barlee and Macklin, JJ.*) VITHABAI *v.* MALHAR. **40 Bom.L.R. 147.**

——**S. 52**—*Construction—"Any other party thereto."—If limited to opposite parties.*

Obiter, the words "any other party thereto" in S. 52, Transfer of Property Act, cannot be construed as meaning only any opposite party or any party who has opposing interest.' The words are unconditional. (*Wort and Manohar Lall, JJ.*) NRISHINGHA CHARAN NANDI CHOUDHURY *v.* ASHUTOSH DEO GHATWAL. **19 Pat.L.T. 35.**

——**S. 53**—*Fraudulent intention—Inference from conduct.*

The subsequent and the prior conduct as well as the contemporaneous conduct of the transferor are all relevant and must be considered in order to decide what his motive was in transferring the property. Where at the date of transfer of the property to her sons the transferor did owe money to the creditors and subsequently had to transfer her goods at a great loss to some of the creditors and there were still creditors who had not been satisfied,

Held, the inference was irresistible that her motive in transferring the property in favour of her sons was to screen it from her creditors. (*Jai Lal, J.*) RATTAN

T. P. ACT (1882), S. 53.

CHAND *v.* KISHAN CHAND ISHAR DAS. A.I.R. 1938 Lah. 136.

———S. 53—*Fraudulent intention — Proof — Fact that debts are due from transferor—If sufficient.*

The mere fact that debts are due from transferor is not alone sufficient to establish a fraudulent intention; on the other hand it must be proved that at the time of the transfer, motive for the transaction was to defeat or delay the creditors. There can however ordinarily be no direct evidence of the existence of a fraudulent intention. This can be inferred from circumstances proved in the case. (*Jai Lal, J.*) RATTAN CHAND *v.* KISHAN CHAND ISHAR DAS. A.I.R. 1938 Lah. 136.

———S. 53—*Issue under—If can be raised by way of defence.*

Where at the time of a sale of the judgment debtor's property in execution of a decree an objection to the sale is made by a party under S. 47, C. P. Code, on ground that he is owner of the property by virtue of a transfer of the property in his favour by the judgment-debtor, the decree-holder is entitled to contest the objector's claim on the ground that the property was transferred fraudulently and he need not file a separate suit to have that transfer declared fraudulent. To such a defence by the creditor, the rule contained in S. 53, Transfer Property Act, as to the form in which the suit is to be brought does not apply. Moreover the defence of the creditor in such a case can be described to be made in a representative capacity to apply for a rateable share in the sale proceeds if the property is sold. (*Jai Lal, J.*) RATTAN CHAND *v.* KISHANCHAND ISHAR DAS. A.I.R. 1938 Lah. 136.

———S. 53—*Relinquishment of rights in property to save it from creditors—If fraudulent.*

[illegible]

(*Zia ul- Hasan and Smith, JJ.*) SUNDAR LAL *v.* GUR SARAN LAL. 10 R O. 187 = 172 I.C. 637 = 1938 O.A. 34 = 1938 O.L.R. 14 = 1938 O.W.N. 104.

———S. 53—*'Transfer'—Relinquishment of rights by co-parcener.*

The relinquishement of his rights by a coparcener in favour of another co-parcener [illegible] be a transfer within the meanin[illegible] fer of Property Act. (*Zia ul-[illegible]*) SUNDAR LAL *v.* GUR SARAN [illegible] 172 I.C. 637 = 1938 O.A. [illegible]

———S. 53 — *Transfer pre[illegible] another—Validity.*

[illegible]

T. P. ACT (1882), S. 68.

another creditor and therefore was not affected by S. 53, Transfer of Property Act.

Held further that the circumstance that the [illegible]

A.I.R. 1938 Lah. 156.

———S. 58 (d) and (g)—*Mortgage deed—Construction —If usufructuary or anomalous*

Where a mortgage deed contained one clause which would make it an usufructuary mortgage but another clause provided in the most explicit terms for recovery of the amount due from the mortgaged property,

Held, that the mortgage was not usufructuary but was anomalous. (*Dalip Singh and Skemp JJ.*) MT. MOHAN DEVI *v.* NAWAB TALIA MEHDI KHAN. A.I.R. 1938 Lah. 145.

———S. 66—*Applicability and scope — Mortgage, simple—Mortgagor in possession—Lease created by—Validity—Burden of proof—Rules of English Law—Applicability of.*

The rules of English law as to the relative positions of a mortgagee and of a tenant under a lease created by [illegible]

gagee is only to cause the mortgaged property to be sold for the payment of his debt. Where leases executed by the mortgagor are questioned by the mortgagee, the burden is not on the lessees to prove that the leases were usual and given in the ordinary course of management, especially where the mortgagee's dues are satisfied by sale [illegible] granted by the [illegible]ad under S. 66 of [illegible]ly generally to all [illegible] acts which either [illegible] possession, and [illegible] rendered insuffi- [illegible] never intended to apply [illegible] session is unsou[illegible] RAMAS RAY [illegible] Pat.L.T. 95.

———S. 67—*Prohibition of sale by usufructuary mortgagee—Principle underlying.*

The principle underlying the statutory prohibition of [illegible] that the mortgagee [illegible] satisfaction of his [illegible] fixed for payment [illegible] this forfeiture that [illegible]ure and sale' and its [illegible]ed to the remedies [illegible] *Singh and Skemp, JJ.*) MT. MOHAN DEVI *v.* NAWAB TALIH MEHDI KHAN [illegible]

T. P. ACT (1882), S. 68.

money on the expiry of the term fixed—Decree for recovery of money by sale, if justified.

Where in a usufructuary mortgage for a fixed term, there was among others, an express provision entitling the mortgagee to recover his money on the expiry of the term fixed, mortgagee is entitled after the expiry of the term fixed the to sue for and obtain a decree for sale under S. 68 (1) (*a*) read with S. 67 of the T.P. Act. The two sections taken together to justify a decree for recovery of money by sale of mortgaged property. (*Niamatullah, Ag.C.J. and Verma, J.*) RAM KUMAR *v.* MAHPAL SINGH. **1938 A.W.R. 27 (H.C.)= 1938 R.D. 230=1938 A.L.J. 18.**

——**S. 68 (1) (c)**—*Applicability—Non-payment of rent by mortgagor tenant—If amounts to depriving mortgagee of the possession of the mortgaged property.*

Where a mortgagor is left in possession of the mortgaged property as a tenant of the mortgagee, mere non-payment of rent by him, cannot be considered to be a wrongful act on the part of the mortgagor depriving the mortgagee of the possession of the lands mortgaged. So long as the tenancy is not disputed any dispute as to the nature of tenancy cannot be said to deprive the mortgagee of part of his security. To such cases S. 68 (1) (*c*) of the T. P. Act is not applicable. (*Niamatullah, Ag.C.J. and Verma, J.*) RAM KUMAR *v.* MAHPAL SINGH. **1938 A.W.R. 27 (H.C.)= 1938 R.D. 230=1938 A.L.J. 18.**

——**(as amended by Act XX of 1929), S. 92**—*Co-mortgagor redeeming entire mortgage—If can claim contribution from co-mortgagors by foreclosure or sale of their shares—Punjab.*

If a subsequent mortgagee or purchaser pays off a mortgage he is subrogated to the rights of the prior mortgagee whose debt he discharges. Similarly a redeeming co-mortgagor is subrogated to the rights of the original mortgagee, as regards his rights to claim contribution from the co-mortgagors by foreclosure or sale of their share in the mortgaged property. Indeed, the position of the co-mortgagor is much stronger than that of a subsequent mortgagee or purchaser who pays off a prior mortgagee, for, under the law it is incumbent on the mortgagor to pay the entire mortgage charge before he can redeem his own share of the mortgage. This equitable principle is equally applicable in the Punjab. (*Tek Chand and Abdul Rashid, JJ.*) ABDUL GHAFUR KHAN *v.* MANGAT RAI GANGA SAHAI. **A.I.R. 1938 Lah. 184.**

——**S. 100, Proviso**—*Applicability—Auction-purchaser—Nankar created by Settlement Court decree—If constitutes charge—Liability of auction-purchaser of property to pay nankar arrears.*

An auction-purchaser takes the property of the judgment-debtor subject to the charge on that property. A purchase by an auction-purchaser is not a transfer to which the T. P. Act applies. As the T. P. Act does not apply to him, the proviso to S. 100 of the Act does not apply to him, and consequently he can get no benefit under it. Nankar created by a Settlement Court decree and entered regularly every year in the under-proprietary khewats and also in the wajib-ul arz, constitutes a charge on the village. Consequently a mortgagee of nankar rights is entitled to recover arrears of the said nankar from an auction-purchaser of the village, and the latter cannot avoid the liability of payment by virtue of S. 100 of the T.P. Act on the ground that he was a *bona fide* transferee without notice. (*Srivastava, Ag.C.J., Zia-ul-Hasan and Hamilton, JJ.*) HAR NARAIN *v.* BANK OF UPPER INDIA. **172 I.C. 855=1938 O.A. 70= 1938 O.W.N. 62 (S.B.).**

TRUSTS ACT (1882), S. 90.

——**S. 108 (j)**—*Transfer by lessee—Option of lessor to enforce his rights against lessee or to proceed against the transferee—Mortgagee from lessee with knowledge of original lease and its terms—Subsequent payment of rent by mortgagee—Lessor, if can sue such mortgagee for rent.*

S. 108 (*j*) of the T. P. Act while giving the lessee the right to transfer his interest, also lays down that the lessee shall not by reason only of such a transfer cease to be liable for the obligations under the lease. This latter provision is for the benefit of the lessor and he has the option either to take advantage of it and to enforce his rights against his lessee alone or to accept the transfer and sue the transferee for the enforcement of his rights under the lease. Where a mortgagee from a lessee had not only notice of the terms of the original lease between his mortgagor and the lessor, but also actually undertook by an express term in the deed of mortgage in his favour, to pay the rent to the original lessor and did in fact pay it to him, such a mortgagee is a person claiming under a party, to the original lease, by a title arising subsequent to the contract of lease. As such the lessor is entitled to sue such a martgagee for the rent fixed in the original lease. The principal that a sub-lessee or mortgagee of lessee rights is not *ipso facto* brought into direct relations with the lessor, cannot be applied to a case where the mortgagee has paid rent to the lessor and the latter has accepted it from him. (*Niamatullah and Verma, JJ.*) GIRENDRA NARAIN *v.* GANGA NARAIN. **1938 A.L.J. 66= 1938 R.D. 205=1938 A.W.R. 68 (H.C.).**

TRUST—*Creation of—Essentials—Charitable endowment by a Hindu in Punjab.*

For the foundation of a charitable endowment by a Hindu in the Punjab, no writing is required. What is necessary is that the purpose be clearly specified and that the property intended for the endowment should be set apart as dedicated to that purpose. It is necessary that the donor should divest himself of the property. The evidence of divestiture may be contemporaneous in such a case the subsequent acts and conduct of the donor are irrelevant and cannot re-invest him. (*Lord Thankerton.*) SUNDER SINGH *v.* SUNDER SINGH. **172 I.C. 993=47 L.W. 239= A.I.R. 1938 P.C. 73 (P.C.).**

TRUSTS ACT (II OF 1882), S. 90—*Scope—Claim to benefit of—Burden of proof—Lands held by individual Hindu Coparcener under grant by Government—Subsequent grant of lease with full occupancy rights—Right of family to claim benefit of grant.*

S. 90 of the Trusts Act is based on the principle that no person who is in a fiduciary capacity or position can make a profit out of that position to the detriment of persons who are actually interested with himself in the property held by them all. In other words, a person who is a limited owner by reason of his position must not utilise that position to obtain an advantage to the detriment of his co-owners. It is not necessary that the other persons should make out that the advantage was obtained fraudulently or by misrepresentation or by suppression of the true facts. All that the section says is that if there is a person in a fiduciary relation to another, be cannot take advantage of that position so as to gain something exclusively for himself which he otherwise would not have obtained or but for the position which he held. Where a lease of Government lands with full occupancy is made to an individual member of a joint Hindu family *eo nominee* and for himself—the lands having been held by him under a grant to himself *eo nominee* and for himself—the other members of the family cannot claim the benefit of the lease under S. 90

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of the Trusts Act, unless upon proof that the property belonged to the family as a whole when the lease with full occupancy was granted. (*Rangnekar, J.*) DATTATRAYA SITARAM *v.* SHANKAR. 40 Bom. L R. 118.

——S. 90, Ill. (b)—Applicability—Fiduciary capacity —Grant of Sheri land by Government to member of Hindu joint family—Grantee named in patta individually—Subsequent enlargement of tenure by grant of full occupancy rights to heirs—Benefit of grant—Right of joint family to claim. *See* HINDU LAW—JOINT FAMILY. 40 Bom L R. 116.

UNITED PROVINCES AGRICULTURISTS' RELIEF ACT (XXVII OF 1934), S. 2 (2) (a)—*Agriculturist—Person paying revenue on house sites.*

Where the revenue paid by a person was on account of house sites and not on account of 'land' as defined in in the Tenancy Act, the revenue payable by such a person is not 'land' revenue' within the meaning of S. 2 [illegible]

——S. 30 (2)—*Construction—'If a decree has already been passed'—Meaning of—Benefit of S. 30 (2) who can claim.*

The words 'if a decree has already been passed' occurring in S. 30 (2) of the Agriculturists' Relief Act, on a proper interpretation, must be taken to refer only to the date on which the debtor makes his application under S. 30 of the Act and can have no reference to the date of the decree. The benefit of S. 30 (2) can be claimed even by those Judgment-debtors against whom decrees have been passed after the Act came into force. (*Harries and Rachhpal Singh, JJ.*) ABDUL NOOR *v.* BRIJ MOHAN SARAN. 1938 A L J. 107= 1938 R D. 223=1938 A.W.R. 75 (H.C.).

——S. 30 (2)—*Mortgage suit—Plea of interest being excessive—Later* ex parte *mortgage decree—Mortgagor, if can apply under S. 30 (2) for reduction of interest*—Res Judicata.

Where in a mortgage suit the mortgagor after raising the plea of the interest being excessive, failed to appear at the later stages and an *ex parte* decree was therefore passed, it is open to such a mortgagor [illegible] quently under S. 30 (2) of the Agricultur[illegible] for reduction of interest. The principle [illegible] can possibly have no application to such [illegible] the Agriculturists' Relief Act applies. In spite of the fact that S. 30 (2) of the Act [illegible] there is no doubt that a debtor is [illegible]

[illegible]

If necessary.

The definition of landlord i[illegible] Act is perfectly clear and [illegible] therefore, no need to go to [illegible] interpreting that definition. [illegible] *Bomford, J.M.*) JAGMOHAN NATH KAUL *v.* TARUNENDRA SHEKHAR SHUKLA. 1938 O.W.N. 35=1938 R.D. 41= 1938 A.W.R. 24 (B.R.).

——S. 4—Amendment —Application under—Nonjoinder of necessary parties—Concealment of existence of persons to be joined and specific assertion of nonexistence of those persons—Amendment to add those

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persons—Permissibility. *See* C. P. CODE, O. 6, R. 17. 1938 R D. 137=1938 A.W.R. 44 (B.R.).

——S. 4—*Amendment—Powers of special judge to cause amendment in application under S. 4.*

Where an application under S. 4 of the U. P. Encumbered Estates Act has been forwarded to the Special Judge after an order under S. 6, the special Judge has no power to order an amendment of the application by adding parties. The proper authority to order or effect an amendment is the collector who must be moved in the matter. (*Darling, S. M. and Bomford, J.M.*) GUR DIN LAL *v.* SHEOBARAN SINGH. 1938 R D. 112=1938 A.W.R. 64 (B.R.).

——S. [illegible]

family. (*Darling, S.M. and Bomford, J.M.*) JAGMOHAN NATH KAUL *v.* TARUNENDRA SHEKHAR SHUKLA. 1938 O.W.N. 35= 1938 R.D. 41=1938 A.W.R. 24 (B R.).

——S. 4—*Application under by two sons—Minor son represented by mother as guardian—Mother not included in the application as heir—Amendment—If can be allowed.*

Where the two sons of a deceased debtor made an application under S. 4 of the Encumbered Estates Act and the mother signed the application as guardian for one of the sons who was a minor and an order was passed under S. 6, on an objection by a creditor that some of the heirs had not been mentioned, the applicants prayed for permission to amend their application.

Held, that it was a case where the amendment ought to be permitted to be made and that it was an oversight that the mother had not been joined, whose existence for from being concealed was fully disclosed. (*Darling, S.M.*) MURARI LAL *v.* MAHMOOD ALI KHAN. 1938 R.D. 62=1938 A.W.R. 31 (B.R.).

——S. 4—*Right to apply—Landlord—Proof of—Applicant not recorded as landlord in Khewat—Entry in papers showing him as muafidar, muafi atia Zamindaran—Settlement parcha showing applicant as* [illegible]

[illegible] ice to show that [illegible] t the fact that [illegible] not make him otherwise than as a landlord, if he be one. It is open [illegible] an applicant [illegible] "muafi atia [illegible]

[illegible] must prove conclusively that [illegible] orded as "malikan adna" in area paying Re. 1 acreage. Settlement "records in [illegible] an adna" are not really good [illegible] be checked and compared. [illegible] *ford, J.M.*) RAM SIDH [illegible] 1938 R.D. 119= 1938 A.W.R. 75 (B.R.).

——S. 4—*Right to apply under—Under proprietors transferring bulk of property by way of gift—Deed providing for right of donee to apply for mutation and to conduct and finance litigation under Encumbered Estates Act—Property retained by donors paying less than Re 1 as local rate—Application by donors under sec. 4 subsequent to transfer—Competency.*

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Certain under-proprietors transferred the bulk of ieir property to one *B* by a deed of gift, and the very ext day they filed an application under S. 4 of the ncumbered Estates Act jointly with *B*. The property tained by the under proprietors had a local rate of ss than Re. 1. *The deed of gift provided that the* onee *B* was entitled to apply for mutation forthwith id that he should conduct the litigation under the ncumbered Estates Act and find the finance for the ime. The donee started off with performing his part the contract.

Held, that the deed of gift was not merely a onditional deed of gift, but was a transfer for consieration by which the under proprietors parted with ieir proprietary rights, and handed over to *B* all the ossession that they had, and since there was nothing prevent *B* claiming mutation at any time and demandg and getting expunction of the names of his transrors in the property transferred and since the property tained by the transferors did not pay a local rate of e. 1, they were not entitled to apply under S. 4 *Darling S.M. and Bomford, J.M.*) JANG BAHADUR INGH *v.* MOTI SINGH. **1938 R.D. 83 = 1938 A.W.R. 54 (B.R.).**

——**S. 4**—*Right under—Person not qualified to* *pply at the time of coming into force of Act—Appliation by—Competency.*

An applicant who is not qualified as a landlord to pply under the Act when the Act came into force canot become qualified later on except by succession. *Darling, S.M. and Bomford, J.M.*) GANGA PRASAD . NAGAR MAL. **1938 R.D. 118 = 1938 A.W.R. 48 (B.R.).**

——**S. 4 (1) (b) and Rule 2 (3) of Rules framed under S. 54**—*Application under S. 4—Omission to give ames of all the members of the joint Hindu family—f fatal to application.*

Cl. (1) (*b*) of S. 4 of the Encumbered Estates Act nakes it incumbent on the applicant to give the names nd addresses of the remaining members of his family, rom whom he wishes to separate. Rule. 2 (3) of the ules made by the Local Government under S. 54 of the Act lays down that the names and addresses of *all* memers of such a family, who do not join in the application, hould be given. Hence the failure to disclose the preence of other members of a family, is a fatal flaw in he application. (*Darling, S.M. and Bomford, J.M.*) GANGA DHAR *v.* BABU LAL. **1938 A.W.R. 5 (B.R.) = 1938 R.D. 148.**

——**S. 4, proviso 2**—*Scope—Mandatory.*

Proviso 2 to S. 4 of the Encumbered Estates Act is mandatory; and non-compliance with its terms is fatal. (*Darling, S.M. and Bomford, J.M.*) GUR DIN LAL *v.* SHEODARAN SINGH. **1938 R.D. 112 = 1938 A.W.R. 64 (B.R.).**

——**S. 6**—*Power of review—Power of Deputy Commissioner to cancel order—Proper procedure.*

The Deputy Commissioner who has passed an order under S. 6 of the United Provinces Encumbered Estates Act has no [illegible] an order passed under S. 6; if he thinks that a mistake has been made in passing the order under S. 6, the correct procedure for him to adopt is to make a reference, after hearing the parties, to the Board of Revenue which can then exercise its revisional powers under S. 46, and cancel the order. (*Darling, S.M. and Bomford, J.M.*) GUR DIN LAL *v.* SHEOBARAN SINGH. **1938 R.D. 112 = 1938 A.W.R. 64 (B.R.).**

——**S. 6**—*Review—Power to review order under—Procedure.*

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A collector or sub-Divisional Officer who has passed an order under S. 6 of the United Provinces Encumbered Estates Act should not review that order subsequently on the ground that the application under S. 4 has not been duly made. The proper procedure, if he thinks that he has made a mistake, is to submit the case to the Board of Revenue under S. 46. (*Darling, S.M. and Bomford, J.M.*) HAR PRASAD *v.* PARMESHWARI DAS. **1938 R.D. 132 = 1938 A.W.R. 44 (B.R.).**

——**S. 7**—*Proceedings in execution in Court not situated in U. P.—If can be stayed—C. P. Code, O. 39, R. 7.*

There is no provision in the United Provinces Encumbered Estates Act for stay of execution proceedings against the property of the applicant in a Court not situated in the United Provinces. Nor can such an order be passed under O. 39, R. 7, C. P. Code. An order staying sale of property in execution of a decree is not an order for 'preservation' of that property. Moreover, under O. 39, R. 7 (*a*) the property sought to be preserved must be the subject-matter of a suit but the suit between the applicant and the creditor in the Court of the Special Judge does not relate to any property but to a debt owing by the applicant to the creditor. O. 39, R. 7, C. P. Code, has therefore, no application. (*Zia-ul-Hasan and Hamilton, JJ.*) LAL MOHAN TRIVEDI *v.* RAM CHANDRA AVASTHI. **173 I.C. 10 = 1938 O.A. 114 = 1938 R.D. 213 = 1938 A.W.R. 9 (C.C.) = 1938 O.L.R. 74 = 1938 O.W.N. 136.**

——**S. 7 (a)**—*Construction—"All proceedings"—Suit for ejectment, if included.*

The expression all proceedings occurring in S. 7 (*a*) of the United Provinces Encumbered Estates Act are wide enough to include suits for ejectment. (*Niamatullah, Ag.C.J. and Verma, J.*) MUKAT BIHARI LAL *v.* MANMOHAN LAL. **1938 A.W.R. 71 (H.C.) = 1938 R.D. 103.**

——**S. 7 (b)**—*Bar of suit under—Forfeiture of tenancy owing to non-payment of rent—Suit for ejectment—If barred.*

A suit for ejectment on the ground of forfeiture of tenancy owing to non-payment of rent, is a suit 'in respect of' the arrears of rent, which must be held to be within the meaning of the word 'debt' as defined in the United Provinces Encumbered Estates Act, and hence barred under S. 7 (*b*) of the Act. (*Niamatullah, Ag. C.J. and Verma, J.*) MUKAT BIHARI LAL *v.* MANMOHAN LAL. **1938 A.W.R. 71 (H.C.) = 1938 R.D. 103.**

——**S. 14 (7)**—*Order by Special Judge that moneydecree should be passed in favour of creditor and appointing commissioner to find out exact amount due—If a decree—Court-fee payable on appeal.*

Where a Special Judge passes an order that a moneydecree should be passed in favour of the creditor, in respect of the amount found due and appoints a commissioner to find out the exact amount due, his decision amounts to a decree under S. 14 (7) of the Encumbered Estates Act. Accordingly in an appeal against that decision, Court-fee is payable as on a decree. (*Zia-ul-Hasan and Hamilton, JJ.*) JAGAT JIT SINGH *v.* MUNNOO BIBI. **172 I.C. 941 = 1938 O.L.R. 68 (1) = 1938 O.A. 113 = 1938 R.D. 212 = 1938 A.W.R. 10 (C.C.) = 1938 O.W.N. 135.**

——**S. 25**—*Costs—Creditor successfully objecting to application under S. 4 and order under S. 6—Delay in lodging objections—Right to costs.*

A creditor who succeeds in showing that an application under S. 4 of the United Provinces Encumbered

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Estates Act was not duly made and that therefore order under S. 6 should be cancelled will not be aware costs, if he is guilty of considerable delay in lodging his objection. (*Darling, S.M. and Bomford, J.M.*) HER PRASAD *v.* PARMESWARI DAS.

1938 R.D. 137 = 1938 A.W.R. 44 (B.R.).

——**Ss. 45 and 46**—*Appeal—Revision—Order of under S. 6—Right of appeal—Powers of Board of Revenue.*

Only parties to a decree or order can appeal. In orders under S. 6 of the United Provinces Encumbered

application of "any person concerned". As a decree-holder is a person concerned and is aggrieved by the order, the Board will interfere treating his appeal as a

Setting aside in revision—Powers and Duties of Board of Revenue—Plea of limitation—Susta

If the collector unwittingly gives t the United Provinces Encumbered

only—Validity.

Quære.—Whether a notice can be sent under S. 23 (6) United Provinces Land Revenue Act

co-sharer—If justified.

ted as patwari. He should not be rejected because he is a tenant and co-sharer. (*Darling S.M. and Bomford, J.M.*) NAWRANG SINGH

1938 R.D. 128 =

——**S. 24 (1)**—*Nomination ... dar's right to change his n... notice calling for same—Subseq... Second nomination—Validity.*

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——**S. 24 (1)**—*Nomination of patwari—Personal attestation by lambardar before collector—If essential—Nomination not personally attested—If not duly made—Second nomination—If can be called for.*

The Land Revenue Act only lays down that a lambardar must nominate; there is nothing in the Act which requires that the lambardars must attest their nominations before the Collector. A nomination which is not personally attested is not therefore to be regarded

——**S. 24 (1)**—*Right of nomination of patwari—Lambardars named in khewat but not named in register or list of mahals under S. 31 (b)—Right of—Proof of*

the Act. When the list of mahals shows the names of

cases are not to be used for those purposes for which other remedies by way of regular suits have been provided

BASHIR AHMAD *v.* MOHAMMAD ALI.

1938 R.D. 73 = 1938 A.W.R. 19 (B.R.).

——*...on proceedings—Widow in possession ... obtaining succession certificate—Preference—Value of certificate—Succession Act S. 387.*

———S. 34 (5)—*Objection—Plea that mortgagees of specific plots of* sir *are not entitled to sue in ejectment—If can be raised for first time in appeal.*

Though a point of law can be taken at any time, a point of mixed law and fact cannot be so raised in appeal. Prior to 1932, mortgagees of specific plots of *sir* land were never entered in the khewat, and a plea under S. 34 (5) of the Land Revenue Act to the effect that such mortgagees, not having been shown in the khewat, were not entitled to sue in ejectment cannot be raised for the first time in appeal, as it involves a question of fact. (*Bomford, J.M.*) KARHARI DUSADH *v.* SITA RAM LOHAR. **1938 R.D. 107= 1938 A.W.R. 68 (B.R.).**

———S. 39—*Scope of—Award of exproprietary rights by order of Court—Summary proceedings under S. 39, if can be availed of to abrogate such rights.*

In summary proceedings under S. 39, of the Land Revenue Act the ex-proprietary rights formally awarded by a decree of Court, cannot be abrogated. The proper procedure would be to retain the names of the exproprietary tenant in the *khatauni* until it is established by a regular suit under the Tenancy Act that they have lost their rights. (*Darling, S.M. and Bomford, J.M.*) MALKHAN *v.* ASA RAM. **1938 R.D. 192= 1938 A.L.J. (Supp.) 11=1938 A.W.R. 57 (B.R.).**

———S. 42—Decision under—If *res judicata*—Suit under S. 121—Bar. *See* C. P. CODE, S. 11. **1938 R.D. 132.**

———S. 45—*Plot proprietor—If a co-sharer 'of' the mahal.*

Any identification of a plot proprietor with a co-sharer 'of' a mahal so far as S. 45 of the Land Revenue Act is concerned, is based on a misinterpretation of S. 142 of the Act. (*Darling, S.M. and Bomford, J.M.*) RAHMAT ULLAH MIAN *v.* RAM KISHORE MISRA. **1938 R.D. 74=1938 A.W.R. 6 (B.R.).**

———S. 56—'Nadhwana', if a cess. *See* AGRA TENANCY ACT, S. 132. **1938 A.W.R. 38 (B.R.).**

———S. 86—'Nadhwana', if a cess. *See* AGRA TENANCY ACT, S. 132. **1938 A.W.R. 38 (B.R.).**

———S. 107—*Application for imperfect partition—Village suffering from serious fluvial action—Duty of partition officers.*

Where a village is admittedly suffering seriously from fluvial action, an application for an imperfect partition in respect of such a village ought never to be entertained at all. (*Darling, S.M. and Bomford, J.M.*) RAM NATH *v.* KANHAIYA LAL. **1938 R.D. 28= 1938 A.W.R. 25 (B.R.).**

———S. 109—*Scope and effect of—Claim—When can be made.*

Under S. 109 of the U. P. Land Revenue Act any party to a partition can apply to have the partition quashed up to the date of the confirmation of partition. Any co-sharer is legally entitled to put in a claim under S. 109 at the last posssible moment. (*Darling, S.M. and Bomford, J.M.*) RAM NATH *v.* KANHAIYA LAL. **1938 R.D. 28=1923 A.W.R. 25 (B.R.).**

———S. 121—Suit under—Prior decision under S. 42—If a bar. *See* C. P. CODE, S. 11. **1938 R.D. 133.**

UNITED PROVINCES MUNICIPALITIES ACT (II OF 1916), Ss. 3, Cl. (1) (a) and 337 (1)—*Municipal area and notified area—Distinction between.*

The case of a municipal area is different from that of a notified area. The distinction is this, that while an agricultural village cannot be included in a notified area under S. 337 of the U. P. Muncipalities Act, any local area may be declared to be a municipality under S. 3 (1) (a) of the Act. (*Ganga Nath, J.*) PANGUWA *v.* RATAN SINGH. **1938 A.L.J. 69=1938 R. D. 228= 1938 A.W.R. 56 (H.C.)=A.I.R. 1938 All. 129.**

———S. 337—*Notification under—Effect of—Finality—Zamindar, if can claim right in soil in respect of notified area.*

According to S. 337 of the U. P. Municipalities Act a notification is to be made by the Government in respect a local area other than an agricultural village. The decision of the Local Government that a local area is not an agricultural village is final and conclusive. After a notification under this section, it cannot be contended that the area in respect of which it is made, is an agricultural village. So a zamindar cannot claim any right in the soil in respect of any portion in the notified area. (*Ganga Nath, J.*) PANGUWA *v.* RATAN SINGH. **1938 A.L.J. 69=1938 R.D. 228= 1938 A.W.R. 56 (H.C.)=A.I.R. 1938 All. 129.**

UNITED PROVINCES REGULATION OF SALES ACT (XXVI OF 1934), S. 3—*Valuation—Rules as to*—Sir *fields—Deduction from recorded rent—If justifiable*—Khattas *in possession of mortgagees—No profits shown—Calculation of value at 50 times land revenue—Propriety—Valuation—Determination—Duty of Collector.*

For purposes of valuation of *sir* lands, a deduction of two annas in the rupee from the recorded rent, is not justified by the rules. Where no profits were shown with reference to some *khattas* as they were in the hands of mortgagees, the valuation should nevertheless be calculated only on the basis of 70 times the profits and not on the basis of 50 times land revenue. The Act lays a duty on the Collector to determine the valuation, and not to accept any figure given by the patwari. (*Darling, S. M. and Bomford, J. M.*) FAUJDAR SINGH *v.* SUBHADRA KUER. **1938 R.D. 60=1938 A.W.R. 10 (B.R.).**

———S. 3 (3)—*Consideration of valuation—Notice for—Service—Avoidance*—Bona fides—*Test—C nsiderations.*

While there is no doubt that the service of notices under the Regulation of Sales Act is often very slack and also dishonest, it is equally notorious that judgment-debtors who have no case at all try to avoid the service with a view to prolong the proceedings. Therefore if there is no *prima facie* reason for the decree-holder to attempt to get the property by dishonest means, there is the less reason to suspect the *bona fides* of the process server's report and the more reason to scrutinise the conduct of the judgment-debtor. (*Darling, S.M. and Bomford, J.M.*) RAM PALTAN MISRA *v.* BASDEO SINGH. **1938 R.D. 76=1938 A.W.R. 32 (B.R.).**

———S. 4 (a)—*Application under—Proper order to be passed—Duty of Assistant Collector.*

Where on an application by the decree-holder under S. 4 (*a*) of the U. P. Regulation of Sales Act, the Assistant Collector passed an order that the valuation be accepted and that the property be transferred to the decree-holder in satisfaction of his decree less a particular amount.

Held, that it is an erroneous order and that it was the duty of the Assistant Collector in such case to transfer the property to the decree-holder in full satisfaction of his claim. (*Darling, S.M. and Bomford, J.M.*) FAUJDAR SINGH *v.* SUBHADRA KUER. **1938 R.D. 60=1938 A.W.R. 10 (B.R.).**

———S. 5—*Order transferring property—Review—Power of Collector to set aside—Proper procedure.*

A Collector has no power to set aside on review an order transferring the property to the decree-holder under S. 5 of the U. P. Regulation of Sales Act. If he

U.P. REGULATION OF SALES ACT (1934), S. 5.

thinks that it should be set aside, he should report to the Board of Revenue in revisio
Bomford, J.M.) MAHABIR SI
1938 R.D. 115=1.

——S. 5—*Review—Order*
Board preferred—Application to Collector for review—Competency.

No application for review of an order under S. 5 of the U. P. Regulation of Sales Act transferring perty to the decree-holder will lie, when against order has been preferred to the Revenue. *(Darling, S.M. and Bomford, J M.* BIR SINGH *v* LALTA SINGH. 1938 R D. 115=
1938 A.W.R

UNITED PROVINCES REVENUE

Para. 223—*Plot proprietor—If a co-shar to be appointed lambardar.*

A plot proprietor is not a co sharer withi ing of the rule in Para. 223 of the Revenue Manual and as such is not qualified to be appointed *(Darling, S.M. and Bomford, J.M.)* ULLAH MIAN *v.* RAM KISHORE MISRA.
1938 R.D. 74=1

——**Para. 996**—*Right to a holding an interest"—Co-sharer set aside sale.*

In order to give a co-sharer a right to apply to have a sale set aside under Para 996 of the U. P. Revenue Manual, as a person holding an interest in the property, it is not sufficient that he actually bids at the auction and is prepared to go as far in the bidding as any rival at the auction. His interest in fact only begins when the auction is over. Before the auction a mere co-

UNITED PROVINCES SUGAR CANE RULES (1934), R. 13 (1) (i)—*Interpretation—Registers and records—If should be kept at purchasing centre.*

What Sub R. (1) (*i*) of R. 13 of t Rules means is that all the registers required by R. 11 (7) shall be kept at centre and shall be "made available"

WILL.

——*Construction — Some provisions to take effect during testator's lifetime—Other provisions satisfying the requirements of a will—Effect.*

Where certain of the provisions of will were intended to take effect on its execution, but the other provisions clearly satisfied the requirements of the definition of a will as defined by S. 2 (*h*) of the Succession Act, the document must be regarded as containing provisions which make it a will and one, in respect of which a probate may legally issue. *(Mukerji and S.K. Ghose, JJ.)* GARIB SHAW *v.* SM. PATIA DASSI.
66 C.L J. 337.

——*Construction—Will in favour of wife and daughter—Nature of interest conferred.*

A will provided that after the death of the testator and even in his lifetime in case he ceased to be in possession of his senses, the wife should have proprietary

attaining majority and until that majority the wife should supervise and manage the estate and remain in possession "bataur e malikana", as a proprietor would. to be owner of after genera-

fe-interest and absolute interest was given to the daughter. *(Zia ul-* RAM *v.* MAHOMED
172 I.C. 882=
=1938 O W.N. 67.

by executor— Re- to direct executor to deposit amount.

If the beneficiary of an estate thinks that the executor

Succession The District counts of the executor and to direct him to deposit any amount in Court. *(M.C. Ghose, J.)* PROMOTHANATH DUTTA *v.* GOURDAS MAHATO. 66 C.L J. 386.

——*Probate—Granting of—Considerations.*

In connection with the question as to whether probate should or should not be granted, probability is not the main thing to be considered by a Court. It has to be satisfied as to whether the will was, as a matter of fact, executed and if so executed whether it was by a free, capable and willing testator. *(Mukerji and S. K. Ghose, JJ.)* GARIB SHAW *v.* PATIA DASSI.
66 C.L J. 337.

Court—Duty of—Locus standi *of objection—Procedure—Preliminary proceed- of issue after taking of evidence—Propriety.*

An issue on the question of the *locus standi* of an objector to contest the proceedings for the grant of a be tried and deter- It is quite wrong amination of all the *S. K. Ghose, JJ.)* IA DASSI. 66 C L J. 337.

—Province of—Question whether a kes effect immediately—Validity or ovisions.

cannot entertain questions as to the provisions of a will would take whether other provisions contain- otherwise. These will have to be determined if proper proceedings are started for the construction of the will. *(Mukerji and S.K. Ghose, JJ.)* GARIB SHAW *v.* PATIA DASSI. 66 C.L.J. 337.

——*Proof of—Omission to call writer as witness—Effect.*

The omission to call the writer of a will as a witness and to examine him, is not anything wrong, so long as the other witnesses have been examined and they have given convincing evidence. *(Mukerji and S.K. Ghose, JJ.)* GARIB SHAW *v* PATIA DASSI. 66 C.L.J. 337.

——*Proof of—Onus—Suspicious circumstances—Duty of applicant for probate.*

The burden to show the probate of which is sought, is and capable testator lies on probate, and if there are any the

WORKMEN'S COMPENSATION ACT (1923), S. 2.

execution of the will, the burden is on the petitioner to explain those circumstances. Where the testator is a man advanced in years and in extremely feeble state of health and where the disposition evidenced by the will runs counter to those admitted to have been made by him by previous wills executed by him, the burden is all the heavier on the applicant for probate. (*Iqbal Ahmad and Ismail, JJ.*) ARTHUR ALBERT UNGER *v.* MRS. MAUD MARTIN. **1938 A.W.R. 89 (H.C.)= 1938 A.L.J. 97.**

WORKMEN'S COMPENSATION ACT (VIII OF 1923), S. 2 (1) (n)—*'Not permanently employed'—Meaning of.*

The expression "not permanently employed . . . in any office of a railway" in S. 2 (1) (*n*) of the Act contemplates such servants as are not required to perform their duties continuously or habitually in the office, that is to say, indoors, but occasionally have to do out-door work in the course of their employment. The word 'permanent' denotes continuity and the expression in its concrete application will mean "not continuously working in any office". The expression "permanently employed" does not mean a railway servant who is "permanently engaged" as opposed to one who is "temporarily engaged". Accordingly a railway servant who has, in the course of his employment, to do out-door work of going round on his bicycle to deliver the office post is a servant who is not continuously or habitually working in the office, and therefore he falls within the ambit of the definition of workman in S. 2 (1) (*n*) of the Act, although he is permanently employed in the office. (*Niyogi, J.*) SECRETARY OF STATE *v.* GEETA. **172 I.C. 705=A.I.R. 1938 Nag. 91.**

——**S. 2 (1) (n)**—*Word 'administrative'—If qualifies 'District or Sub-Divisional office'.*

The word 'administrative' in S. 2 (1) (*n*) of the Act is not an adjective qualifying 'district' and "Sub-Divisional office". (*Niyogi, J.*) SECRETARY OF STATE *v.* GEETA. **172 I.C. 705= A.I.R. 1938 Nag. 91.**

——**S. 2 (1) (n) and Sch. II (i)**—*Workman—Conductor of a motor bus—If comes under the definition.*

A conductor of a motor bus is as much concerned with the operation of the mechanically propelled vehicle, as the driver is within the meaning of Cl. (*i*) of Sch. II to the Act. As such he is a workman within the meaning of the definition in S. 2 (1) (*n*) read with Sch. II, Cl. (*i*) of the Workmen's Compensation Act. (*Venkataramana Rao and Stodart, JJ.*) POLLACHI TRANSPORT, LTD. *v.* ARUMUGA KOUNDER. **1938 M.W.N. 186=47 L.W. 186.**

——**Ss. 8 (4) and 9**—*Death of an employee—Allotment of compensation to dependant—Subsequent death of dependant—Employer, if entitled to refund of amount paid.*

It is clear that once an allotment of compensation to a dependant or a distribution of compensation money among several dependants is made, the compensation, so allotted or distributed becomes the property of the defendant and if the dependant dies, the said sum being his property will devolve on his or her heirs. The right of an employer to get a refund under Cl. (4) of S. 8 can only arise when a workman dies without any dependant. S. 9 has no application to a case where money has been allotted to dependant on the death of an employee. (*Venkataramana Rao and Abdur Rahman, JJ.*) ABDURAHIMAN *v.* BEERAN KOYA. **1938 M.W.N. 124=47 L.W. 159.**

——**S. 9**—Applicability—Allotment made to dependant on death of employee. *See* WORKMEN'S COMPENSATION ACT, Ss. 8 (4) AND 9. 1938 M.W.N. 124=47 L.W. 159.

WORKMEN'S COMPENSATION ACT (1923), SCH. II.

——**S. 10**—*'Claim'—Meaning of—Demand by workman to foreman of railway for compensation—Sufficiency.*

A claim within the meaning of S. 10 of the Workmen's Compensation Act is a communication by or on behalf of the workmen from which the employer can see that a demand is being made upon him to pay compensation in respect of an accident. In the case of a very large concern like a railway company, a demand by a workman to a foreman for compensation is not a claim within the meaning of the section. (*Derbyshire, C.J. and Mukherjea, J.*) SALAMAT *v.* THE AGENT, EAST INDIA RAILWAY CO. **42 C.W.N. 341.**

——**S. 10**—*Sufficient cause for not instituting claim within six months—What amounts to.*

What amounts to sufficient cause for a workman not instituting a claim within six months of the accident can only be decided in each particular case with reference to the facts and circumstances of that case. Where the workman on returning to work three months after the accident was re-employed by the same employer in the same workshop at the same rate of wages and he continued in that employment at those wages until long after the period of six months from the happening of the accident had gone by, there was sufficient cause for his not bringing proceedings under the Workmen's Compensation Act within six months of the accident. (*Derbyshire, C. J. and Mukherjea, J.*) SALAMAT *v.* THE AGENT, EAST INDIA RAILWAY CO. **42 C.W.N. 341.**

——**S. 10**—*Workman having sufficient cause for not instituting claim within six months—Act, if imposes further time limit.*

When once the workman had, for sufficient cause, not brought his proceedings for compensation within six months of the accident, there is nothing in the Workmen's Compensation Act, the Limitation Act or in any other statute imposing a further time limit for bringing his proceedings. (*Derbyshire, C. J. and Mukherjea, J.*) SALAMAT *v.* THE AGENT, EAST INDIA RAILWAY CO. **42 C.W.N. 341.**

——**Sch. II (iii)**—*Construction—"Otherwise adapting for use, transport, or sale, etc."—Meaning of.*

The purpose of making, altering, repairing, ornamenting and finishing articles for use, transport, or sale denotes some work actually upon the article, and the words "or otherwise adapting" can in the context in which they appear only cover some physical act performed upon the article or part of the article required for the purpose of adapting it for use, transport or sale. The whole clause denotes work done physically upon the article. A person employed as a labourer in a cotton godown and who helps to unstack cotton bales or remove them from the [illegible] workman falling within Cl. (*iii*) of Sch. II o[illegible] Compensation Act; the whole proce[illegible] the bales from the stack in the godo[illegible] examination in order to enable a purchaser to take a sample, and its closing up and removal constitutes a process which may be adapting it for transport or adapting it for sale. (*Beaumont, C. J. and Sen, J.*) SAVLARAM *v.* SALUBAI. **40 Bom.L.R. 106.**

——**Sch. II (x)**—*Construction—"Working . . . pipe line"—Meaning of—Cooly employed to guard at night machinery to test water pressure in water main—If employed in working a pipe line—"Workman."*

Per *Beaumont, C. J., and Sen, J.*—The expression, "working a pipe line", in Cl. (*x*) of Sch. II of the Workmen's Compensation Act covers all work necessary in the view of the employers for the efficient working of

WORKMEN'S COMPENSATION ACT (1923), SCH. II.

the pipe line. The Court ought rather to give a wider than a narrower interpretation to the expression. The test is really whether when a man meets with an accident arising out of and in the course c
was in the position in which he v
occurred because of the work s
His particular share in the
passive, skilled or unskilled, is irrelevant.

Norman, J.—Though in some contexts "working" has a very wide significance, nection with machinery it has a more meaning and means something positive whi to make the machine work. A narrower intended in the expression "working a pipe-line" in Cl

water mains fixed to the stand pipe a recording instrument which had to be kept working for 24 consecutive

WORKMEN'S COMPENSATION ACT (1923), SCH. II.

hours. Two coolies who were employed in the water Department of the Municipality were placed on guard to watch the instrument during the night. The instrument

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, J.
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Norman J—The deceased could not be said to be
the pipe-line when his sole
external interference with the
no knowledge whatever of
orked, and was not a work-
, *Sen and Norman, JJ.*)
UNICIPAL CORPORATION.,
A.I.R. 1938 Bom 155 (S.B.).

II—SELECT ENGLISH CASES.

COMPANY—*Capital—Reduction of—Confirmation by Court—Deferred shareholders—Modification of their rights—Reduction of capital falling exclusively on deferred shares—Class meeting—Attendance by shareholders belonging to a different class—Validity of extraordinary resolution passed—Companies Act*, 1929, *S.* 55.

The directors of a company promulgated a scheme of reorganization of its capital in which a reduction of its capital from 95,000,000*l.* to 89,565,859*l.* was an integral part. 63,000 shareholders held both ordinary and deferred shares, 65,000 shareholders holding ordinary shares only and 17,000 shareholders holding deferred shares only. As a result of the scheme, the holders of the issued deferred shares were to become holders of ordinary shares, representing one half in normal value of their previous holding in deferred shares (*i.e.*) one fully paid ordinary share of 1*l.* being substituted for four fully paid deferred shares of 10*s.* each. This involved a reduction of or cancellation in some form of 5*s.* paid up on every issued deferred share, an aggregate reduction of 5,434,141*l.* of paid up deferred capital. Notice convening meetings were sent to the shareholders. The form of notice seemed to presuppose that there had to be three specific meetings—the first an extraordinary general meeting consisting of all shareholders in the company—preference, ordinary and deferred—at which the scheme in all its details as affecting the company generally, would be submitted for approval by special resolution; the second, a meeting of the ordinary shareholders only at which the scheme as affecting their particular class interests would be submitted to them separately for approval by extraordinary resolution; and the third, a corresponding meeting of deferred shareholders only, similarly convened to approve of the scheme as specially affecting their class interests. At the extraordinary general meeting, about 1,600 shareholders of all classes were present. They were invited to remain seated as they were until the business of the last of the three meetings had concluded. The class meetings of the holders of ordinary shares followed. The class meeting of the holders of the deferred shares then took place. The holders of shares of other classes than deferred shares were in the hall during this meeting, but did not take part in it. The substantial opposition to the scheme came from deferred shareholders although the ordinary shareholders were not unanimous in its favour. The proceedings were conducted in such a manner as to satisfy those present and no objection was taken by any of the shareholders present at either of the class meetings to the physical presence in the hall during the conduct of such meeting of holders of shares of a class other than that affected. A poll was demanded. The Chairman then announced the result of the polling and declared that the resolutions laid before the extraordinary general meeting had been duly carried as special resolution and that those before the respective class meetings of the holders of ordinary and deferred shares had been duly carried as extraordinary resolutions with the requisite majority. The company presented a petition to the High Court of Justice praying for confirmation of the capital reduction involved in the resolutions passed. The reduction of the company's capital was confirmed successively by Eve, J. and the Court of Appeal. A single deferred shareholder appealed to the House of Lords.

Held, (dismissing the appeal), that the reduction of capital was not *ultra vires* the company and the scheme of re-arrangement was entirely fair to the deferred shareholders and to the ordinary shareholders.

Per *Lord Blanesburgh.*—That the fairness or otherwise of the proportion in which the ordinary and the deferred shares were to be taken and given in exchange —fraud of any kind being out of the question—was a matter for the shareholders in their different classes to decide and for no one else. No consent from the deferred shareholders to the incidence of the reduction being laid exclusively upon their shares, notwithstanding that such incidence was not otherwise authorized by the Articles was either asked for or given So the reduction cannot be regarded as having been authorized by the extraordinary resolution of the deferred shareholders. The deferred shareholders' meeting which is attacked was not a separate meeting within the meaning of the Company's Memorandum of Association and apart from waiver, it could not be so regarded.

Per *Lord Blanesburgh and Lord Maugham.*—Both the extraordinary resolutions which are said to have been passed must be taken to have been duly passed, for the simple reason that the regularity of the meetings at which they were so passed is not directly in issue and because no steps have been taken to question their regularity either by application under S. 61 of the Act or by action properly constituted for that purpose.

Per *Lord Russell of Killowen and Lord Maugham.*—That the meeting was properly convened. *Prima facie* a separate meeting of a class should be a meeting attended only by members of the class. But in the present case the deferred shareholders present, with knowledge that many were in the room who had no deferred shares raised no objection, or at all events, no audible objection of any kind. So they must be taken to have assented to the meeting being so conducted and the resolution was accordingly a valid extraordinary resolution passed at a meeting of the deferred shareholders.

Per *Lord Blanesburgh and Lord Maugham.*—Art. 44 provided that the company may by special resolution reduce its capital by paying off capital, cancelling capital which has been lost or is unrepresented by available assets, reducing the liability on the shares, or othewise, as may seem expedient......Hence by this Article, the company had power to reduce its capital in any way authorized by the Companies Act, 1929.

Per *Lord Russell of Killowen.*—In view of the large number of votes in favour of the scheme given, at the meeting of deferred shareholders, by persons who also held ordinary shares, the Court should itself decide upon the evidence whether the scheme is fair to both classes.

Per *Lord Maugham.*—The extraordinary resolutions purporting to modify the rights of the holders of the

CONTRACT.

ordinary and deferred shares respectively, were on Arts. 71 and 72 of the Articles did not require the approval of or confirm. The Court could not interfere unless it w

duction is a fair or an unfair one. The holders of

Court is not entitled to substi of the directors and experts. ed with a view to the future The shareholders acting honestly are usually much better Judges of what is to their commercial advantage than the Court can be. But this proposition may not be of much value as a guide, when it is proved that the majority of the class have voted or may have voted in any way they did because of their interests as share holders of another class. CARRUTH *v.* IMPERIAL CHEMICAL INDUSTRIES, LTD. **(1937) A.C. 707.**

CONTRACT—*M*

Mistake of fact, wh
company of the c
aware that another
If company can rec

The plaintiff c registered office at branch factory at *S* plaintiff required a large supply of water. They there fore entered into a contract in 1925 with the local District Council at *S* for the supply of water at a minimum rat contract quarter. agent, a commun and *S*, demand

N and *S* at 375*l*. till 1936 when the mistake was discovered and then the plaintiff company claimed to recover the amounts overpaid from 1928 to 1935. The managing agent at Glasgow was not aware that the cheques for the larger amount was being issued, though he was finally signing those cheques blindly.

Held, that the mistake was a mistake of fact and not a mistake of law. The fact that the managing director of the company knew of the agreement of 1927 is immaterial inasmuch as he had no idea that it was being acted upon. The cause of action arises for purposes of limitation from the date of payment and notice and demand is not necessary as completion of the cause of action.

BEET SUGAR CORPORATION, LIM
URBAN DISTRICT COUNCIL.

COPYRIGHT—*Publisher of pictures—Publication of pictures outside Canada prior to 1924—Right to copyright in Canada—Canadian Copyright Act of 1924—Non-compliance with—Imperial Copyright Act of 1911, S. 25—Certificate of Secretary of State—Effect of.*

The appellant, a publisher of fine art colour prints, residing in England, brought an action against the respondents for publishing, in Toronto, a number of

DEBT.

The appellant in virtue (2) the in question were made before 1924 outside Canada.

Held, (1) that S. 42 of the Canadian Copyright Act of 1921 is only a transitional enactment designed to prevent the loss of rights existing before 1st January, 1924, and the pre-existing copyright must have been copyright in Canada. As the appellant never acquired Canada under the prior Act of 1906 and led to copyrigh in Canada before 1st , nor did he record the copyright thereof the latter Act and protect his rights, his (2) The certificate of ted under S. 25 of the mber, 1923, did not and al Act to Canada. His opera- purposes (but for those purposes only) be treated as if it were a Dominion to which the Act extended. The Imperial Act conferred no rights in Canada and it was only in respect of

by the Imperial Act. So the Imperial Act conferred no

and severally liable to pay, to a third company *T* a sum of money. A scheme of arrangement between one of the companies *S* and its creditors was sanctioned by the

was also released.

Held, that the scheme did not release the *G* company from its liability in respect of the debt to *T* company. The effect of S. 153 of the Companies Act is to give to a scheme when sanctioned by the Court under the section a statutory operation. The scheme when sanctioned by the Court becomes something quite different from a mere agreement signed by the parties. Accord and satisfaction between a creditor and one of several debtors, who are jointly and severally liable to the creditor, discharges the other debtors unless it appears from the terms of the agreement or the surrounding to reserve his ne of several not release 'S, LIMITED, *In re.* **(1937) 1 Ch. 594.**

———*Limitation — Arrangement between creditor and debtors—Creditor provided with farm produced and house—Continuous acknowledgment of debt—Statute bar—Limitation Act, 1623.*

The claimant advanced debtors who were engaged in way of loan between 1923 and 1924

a sum in cash by way of interest. Towards the end of 1926, the claimant asked the debtor to pay interest on the loan but was told by them that they were unable at that time to do so but that they hoped to pay it before long. In 1927, it was arranged between the creditor and the debtors, that as the debtors' obligation to pay interest should be discharged or partly discharged by the claimant living at a farm (leased to the debtors) rent free and his being provided with farm produced without charge. In pursuance of this arrangement, the claimant lived at the house on the farm, the rent, rates and taxes in respect of the house being paid by the debtors until 1935 when the lease of the farm to the debtors expired. The claimant was also supplied farm produce by them under the arrangement. In 1935 the debtors entered into a deed of arrangement for the benefit of their creditors. The claimant claimed to be entitled as a creditor under the deed to the sum advanced by him by way of loan. The claim was rejected by the trustee of the deed.

Held, that the arrangement made in 1927 clearly acknowledged the existence of the debt for it provided for the future discharge of interest in respect of it. The services rendered to the claimant in pursuance of the arrangement constitute a continuous acknowledgment of the debt from which as each payment was made, a new promise to pay the debt ought to be inferred. The debt constitutes a valid enforceable claim against the debtors and the trustee appointed under the deed of arrangement should admit the same to proof as the carrying out of the arrangement of 1927 takes the case out of the Limitation Act, 1623. *In re* WILSON: *Ex parte* WILSON *v.* THE TRUSTEE OF A DEED OF ARRANGEMENT. (1937) 1 Ch. 675.

INSURANCE — *Life Insurance — Husband taking policy for benefit of his wife—Death of wife—Husband continuing to pay premiums till maturity—Right of husband's estate — Lien on the policy moneys for the premiums paid.*

A husband took out a policy of insurance on his own life for the benefit of his first wife. At the date of her death the policy had no surrender value. After her death, he continued to pay the annual premiums until maturity when the policy moneys were paid to the administrators of the wife's estate and were placed on deposit in a bank. The husband in the meantime died, having appointed his second wife executrix of his will.

Held, that the husband was a trustee of the policy and while trustee, he paid the premiums to keep up the policy out of his own moneys and his estate is entitled to a lien on the policy moneys for the premiums paid by him after the death of his first wife. The executrix is entitled to be repaid out of the proceeds of the policy the total amount of premiums. SMITH'S ESTATE, *In re* BILHAM *v.* SMITH. (1937) 1 Ch. 636.

———*Motor insurance — Risk of third party liability undertaken — Exemption of liability of insurer in the case of a passenger other than a passenger carried in pursuance of a contract of employment—Contract of employment, if can be with a third party—Passenger risk how far covered by policy—Proposal excluding liability to passenger—Inconsistency between proposal and policy—Construction.*

The respondent company issued a commercial Motor Vehicle Policy to *D* against various risks, Including liability to third parties. The appellant was a widow whose husband had been killed by the negligence of a servant of *D*. She sued the respondents on the ground that *D* was entitled under the policy to be indemnified by them in respect of the third party liability. The deceased was employed by *I.B.* who had entered into a contract with *D* that he should do haulage work for them and put a lorry at their disposal for the coneyance of workmen. The deceased met his death while being carried on the insured vehicle. On the face of the proposal, the liability to passengers is excluded. Under the policy, the company will indemnify the insured against liability in respect of death or bodily injury to any person caused by or arising out of the use of the vehicle, including the loading or unloading of it. This indemnity is subject to certain proviso "provided always that the company shall not be liable in respect of:— . . . (*b*) Death of or bodily injury to . . . any person in the employment of the insured arising out of and in the course of such employment. (*c*) Death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon . . . such vehicle at time of the occurrence of the event out of which any claim arises . . ." The company undertook liability incurred when the vehicle was being used only for haulage and other trades.

Held, (1) that the proposal and the express conditions of the policy must be read together. If there is a final and direct inconsistency, the positive and express terms of the policy must prevail. (2) What is negatived under the head of passenger risk is the full passenger risk required in the case of 'private hire cars' but not required in the case of commercial vehicles. Though passenger risk in the full sense of the term is excluded, a certain limited class of passenger risk is specifically covered—namely, that described in the words in brackets in (*c*) which is in the form of an exception to an exception and thus constitutes a positive cover. (3) "The contract of [illegible]" should not be construed as subject to the [illegible] 'with the person insured by the policy'. It includes a contract with a third party. (4) The deceased was being carried for purposes of the trade in which the vehicle was engaged and as an incident of the haulage so far as *D* was concerned. So the liability which the appellant seeks to enforce is covered by the policy. IZZARD *v.* UNIVERSAL INSURANCE CO. (1937) A.C. 773.

INTERNATIONAL LAW—De facto *government—Italian Government invading and occupying territory of* E—*Recognition of* de facto *government by British Government—Bank in* E *placed in liquidation by the Italian Government—Proceedings on behalf of the Bank without the authority of the liquidator—Validity of—*De jure *monarch's rights—Whether to be recognised by courts.*

A company, the Bank of Ethiopia, was formed under the law of Ethiopia. In the course of war between Italy and Ethiopia, the fortunes turned against the latter. The Italian army entered the capital on 5th May, 1936, and from the next day, the affairs of the Bank, in the capital were conducted under the supervision of the representative of the Italian Government authorities. On 9th May, the Italian Government issued annexation proclamation. The Emperor of Ethiopia had left the capital and the country. In the middle of December, the British Government recognised the Italian Government as being in fact (*de facto*) the Government of the area of Abyssinia then under Italian control. In 20th June, a Government decree, valid according to the law as recognised and administered by the *de facto* government placed the bank in liquidation and appointed a liquidator. An action was started in September, 1936, against the National Bank of Egypt, in the name of the Bank of Ethiopia under the authority of persons who had been directors before June, and who were not, at the date of the action, acting under the direction or with the approval of the liquidator. A decree signed by the

LANDLORD AND TENANT.

convened.

Held, (1) that the Bank of Ethiopia has by virtue of the laws of the country under the laws whereof it was incorporated, been dissolved and has accordingly ceased

Government as the *de facto* government but also to any acts of that government done at any time at which they were in fact the government, though not yet recognised as such by His Majesty; (4) as the former government has departed and there is no governmental authority except that of the *de facto* government, it must necessarily assume the full responsibility of government and its acts must necessarily have the status of acts of a fully responsible government. It cannot confine itself to the protection of its military forces; (5) when His Majesty's

LANDLORD AND TENANT—*Lease—Covenant to produce under-lease to lessor—Under-lease by lessee of the whole premises—Under-lessee grants of part to the original lessee—Covenant, to the second under-lease.*

The plaintiffs, as lessors, granted a fendants for a term, of property *R*. The lease contained a covenant that the lessees will within two calendar months next after the execution of every assignment or under-lease of the *demised premises* or any part thereof produce or cause to be produced such assignment or under lease or the counter part thereof to the lessors or their agents or solicitor for registration. The defendants demised the same premises to the *M* Bank and, the same day the *M* Bank under let part of the demised premises to the defendants

plaintiffs' solicitor for registration.

Held, that the covenant applied granted by the *M* company to the under lease within the meaning PORTMAN *v.* J. LYONS & CO.

LEGISLATION—*Statute within the the legislature—Other matters incidentally Effect—True test of valid legislation— Products Act of Northern Ireland*, 1934 *and validity of—Act regulating supp Farmers outside Northern Ireland adve If entitled to remedy—S.* 4 (7) *of the Ireland Act*, 1920—*If offended against.*

that a person shall not sell milk except under and in accordance with the Act and a person shall not sell milk unless he holds a licence." The appellant is one of the farmers whose farms are situate in the county of *D*

PRINCIPAL AND AGENT.

territory of Northern Ireland but within a en in the habit to the Act and

not apply to the producers whose premises are outside Northern Ireland territory and such persons are not entitled to a producer's licence under the Act, to sell milk in that construed as imposho within Northern whether the milk rthern Ireland; (3) the Act, its pith

gers of an unregulated supply of milk. Though it may incidentally affect trade with *D*, it is not passed in respect of trade and cannot be attacked on that ground. So it does not offend the express limitations of S. 4 (7) of the Government of Ireland Act, 1920.

Per *Lord Atkin*.—If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not, under the guise of dealing with one matter in fact encroach upon

order, and good government of....Northern Ireland with the following limitations, namely....that they shall not have power to make laws in respect of the following . Trade with any thin their jurisdic-

(1937) A. C. 863.

MINOR — *Hire-purchase agreement of a motor lorry—Minor carrying on business as haulage contractor —Contract not for minor's benefit—Not binding on the infant.*

The defendant, at the time of making a contract of hire-purchase of a motor lorry, was a minor being 20 years old. The price of the lorry was 666*l*. and on the usual hire-purchase terms the minor, who was then carrontractor, entered into cial difficulties and fell In a suit to recover a the that and

the . It

minor, it was not binding on him. MERCANTILE GUARANTEE CORPORATION, LIMITED *v.*

(1937) 2 K.B. 498.

PRINCIPAL AND AGENT 1889— *Owner, meaning of— documents by agent to*

same to pledgor as trustees for sale—Pledgor fraudulently pledging elsewhere—If Bank entitled to recover the documents.

The Lloyds Bank advanced money to S. & Co., Ltd., which carried on business in Bombay and London and received by way of security for such advances Bills of lading and invoices in respect of certain merchandise. The Bank handed to S. & Co. in London the Bills of lading and invoices to enable S. & Co. to sell the merchandise as trustees for the plaintiffs on the terms of two letters executed by S. & Co. to the Bank. This practice of the Bank surrendering documents like this had been in existence for over 6 years. But S. & Co. was then in financial difficulties and unknown to the Bank pledged with the defendant Association those documents taken from the Lloyds Bank. The defendant neither knew nor had any reason to suspect S. & Co. in this matter. The Bank claimed the return of the documents and damages from the defendant.

Held, that S. & Co. were mere mercantile agents entrusted with the goods by the owner under the provisions of the Factors Act, 1889. The Lloyds Bank were the owners within the meaning of the Factors Act and S. & Co. mercantile agents employed to sell. The documents were not handed back to S. & Co., as owners but as agents to deal with them in their capacity of agents to Lloyds Bank. The defendants who acted *bona fide*, were therefore protected. LLOYDS BANK, LIMITED *v.* BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

(1937) 2 K.B. 631.

PROHIBITION—*Writ of—Quasi-judicial act of a corporate body—Declaration regarding a house that it is insanitary—Application of wrong test—Power to order demolition of house—Approval of independent authority being condition for the exercise of—Operation of writ after declaration—Corporate body if* functus officio—*House unfit for human habitation—Meaning of.*

The appellants are the owners of a house, and the respondents are a corporate body, constituted by the Singapore Improvement Ordinance, 1927, and entrusted with the duty of carrying out the provisions of that Ordinance. The respondents made a declaration that a large block of houses including the appellants' said house were insanitary within the meaning of S. 57 of the Ordinance. The appellants objected to the declaration and the respondents heard objections to the declaration. The respondents submitted to the Governor-in-Council the declaration in accordance with the provisions of Ss. 59 of the Ordinance. If the Governor-in-Council approves the declaration, the respondents may require the owner to demolish the house. The appellants applied for a writ of prohibition on the ground that the respondents had acted *ultra vires* in making the declaration.

Held, (1) that the respondents must be regarded as exercising quasi-judicial functions in deciding whether the declaration should be revoked or submitted to the Governor-in-Council. (2) That the respondents were applying a wrong and an inadmissible test in making the declaration and deciding to submit it to the Governor-in-Council. They were therefore acting beyond their powers and the declaration is not enforceable and is *ultra vires.* The respondents gave the appellants no opportunity of applying for prohibition or *certiorari* before they sent the declaration to the Governor-in-Council. In requiring the demolition they would be carrying into effect the original declaration which indeed required the approval of an independent authority. There must remain something to which the prohibition can apply, some act which the respondents, if not prohibited may do, in excess of their jurisdiction including any act, which may be done by them in carrying into effect any quasi-judicial order which they have wrongly made. The respondents are not *functus officio.* The application of the appellants is not too late and a writ must issue. (3) A proceeding is none the less a judicial proceeding subject to prohibition or *certiorari* because it is subject to confirmation or approval by some other authority. (4) A house with rooms in it which are badly lighted or ill-ventilated cannot be held to be unfit for human habitation. When a house is stated to be unfit for human habitation, it is the whole house that is being so described. ESTATE AND TRUST AGENCIES (1927), LTD. *v.* SINGAPORE IMPROVEMENT TRUST.

(1937) A.C. 898.

REVENUE—*Estate duty — Testator bequeathing annuity to widow—Annuity paid out of general income—No fund set aside to meet the annuity—Death of the annuitant—Estate duty if payable—Estate Duty Ordinance, Hong Kong, No. 3 of 1932, S. 25 (1) and (2)—Taxing Statute of Dominion or Colony—Evolution of British statute and decision of British Courts—Consideration of.*

Under the will of a testator, an annuity was bequeathed to his wife. No fund was set aside by the trustees of the will to meet the annuity to the widow of the deceased and the annuity was in fact paid out of general income of the estate as and when the annuity became due. The widow died subsequently and thereupon her annuity ceased. The respondent claimed that upon the death of the widow, estate duty became payable under S. 5 (1) of the Estate Duty Ordinance, 1932, to the extent to which a benefit accrued by the cesser of the annuity. The question arose whether there is or is not "settlement" to use the language of S. 25 (2) under or by virtue of which instrument any property or any estate or interest in any property stood, during the lifetime of the widow, limited to or in trust for any person by way of succession. Estate duty was paid in respect of the property passing under the will upon the death of the testator.

Held, that there was property of the testator in which the widow had an interest ceasing at her death, and to the extent to which a benefit accrued by the cesser of the annuity, that property was deemed to be included in the property passing upon the death of the deceased. It cannot be held that a hypothetical slice of the property passing by the will can properly be treated as an interest in the property within the meaning of S. 25 (2). The phrase "any property, or any estate or interest in any property" coupled with the words 'stands limited' refers to definite property or an estate or interest in it, which actually exists and can be properly defined. The exemption given by S. 25 (1) does not apply and estate duty is payable. In interpreting a taxing statute of a Dominion or a Colony which contains, on its face, no reference to its origin or to previous legislative history, it is not permissible to consider the evolution of any British statute or provision from which the terms or whole sections of the enactment under consideration may have been taken, or to rely on decisions as to the true interpretation in the courts of Great Britain of those terms or sections. (S. 25 of the Estate Duty Ordinance, 1932, runs thus: "S. 25. (1) If estate duty has already been paid in respect of any settled property since the date of the settlement, upon the death of one of the parties to a marriage, no estate duty shall be payable on the death of the other party to the marriage unless such person was at the time of his or her death or had been at any time during the continuance of the settlement competent to dispose of such property. (2) For the

REVENUE

purposes of this section, the term settlement means any deed, will, agreement for a settlement, or other instrument, or any number of instruments, whether made before or after or partly before and partly after the commencement of this Ordinance, under or by virtue of which instrument or instruments any property, or any estate or interest in any property, stands for the time being limited to or in trust for any persons by way of succession, and the term settled property means the property comprised in a settlement.") ARMSTRONG ESTATE DUTY COMMISSIONER.

(1937) A.C. 885

——*Income-tax—Company manu... Advances by Government—If trade... to income-tax—British Sugar Ind... Act*, 1931.

The Government made advances to a company carrying on the b... sugar from beet ... statutory scheme ... stry (Assistance) ... were intended to ...

as such in computing the balance ... for the year in which they were recei... were assessable to income tax under ... the Income-tax Act, 1918.

Per *Lord Macmillan*.—The word 'advances' is ambiguous and may either refer to prepayments of what will become due in future or be a polite euphemism for loans; but when 'advances' are declared to be 'repayable' (though only conditionally) they certainly lean to the side of loans. LINCOLNSHIRE SUGAR COMPANY *v.* SMART. (1937) A.C. 697.

——*Income tax—Guarantee to make up deficiency in the fixed dividend or pay the entire dividend to shareholders of a company—Payment by guarantor contingent and variable—If 'annual' payments—Liability to tax—R. 21 of the General Rules of the Income-tax Act*, 1918.

The appellants and another company jointly and severally guaranteed and covenanted with the trustees of ordinary shareholders of *D* company that in case the profits should be insufficient to pay the preferential fixed dividend of 7½ per cent. (*less* income-tax) for each of the first five years, the guarantors would make up and pay to the trustees a sum equivalent to the amount required to pay the aforesaid dividend or in case there should be no profits available for distribution, in respect of any of such years, the guarantors would pay to the trustees a sum equivalent to the sum required to pay the fixed divided. In some of the years, the *D* company made no profits, in others the profits made were insufficient to pay the dividend in full ...

'annual ... the mear... all Sche... that the payments were contingent and ... amount does not affect the ... 'annual payments'. The ap... sed.

Per *Lord Maugham*.—In ... must be taken to have, lik... annuity, the quality of being ... recurrence and in this case the payments had the necessary quality of recurrence. MOSS' EMPIRES, LIMITED

TRADE ASSOCIATION.

v. INLAND REVENUE COMMISSIONERS. (1937) A.C. 785.

TORT—*Damages—Injury as a result of accident—Death of the injured person a few days after accident—Law Reforms (Miscellaneous Provisions) Act of* 1934—*Loss of expectation of life—Claim for—Cause of action if survives to personal representative.*

A girl of twenty-three was seriously injured in a ... the direct result of the ... the leg. The adminis... ...er, brought an action ... for himself and his ... ...tal Accidents Acts, ... benefit of the estate of his daughther under the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934. After giving damages under the first head, the trial Court refused to award any damages for loss of expectation of life. The Court of Appeal also held that no such ... ...ured person had ... at the injured ... the period dur... ...of ... life ...

and by virtue of the Act of 1934, it survives for the benefit of her personal estate and passes to her personal representative. ROSE *v.* FORD. (1937) A.C. 826.

TRADE ASSOCIATION—*Policy of price protection—Power to place a member's name on Stop List—Demand for payment as an alternative—Rule if illegal and* ultra vires—*Larceny Act*, 1916, *S.* 29 (1)—*Person writing letter demanding payment—Whether criminally liable*

In pursuance of the policy of price protection, the rules of a Trade Association provide that no member of the Association shall sell their goods at a price other than the list price relevant thereto. Further, the Association is empowered by one of the rules to order that the name of a member committing a breach of the above rules or any other person be placed upon the Stop List unless within twenty-one days such person pays to the Association a fine to be fixed as provided for. The appellant, a member of the Association, sought a declaration that the rule is illegal and/or *ultra vires*, as necessarily contravening a provision of the criminal law contained in S. 29 (1) of the Larceny Act, 1916. It was argued that the pronouncing of such an order would constitute a felony within the meaning of S. 29 (1) of the Act.

... *bona fide* exercised the ... only of carrying out ... be demanding the pay...

... person who utters, ... contents ... any ... letter or writing ... person ...ces.

and without reasonable or probable cause, any property or valuable thing......shall be guilty of felony.") THORNE *v.* MOTOR TRADE ASSOCIATION.

(1937) A.C. 797.

WORKMEN'S COMPENSATION ACT (1925), S. 10 (ii)—*Collier—Additional duties as checkweigher and collector of union—Separate payments therefor—During those services offtime from colliery—If concurrent contracts of service—Accident in colliery employment—Basis of compensation.*

A workman, a collier, in addition to his employment as a collier in the appellant's mine, acted as sub-checkweighman at the colliery. He was also employed by his trade union to collect subscriptions on Fridays from the members. He was allowed time off by his colliery employers when doing these two duties and for the time occupied in doing these two duties he was not paid by the company, but from out of checkweigh fund and the Union. The checkweigher's function is to check the weight of coal brought to the surface in order to ensure that colliery workers who are paid by weight receive the full amount of wages to which they are entitled. The person appointed for it would be employed by the colliery workers appointing him. It was held that a checkweigher so appointed ceased to be employed by the owners but "entered upon a new employment, which was an employment by the men". It was found that a member employed to collect subscriptions is employed by the Union, the money which he collects is the union money, and the remuneration which he receives is paid out of funds belonging to the Union. The collier met with an accident in the course of his employment as collier and was totally incapacitated. He was given compensation calculated on his wages as collier alone excluding his orther income as checkweigher and union collector. He claimed that he was entitled to them also under S. 10 (*ii*) of the Workmen's Compensation Act, 1925, as earned in pursuance of concurrent contracts of service within the meaning of the section. S. 10 provides that "For the purposes of the provisions of this Act relating to 'earnings' and average weekly earnings of a workman, the following rules shall be observed.... (*ii*) where the workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer, his average weekly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident".

Held, that the earnings under each head were earnings under a concurrent contract of service within the meaning of S. 10 (*ii*) of the Workmen's Compensation Act and that the workman was entitled to have the other incomes also taken into account in fixing the compensation payable to him. UNSWORTH *v.* PEASE AND PARTNERS, LIMITED. **(1937) 2 K.B. 504.**

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N

"THE YEARLY DIGEST"

OF

INDIAN AND SELECT ENGLISH CASES.

I—INDIAN DECISIONS.

ADVERSE POSSESSION—*Landlord and tenant—Permanent tenancy—Acquisition of—Essentials—Assertion by tenant—Adjudication in judicial proceeding—Effect of.*

A permanent tenant right can be acquired by adverse possession. In such a case it is enough for the tenant pleading adverse possession to show that he continued in open and hostile possession for over the statutory period after asserting his right in an earlier judicial proceeding, and that the landlord ... of the claim put forward duri... (*Venkatasubba Rao and Abdur Ra...* RAMANKUTTI *v.* UPPARI. (1938) I M.L.J. 400.

AGRA PRE EMPTION ACT (XI OF 1922), S. 4 (1)—*Co-sharer—Who is—Entry in Revenue Papers—Effect on right of pre-emption.*

In order to be a co-sharer within the meaning of the definition in S. 4 (1) of the Agra Pre-emption Act, a person must be 'entitled' as proprietor to some share in

AGRA TENANCY ACT (III OF 1926), S. 3 (7)—"*Sub-tenant*"—*Grantee of* muafi khidmati—*Person holding under—Status of—Ss. 187 and 188*

It cannot be held that there can be ... a rent free grantee holding a *mua...* service grant is liable to have rent fixed under S. 187 of the Agra Tenancy Act, though it may also be resumed under S. 188. A person holding from such a grantee is a sub-tenant as defined by S. 3 (7) of the Act. (*Darling, S.M. and Bomford, J.M.*) BADRI TEWARI *v.* BECHAI CHAMAR. 1938 R.D. 160 = 1938 A.W.R. (B.R.) 91.

———S. 15 (5)—*Applicability—... as to delivery of possession to ... Waiver.*

Where a proprietor executes a mortgage of certain *sir* plots and makes a statement therein that he has delivered possession to the mortgagees, he must be taken to have deliberately waived his ex proprietary rights in accordance with S. 15 (5) of the Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) GHURAN PANDEY *v.* HIRA LAL. 1938 R.D. 391.

AGRA TENANCY ACT (1926), S. 29.

———Ss. 17 (1) (b) and 265 (2)—*Perpetual lease by lambardar conferring occupancy rights—All co sharers not concurring—Effect—Position of lessee*

A lambardar without the written concurrence of all co-sharers has no authority to confer occupancy rights on any one as laid down in Cl. (1) (*b*) of S. 17: but under Cl. (2) of S. 265 of the Tenancy Act a lambardar is 'entitled to settle and eject tenants'. So where a lam... onferring occupancy ...ave not concurred, ... occupancy rights is ... lessees as tenants of the holding is not thereby rendered null and void. The lessees having been duly admitted by the lambardar to the tenancy are not liable to ejectment as trespassers. (*Darling, S.M. and Bomford, J.M.*) KHARAG SINGH *v.* ISHRI SINGH. 1938 R.D. 325.

———S. 24—*Co-sharing—What constitutes.*

———S. 24—*Separated sons of occupancy tenant—Right of succession.*

Quaere.—Whether the separated sons of an occu... share in their father's ... *M. and Bomford, J.M.*) 1938 R.D. 177 = 1938 A.W.R. (B.R.) 110.

———S. 24—*Succession—Death of one of several brothers—Right of joint brothers in preference to separated brothers—Proof of separation.*

On the death of one of several brothers who are entitled to a tenancy, the brothers who are joint with him are entitled to the share of the deceased brother to the ... But in the absence ... such separation, all ... The fact that some of the brothers are sons of a different mother by the same father is not conclusive of the fact of separation (*Bomford, J.M.*) MANNU TEWARI *v.* INDERJEET TEWARI. 1938 A.W.R. (B.R.) 103 = 1938 R.D. 166.

———S. 29 (4)—*Unregistered lease—Possession in pursuance of—Admissibility of document.*

AGRA TENANCY ACT (1926), S. 29.

Where a lease required to be registered by S. 29 (4) of the Agra Tenancy Act, is not so registered, though it might not protect parties, if the zamindar had come down on them for illegal subletting, is certainly evidence as to the nature of the transaction between the parties. (*Darling, S. M. and Bomford, J.M.*) NANDAN *v.* ZAHUR. **1938 R.D. 381.**

———**S. 29 (6)**—*Benefit under—Person nearly blind—If entitled to.*

A tenant who was not a blind man, but was only a weak-sighted man is not entitled to the benefits of Cl. (6) of S. 29 of the Tenancy Act which applies only to blind persons. (*Darling, S. M. and Bomford, J.M.*) MUKARRAM ALI KHAN *v.* PURAN.
1938 A.L.J. (Supp.) 29.

———**S. 32 (2)**—*Applicability—Benefit under—Right to claim—Extent of and limits to.*

The benefit of S. 32 (2) of the Agra Tenancy Act is limited to the lifetime of the tenant or for 10 years whichever is shorter. The section cannot be read as covering the lifetime of the successors of the original mortgaging tenant. The fact that a person holds under a valid mortgage is not by itself a ground on which he can claim the benefit of S. 32 (2). (*Darling, S.M. and Bomford, J.M.*) BALGOVIND *v.* SATNARAIN LAL.
1938 R.D. 174=1938 A.L.J. (Supp.) 2=
1938 A.W.R. (B.R.) 93.

———**Ss. 44 and 99**—*Applicability—Suit under S. 44—Plea of surrender and new admission by zamindar—Zamindar's support, if converts suit into one under S. 99—Effect on limitation—Procedure to be followed.*

Where a suit is filed under S. 44 of the Tenancy Act and the defendant pleads that there was a surrender by plaintiff and that be got the lands from the zamindar, then if such plea is supported by the zamindars, the suit becomes one under S. 99 and ought to be changed accordingly and fresh issue framed as to limitation. In such a case where the plaintiff became aware of the hostile attitude of the zamindars only after filing of his suit under S. 44, the suit as filed was held to be within time. (*Darling, S.M. and Bomford, J. M.*) BADRI PRASAD *v.* BINDRABAN. **1938 R.D. 339.**

———**S. 44**—*Burden of proof of suit being in time.*

In a suit under S. 44 of the Agra Tenancy Act, it is for the plaintiff to prove that his suit is brought within limitation when it appears that the defendant has held for over 12 years by the time the suit is brought. (*Darling, S.M. and Bomford, J.M.*) AMINUDDIN *v.* ZAHIR HASAN KHAN. **1938 R.D. 190 (1)=**
1938 A.W.R. (B.R.) 119.

———**S. 44**—*Ejectment—Suit by a co-sharer lambardar—Application by the other co-sharer to be made a party—Dismissal of suit, in spite of—Propriety.*

Where a suit for ejectment under S. 44 of the Tenancy Act is filed by one of the co-sharers lambardar and where the other co-sharer applies to be made a party, it is not proper to dismiss the suit on the ground that the plaintiff could not sue alone. The proper course is to add the other co sharer and proceed with the suit (*Darling, S.M. and Bomford, J.M.*) RAM DAYAB *v.* BUDH SINGH. **1938 R.D. 323.**

———**S. 44**—*Lambardar—Power to eject co-sharer taking possession without his consent of abandoned holding.*

A lambardar can eject a co-sharer who without his consent takes possession of land vacated by a tenant, or a holding abandoned. (*Darling, S.M. and Bomford, J.M.*) BIJAI BAHADUR *v.* CHIRANJI.
1938 R.D. 379.

AGRA TENANCY ACT (1926), S. 44.

———**S. 44**—*Lease by co-sharer, pending partition proceedings—Leased plots falling to share of another co-sharer—Lessee, if can be ejected as trespasser.*

Where partition proceedings were pending, a co-sharer leases certain plots at a time when the proceedings were practically coming to an end and the co-sharer should have been in a position to know that the particular plots would fall to share of another co-sharer, the lessee of such plots is only in the position of a trespasser and cannot resist ejectment at the hands of the co-sharer to whose share, the plots ultimately fall on partition. (*Darling, S.M. and Bomford, J.M.*) MOOL CHAND *v.* JITENDRA PRASAD. **1938 R.D. 346.**

———**S. 44**—*Limitation—Starting point—Lease by Hindu widow with life-interest—Ejectment suit by reversioner—Starting point of limitation.*

In the case of a lease given by a Hindu widow holding a life-interest, it is not open to a reversioner of her husband to attack the lease so long as the lessor-widow is alive; and the limitation of twelve years for a suit by the reversioner to eject the lessee under S. 44 of the Agra Tenancy Act commences to run only from the date of death of the widow and not before that date. (*Darling, S.M.*) PITAM SINGH *v.* LILADHAR SINGH.
1938 R.D. 181=1938 A.L.J. (Supp.) 8=
1938 A.W.R. (B.R.) 98.

———**Ss. 44 and 99**—*Scope—Co-sharers—Ejectment by some only illegally and dispossession of tenant—Suit by latter under S. 99—Subsequent suit by same co-sharers for ejectment of heir of tenant—Plea by latter that plaintiffs are not landlords entitled to sue—Estoppel—If arises.*

A tenant who is illegally dispossessed by some only of the co-sharers of the joint patti has a right to sue such co-sharers under S. 44 of the Agra Tenancy Act. But the fact that he sues them under S. 99 of the Act instead of under S. 44, cannot estop him or his heir in a subsequent suit by those co-sharers for his ejectment from pleading that the plaintiffs co-sharers are not his landlords and that they are not competent to eject him as not being the whole body of co-sharers. (*Darling, S.M. and Bomford, J.M.*) BHAROSA *v.* BIJAI BAHADUR SINGH. **1938 R.D. 163=**
1938 A.W.R. (B.R.) 99.

———**Ss. 44 and 99**—*Suit to eject trespasser—No plea as to non-joinder of recorded tenants-in-chief—Later objection—Procedure to be followed.*

Where in a suit to eject as a trespasser a person recorded as *quabiz*, no plea was specifically taken as to the non-joinder of all the recorded tenants-in-chief but later on the objection is raised, it is unnecessary to make them parties. If the recorded tenants-in-chief have any rights there is nothing to prevent them from asserting their rights under S. 99, if after ejecting the trespasser, the plaintiff either takes the fields into his own cultivation or puts in another tenant. (*Darling, S.M. and Bomford, J.M.*) SHEO NARAIN *v.* SHEO RATAN. **1938 A.W.R. (B.R.) 156=**
1938 A.L.J. (Supp.) 18=1938 R.D. 248.

———**S. 44**—*Suit by recorded* sir *holders for ejectment of defendants as trespassers—Joint mahal—Existence of other co-sharers—Existence of* sir *rights—Materiality.*

The existence or otherwise of *sir* rights is a very material question in a case where the plaintiffs sue as recorded *sir* holders for the ejectment of the defendants under S. 44 of the Tenancy Act as trespassers. For if the land is *khalsa* the suit would be bad, if it is only by some of the co-sharers. (*Darling, S.M. and Bomford, J.M.*) RAM KARAN SINGH *v.* RAM BARAN DUBE.
1938 R.D. 376.

——S. 44—*Suit under—What are proper issues.*

In a suit under S. 44 of the Tenancy Act, the proper issues to be framed are firstly as to the existence of the contract of tenancy, secondly, if the former issue is decided against the defendants, whether they are liable to ejectment as trespassers and lastly, if the prior issue is decided in favour of the plaintiff, to what damages is he entitled. (*Darling, S.M. and Bomford, J.M.*) HARDAN SINGH *v.* SHIB KARAN. 1938 R.D. 347.

——S. 44—*Tenant admitted by some only of the coparcenary body—If only a trespasser.*

Where a person has not been admitted to tenancy by the whole coparcenary body, the lease is invalid and ... not a tenant. ...NGLI *v.* BHA- ... 1938 R D 269

... *from tenant holding after termination of tenancy—Status of—Mortgage over 60 years old—Effect of.*

A mortgagee from a tenant whose tenancy has expired by surrender or by death is a trespasser and can be ejected by the zamindar as such. The fact that the mortgage is over 60 years old makes no difference. (*Darling, S.M. and Bomford, J.M.*) BALGOVIND *v.* SATNARAIN LAL 1938 R D 174 = 1938 A.L J. (Supp.) 2 = 1938 A W.R. (B.R.) 93.

1938 R. D. 201.

——S. 47—*Agreement to pay enhanced rent under* ...

——S. 47—Scope—Rent suit—Compromise varying cash rent into *batai* rent—Rate of commutation not ...

ment of all ex-proprietary rights.

Where in pursuance of a decree for rent against an ex-proprietary tenant, an order in ejectment is passed in execution, all the ex-proprietary rights of the tenant are lost, for no such rights can exist after such formal ejectment. (*Darling, S.M. and Bomford, J.M.*) RAJADEI *v.* THAKUR DAS. 1938 R D. 360

——S 80—*Extension of time—Scope of—Tenant, if entitled to whole of last day—Order for ejectment on such last day—Legality—Review of order—Grounds.*

A tenant is entitled to have the whole of his last day of extension at his disposal for the satisfaction of the decree. Though an order for ejectment on such last day is not necessarily illegal, yet if the debtor appears on the following day and satisfies the Court that he did appear with money within the time allowed by law, the Court should review its order for ejectment. (*Darling, S.M. and Bomford, J.M.*) DURGA *v.* CHARAN SINGH. 1938 A L J. (Supp.) 31 = 1938 A.W.R. (B.R.) 152 = 1938 R D. 301.

——S. 81—*Services of notice under—Extensions of time—Default in payment—Order of ejectment—Review*

Where on service of a notice under S. 81 of the Tenancy Act, a tenant appears and obtains extensions of time more than once for the payment of the arrears, but does not care to appear on the expiry of the extended time, an order for ejectment is passed, his application thereafter to review the order of ejectment should not be allowed. (*Darling, S.M., and Bomford, J.M.*) SWAMI HAR SARAN DAS *v.* NATHU. 1938 R.D. 341.

——S 82—*Applicability—Mortgage by one of several co-tenants—Acquiescence by others—Effect of.*

S. 82 of the Agra Tenancy Act is not inapplicable to the case of a mortgage executed by one of several co tenants of a holding. To hold that the section does not apply in such a case would result in a number of co-tenants whittling away the tenancy by small mortgages with which the zamindar would be helpless to interfere. The co tenants must assert themselves actively as soon as they see that one co-tenant ex... ...e infringing on their rights. If they deli... ...e in it, they must pay the penalty. ... *and Bomford, J.M*) ABDUL MAJID ... D. 1938 R D. 190 (2) = 1938 A.W.R. (B R.) 120.

——S. 82—*Illegal subletting—Co-tenants not object...* *to each other's subletting—Effect—Liability to ...tment.*

As a division of the holding is not binding on the landlord without his consent in writing, it is equally not ...

...nt body did not sublet the whole holding ...saction, and thereby try to escape the consequences of their acts. (*Bomford, J.M.*) LACHHUA *v.* ... LAL. 1938 A.W.R. (B.R.) 149 = 1938 R.D. 290.

——S. 83—*Exemption under—Discretion—Grounds—Subletting of whole holding—Relief if available.*

Under S 83 of the Agra Tenancy Act, the Court in its ...

1938 A L.J. (Supp.) 29.

——S 86—*Ejectment—Notice of—Form—Inclusion of two khatas in one notice—Legality of notice.*

Where two separate khatas are included in one notice of ejectment, the notice is at the very outset bad in form. (*Darling, S.M. and Bomford, J.M.*) SALIG RAM *v.* GHANA RAM. 1938 A.W.R. (B R.) 150 = 1938 R D. 292.

——S. 86—*Ejectment—Person in possession paying sayar—If can be ejected—Appeal—New point of law.*

It is clear that a zamindar cannot under S. 86 of the Agra Tenancy Act sue to eject a person who is only in possession on payment of sayar. Such a point can be taken for the first time in ...

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point of law which can be taken at any time. (*Darling, S.M. and Bomford, J.M.*) MAHADEO SINGH *v.* GANGA RAM DAS. **1938 A.W.R. (B.R.) 86=1938 R.D. 252.**

———**S. 99**—Applicability—Suit under S. 44—Zamindar supporting defendant's plea of surrender and new admission—If converts suit into one under S. 99. *See* AGRA TENANCY ACT, SS. 44 AND 99. **1938 R.D. 339.**

———**S. 99**—Remedy under—When can be availed of. *See* AGRA TENANCY ACT, SS. 44 AND 99. **1938 R.D. 248.**

———**S. 107**—*Belated application—Inference.*

A zamindar who makes an application under S. 107 of the Tenancy Act, a year after he has taken possession, is invoking the aid of the Court under false pretences. Such an application is not intended to legalize *ex post facto* a trespass already committed. (*Bomford, J.M.*) BHAGWATI PRASAD *v.* SUNDAR KOERI. **1938 R.D. 359.**

———**S. 107**—*Scope—Abandonment by tenant-in-chief—Claim by sub-tenant to be tenant-in-chief—Burden of proof—Zamindar's right of ejectment—Delay in suing—Effect of.*

In the case of a holding which is abandoned by the occupancy tenant, the person put in possession by the former tenant-in-chief cannot claim himself to be the tenant-in chief. S. 107 of the Agra Tenancy Act does not give the sub-tenant any rights as against the zamindars. It only protects him against his tenant-in-chief in the zamindar chooses to treat the holding as abandoned, but he can in no case be a tenant-in-chief unless he proves that the zamindar has recognised him as such. The burden is of course on the sub-tenant claiming to be tenant-in-chief, but when the zamindar delays taking actions for many years, the standard of proof required of the tenant must be lowered. (*Bomford, J.M.*) NARSINGH TEWARI *v.* KESHO RAI. **1938 A.W.R. (B.R.) 101=1938 R.D. 165.**

———**S. 107**—*Tahsildar's duty before passing an order under.*

Before passing an order under S. 107 of the Agra Tenancy Act, a Tahsildar should be really satisfied that the tenant has abandoned. (*Bomford, J.M.*) BHAGWATI PRASAD *v.* SUNDAR KOERI. **1938 R.D. 359.**

———**S. 107 (1)**—*Abandonment—Tenant disappearing—No arrangement made for payment of rent—Zamindar's right.*

Where a tenant has abandoned and left the village without making any arrangements at all for the payment of rent to the zamindar, the case comes under Sub-Cl. (1) of S. 107 of the Tenancy Act and the zamindar can straightaway give a lease of the holding to anybody. (*Bomford, J.M.*) RAGHURAJ SINGH *v.* BADRI SINGH. **1938 A.W.R. (B.R.) 145=1938 R.D. 286.**

———**S. 107 (1)**—*Abandonment — Tenant quitting holding without leaving anybody in charge—Effect—Zamindar, if entitled to take possession.*

Where a tenant leaves his field, without either leaving any one in charge of it, or a sub-tenant to whom the zamindar could turn to for his rent, he must be taken to have clearly abandoned his holding as explained in S. 107 (1) of the Tenancy Act and as such the zamindar is entitled to take possession of it and put any other person in his place. (*Darling, S.M. and Bomford, J.M.*) SUKHNA *v.* SHIAM KRISHNA. **1938 A.W.R. (B.R.) 142=1938 R.D. 272.**

———**S. 123**—*Suit for declaration under—Fixed rate tenancy—Rent payable—Entry of* 'adam wasul' *—Meaning.*

Where at the settlement the rent of a fixed rate tenancy was recorded at a particular figure including an amount

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adam wasul the proper rent payable must be the rent recorded as such by the Settlement Officer and the mere fact that for some reason part was not being realized at the time of settlement will not make the whole amount any the less payable. *Adam wasul* means 'not realized' and not 'not realizable'. (*Darling, S.M. and Bomford, J.M.*) SRI NARAIN SINGH *v.* MAHARAJA OF BENARES. **1938 A.L.J. (Supp.) 28.**

———**Ss. 131, 132 and 137**—*Scope—Suit for arrears of grain rent—Suit brought after delay of three years—Claim to interest at 25 per cent.—Maintainability.*

"Siwai", though it is the usual rate on grain loans, is collected at once. A landlord who chooses to wait for about three years and then sues for arrears of his grain rent under a provision of law which is primarily intended for the recovery of cash rent should not be allowed to charge interest at 25 per cent. The Court in such a case should not allow him more than the interest usually allowed on cash rent arrears. (*Darling, S.M. and Bomford, J.M.*) RAJ KUMAR RAI *v.* RAM LAKHAN. **1938 A.W.R. (B.R.) 105=1938 R.D. 169.**

———**S. 132**—*Appraisement—Landlord resorting to remedy under S. 132—Duty as to proof.*

Where a landholder resorts to S. 132 for relief, rather than to the procedure prescribed by Ss. 137 to 139 of the Tenancy Act, he cannot expect the Courts to accept, without the strictest proof, high estimates of the produce. Definite evidence of the value of the produce should be made available to the Court. (*Darling, J.M. and Bomford, J.M.*) GANGA BALLABH *v.* RATAN SINGH. **1938 R.D. 331.**

———**S. 132**—*Suit under—Admission of claim in part by defendant—Plaintiff not appearing—Duty of Court.*

Where in a suit for arrears of rent under S. 132 of the Tenancy Act, the defendant admits the claim in part, then the Court should decree the suit to that extent, even though the plaintiff is absent. (*Darling, S.M. and Bomford, J.M.*) AJUDHIA PRASAD *v.* FATTU. **1938 R.D. 344.**

———**S. 186 (1) (c)**—Applicability—Grantee holding grant for over 50 years—No two successors to original grantee—Status of such grantee. *See* AGRA TENANCY ACT, SS. 187 AND 186 (1) (*c*). **1938 A.W.R. (B.R.) 88=1938 R.D. 304.**

———**Ss. 187 and 186 (1) (c)**—*Grant held for over 50 years, but not by two successors to the original grantee—Position of grantee — Sub-tenants from — Liability to ejectment.*

Even though the grantees may have held the grant for more than 50 years, yet until the grant has been held by two successors in interest to the original grantee, they come under S. 187 of the Agra Tenancy Act and it is wrong to hold that their status is that as defined in Cl. (1) (*c*) of S. 186 of the Act. Any one admitted to a sub-tenancy by such grantees are liable to ejectment as sub-tenant within the definition of Cl. (7) of S. 3 of the Act. (*Darling, S.M.*) UMRAO *v.* SOHAN LAL. **1938 A.W.R. (B.R.) 88=1938 R.D. 304.**

———**Ss. 187 and 188**—Muafi khidmati grant—Nature and incidents of—Grantee of—Person holding under—Status of—If sub-tenant. *See* AGRA TENANCY ACT, S. 3 (7). **1938 R.D. 160=1938 A.W.R. (B.R.) 91.**

———**S. 197 (a)**—*Grove-holder—Status of—Grove ceasing to exist—Position of grove-holder—Liability to ejectment.*

It is clear from the provisions of S. 197 of the Agra Tenancy Act that the status of a grove-holder is that of a non-occupancy tenant. Though, no doubt, the lease under which a grove-holder is presumed to hold as a non-occupancy tenant comes to an end when the grove

ceases to exist, even thereafter his position continues to be that of a non-occupancy tenant and he is therefore liable to ejectment at the instance of the landholder. The mere non-payment of rent by him cannot affect his status as a non-occupancy tenant. A non-occupancy tenant whether holding or not holding under a lease is liable to ejectment at the instance of the landholder, even though he may have continued in possession of the holding for a period of more than 12 years after the expiry of the term of a lease. (*Iqbal Ahmad, J.*) FAKHRUDDIN HUSAIN *v.* ABDUL WAHID.

1938 A W.R. (H.C.) 145 = 1938 R.D. 367 = 1938 A L.J. 208.

——**S. 227**—*Suit against collecting co-sharer—Right to share in profits actually realised.*

When a co sharer sues a collecting co sharer for profits under S. 227 of the Tenancy Act, there is no reason why the sole collecting co sharers should not share with the other co-sharers the profits actually realised. (*Darling, S.M. and Bomford, J.M.*) MADAN *v.* RAM GOPAL. **1938 R D 373.**

——**S. 248 (3)**—*Execution proceedings governed by O. 21, C. P. Code—Order confirming sale—Appeal—Forum—Either revision or appeal under para.* 1011-*A or* 1011 *of the Revenue Manual—Competency.*

Where the execution of a decree in a suit under S. 132 of the Tenancy Act is governed by O. 21, C. P. Code, an appeal against the order confirming the sale of the judgment-debtor's property lies under S. 248 (3) of the Tenancy Act, to District Judge if the value of the subject-matter exceeds Rs. 200. No appeal nor revision lies to the Commissioner under paras. 1011 and 1011-A of the Revenue Manual in such a case. (*Darling, S. M. and Bomford, J. M.*) ASA RAM *v* PARMA.

1938 A.W.R. (B.R.) 158 = 1938 R D. 254.

——**S. 265**—*Admission to tenancy by lambardar after he ceased to have any share in the patti—Validity.*

Where a lambardar had ceased to have any share in the patti, an admission to tenancy in that patti by such lambardar would be invalid. (*Darling, S. M. and Bomford, J. M.*) DAULAT SINGH *v.* SUNDAR.

1938 A.W.R. (B.R.) 155 = 1938 R.D. 247.

——**Ss. 265 and 266**—*Co trustees—Suit by one who is also lambardar but not described as such—Joinder of other trustee as co-plaintiff—If justified—Proper procedure.*

The fact that one of two co trustees who is also the lambardar, does not sue for arrears of rent as lambardar does not entitle the other co trustee to be added as a co-plaintiff in the suit. Since the plaintiff is a lambardar and is as such entitled to make collections, it is against his interests that another person should be given the right to make collections. His failure to sue as lambardar would only deprive him of his costs, but cannot justify the grant of a decree in favour of the other co-trustee as well. [illegible] *J. M.*) HIRA LAL R[illegible] PURNA.

1938 A.W.[illegible]

——**S. 266**—*Co-sharers—Suit by one only for arrears of rent—Competency—Plea that suit not maintainable—When to be raised.*

One of several co-sharers cannot maintain a suit for arrears of rent. The tenant can plead [illegible] one co sharer only is not maintainable [illegible] this plea at any stage. The mere fac[illegible] other zamindars and the son of another s[illegible] box that they have no objection to the plaintiff suing alone cannot satisfy the requirements of the law. The plaintiff co-sharer must implead all the co-sharers as parties to the suit unless he can show that he is their appointed agent or is allowed by usage or contract to sue alone. (*Darling, S.M. and Bomford, J.M.*) RAJ KUMAR RAI *v.* RAM LAKHAN.

1938 AW R. (B R) 105 = 1938 R.D. 169.

——**S. 266**—*Joint patti—Ejectment of heir of statutory tenant—Suit by some only of the co-sharers—Maintainability—Burden of proof.*

The landholder is the person entitled to sue for ejectment of an heir of a statutory tenant; and the landholder in the case of a joint undivided patti is either the lambardar or the whole coparcenary body of co-sharers, or that co sharer who is entitled to receive the whole rent of the tenant. In a suit for ejectment of the heir of a statutory tenant by two of the sharers, who do not form the whole coparcenary body and neither of whom is the lambardar, the burden is on the plaintiff to prove that they used to collect, and had a right to collect, the whole rent of the defendant. In the absence of such proof no decree for ejectment can be made. (*Darling, S M. and Bomford, J M*) BAROSA *v.* BIJAI BAHADUR SINGH. **1938 R.D. 163 = 1938 A W.R. (B R.) 99.**

ALLUVION AND DILUVION—*Accretion—Lanka—Whether accretion—Gradual formation—Meaning of.*

It cannot be laid down invariably that a lanka is not an accretion at all because its formation has not to be proved to be gradual. The recognition of title by alluvial accretion is largely governed by the fact that this accretion is due to the normal action of physical forces, the word "gradual", in reference to the formation, with its qualifications, only defines a test relative to the conditions to which it is applied. (*Varadachariar and King, JJ*) SECRETARY OF STATE *v.* MAHARAJA OF PITHAPUR. **1938 M.W.N. 301.**

——*Claim based on reformation and claim based on lateral accretion—Priority.*

Where there are two competing claims to land, one based on re formation and the other upon lateral accretion, the former must prevail. (*Varadachariar and King, JJ.*) SECRETARY OF STATE *v* MAHARAJA OF PITHAPUR. **1938 M.W.N. 301.**

——*Submerged land—Re formation—Title to—Proof—Identification—Proof required from claimant.*

All that is required to establish title by re formation to a lanka in a tidal and navigable river is identification of the site or part of the site of the lanka with the site of land which formerly belonged to the claimant and which was washed away by the river. The fact that between the submergence and the re-formation the land was wholly lost and absorbed and no part of its surface remained capable of identification in no way militates against the title based upon the re-formation. But a title founded on original ownership and identification of [illegible]

——*Lanka in river—Lateral accretion or vertical accretion—Onus of proof—Circumstances to be considered.*

In the case of a lanka in a river, which at that point [illegible] to establish the continued existence of any stream along the bank of the river which has shrunk, and when it is obvious that the course of the deep channels in the

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river must be subject to frequent changes, the lanka must be held to be a lateral and not a vertical accretion. (*Varadachariar and King, JJ.*) SECRETARY OF STATE *v.* MAHARAJA OF PITHAPUR.

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———*Submerged land—Re-formation after seventy years—Title of owner—Abandonment of right by owner—If can be presumed—Rule as to.*

No presumption of abandonment of title to submerged land can be drawn against to owner from lapse of time, although the interval may amount to about seventy years. The presumption must normally be the other way, because, in the nature of things, the owner of submerged land can exercise no acts of ownership over it during the period of it submergence. Further in the case of a river whose fluctuations in course and tendency to throw up and wash away lankas is notorious, the mere extension of the period of submersion to nearly seventy years is not enough to support a finding that the owner must be deemed to have abandoned his right to the land. (*Varadachariar and King, JJ.*) SECRETARY OF STATE *v.* MAHARAJA OF PITHAPUR.

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APPEAL—*Competency—Decree-Application for review—Rejection—Effect—If supersedes old decree—Correction of accidental slip on review application—If one passed under S. 152 or under O. 47—Appeal from original decree—Maintainability—Original decree, if superseded.*

There are three stages in a review application. The first is the *ex parte* stage when the Court may either reject the application at once or may grant a rule calling on the other side to show cause why review should not be allowed. In the second stage, the rule may either be admitted or rejected. If the rule is discharged, the case ends then and there: if on the other hand the rule is made absolute then the third stage is reached. The case is then heard on the merits and may result in a repetition of the former decree or in some variation of it. In either case the whole matter having been reopened, there is a fresh decree. When the Court rejects a review application holding that there is no ground the order is passed in the second stage and not in the third stage. There is no fresh decree. The hearing of the rule in the second stage may involve to some extent an investigation into the merits, but that does not alter the character of the order made. When the rule is discharged in the second stage, there is no fresh decree superseding the original decree, the parties being relegated to and still resting on the old decree. In such a case an appeal from the original decree is not barred, but is maintainable; and the appeal cannot be dismissed on the ground that the order dismissing the review application has the legal effect of vacating the decree from which the appeal is filed. Nor can the correcting of an error arising from an accidental slip bring into existence a fresh decree barring the right of appeal from the original decree. Such correction must in truth be deemed to be an order passed in exercise of the powers of amendment under S. 152, C. P. Code, though the Court may have passed the order on a review application, purporting to act under the review provisions of the Code. An amended decree must, in the contemplation of law, be taken as in force from the date of the original decree, as there is a well-founded distinction between a case of amendment and a case of novation or substitution. In the case of the amended decree, an appeal therefrom is perfectly competent. (*Venkatasubba Rao and Abdur Rahman, JJ.*) PAKKIRI MAHOMED ROWTHER *v.* SWAMINATHA MUDALIAR.

1938 M.W.N. 250.

BENAMI.

———New point—Point of law—If can be raised in appeal for the first time. *See* AGRA TENANCY ACT, S. 86. **1938 R.D. 252=1938 A.W.R. (B.R.) 86.**

———*New point—Question of fact—Plea based on—If can be raised for the first time in appeal.*

A suit by a mortgagee of a recorded occupancy tenant against another treating him as his sub-tenant, for arrears of rent, was decreed. But the defendant in appeal pleaded for the first time that the plaintiff had not proved his right to sue, as a mortgagee after the Act of 1926 will not be recognized by the Courts. It was held that it was clearly a point that required a definite issue to be framed on which the plaintiff could have produced the requisite evidence. The defendant never having challenged the right of the plaintiff on this question should not be allowed to raise for the first time in the appellate Court, a definite question of fact which should have been specifically raised in the Court below. (*Bomford, J. M. and Darling, S. M.*) DURPAT *v.* SHEO NARAIN. **1938 A.L.J. (Supp.) 6=1938 A.W.R. (B.R.) 96=1938 R.D. 353.**

———Right of—Decree in favour of plaintiff imposing conditions—Appeal against imposition of conditions—Adverse finding—Appealability—Test. *See* C. P. CODE, S. 96. **42 C.W.N. 492.**

ARBITRATION ACT (IX OF 1899), S. 2—*Award relating to mortgaged property situated at Sialkot—Jurisdiction of Amritsar Court to make order filing award.*

Though S. 2, Arbitration Act, does not expressly refer to the provision of the law contained in S. 16, C. P. Code, the implication is obvious when it states where the suit could be instituted. Where mortgaged property which was involved in the award is situated at Sialkot, the Court of the District Judge at Amritsar has no jurisdiction to make an order filing the award, inasmuch as if the subject-matter submitted to arbitration were the subject of a suit, the suit could not be instituted at Amritsar. (*Addison and Din Mohammad, JJ.*) GOPI CHAND *v.* KHAZAN CHAND.

A.I.R. 1938 Lah. 226.

———S. 15—*Award filed in Court—Conclusive nature of—Remedy of aggrieved party.*

An award, once it is made and filed under the Arbitration Act, is conclusive of the matters which it decides until it has been set aside by legal process. A party dissatisfied with an award may either file a suit to set aside the award or he can apply under S. 14 of the Act. (*McNair, J.*) BAL KRISHNA MOHTA *v.* BRIJMOHAN BIANI. **42 C.W.N. 367.**

———S. 15—*Award filed in Court — Effect of—Enforceability as a decree—Objection as to jurisdiction of arbitrator or validity of award—If can be raised in execution.*

Award when filed in Court is enforceable as if it were a decree of Court and an executing Court has to treat it as such and execute it. It is open to an aggrieved party to raise the question of the jurisdiction of the arbitrator by instituting a regular suit. But he cannot be permitted to raise the question in execution as the executing Court cannot go into the question as to the validity of the award or the jurisdiction of the arbitrator. (*Rachhpal Singh and Ismail, JJ.*) KRISHNA GOPAL *v.* MST. LAKSHMI BAI. **1938 A.L.J. 210=1938 A.W.R. (H.C.) 135.**

BENAMI — *Proceeding against benamidar — True owner, if bound.*

A benamidar is ordinarily deemed to be a trustee or representative of the true owner, and consequently in a proceeding by or against the benamidar the person beneficially entitled is fully affected by the rules of *res judicata*. Exceptions to this rule might exist only when

the circumstances disclose a conflict of interest between the benamidar and the real owner. 46 I.A. 1, Rel. on. (*Mukherjea, J.*) THAKUR DAS NATH *v.* KESHAB CHANDRA GHOSH. 42 C.W.N. 497.

BENGAL AGRICULTURAL DEBTORS' ACT (VII OF 1936), S. 34—*Appeal from order setting aside execution sale—Notice received by Appellate Court—Jurisdiction to hear appeal.*

As soon as an order setting aside a sale in execution of a decree is passed under O. 21, R. 90, C. P. Code,

hear the appeal after it receives a notice from the Debt Settlement Board under S. 34 of the Bengal Agricultural Debtors Act. There can be no doubt that by using the expression "other proceeding" in that section,

——**S. 34**—*Applicability—High Court decree—High Court transferring its decree to another Court for execution—Procedure on receipt of notice.*

There is nothing in the Bengal Agricultural Debtors Act which would legitimately exclude decrees of the High Court or other Courts not within the scheduled districts, from the effect of the Act. Where the High Court, after it transfers its decree for ... another Court in the same or a differe... receives the notice under S. 34 of the ... necessary for it to re-call the decree. It would be sufficient if it makes a note that proceedings in execution are stayed and sends a cop... Court. (*Ameer Ali, J.*) ... TORMULL.

——**S. 34**—*Notice for stay—Powers of Civil Court.*

the Board has given an express decision on a question of fact or on a question of mixed law and fact within its jurisdiction as provided for by the Act, as (*e g.*) that the debtor was a debtor within the meaning of the Act and that he ordinarily resided within its jurisdiction, the Court cannot sit in judgment over such decision and override it and then refuse to stay the proceedings in accordance with the notice. (*S.K. Ghose and Nasim Ali, JJ.*) HARISH CHANDRA PA... NATH SAHA.

——**S. 34**—*Notice for stay—Power ... decide if debtor is a debtor within the ...*

A Civil Court receiving notice for stay under S. 34 of the Bengal Agricultural Debtors Act, has no jurisdiction to decide the question whether the debtor is a debtor within the meaning of the Act. (... *Nasim Ali, JJ.*) SOILABALA DAS ... NANDA SARKAR.

——**Ss. 34 and 35**—*Petition fil... Power of High Court to decide if it is properly presented—Exclusive jurisdiction of Board.*

After a petition has been filed purporting to b... under S. 8 of the Bengal Agricultural Debtors A... before the events specified in S. 35 (*a*) and (*b*

place, the High Court cannot, on interlocutory proceedings, decide that the petition should not have been presended. S. 20 of the Act vests the Board with final and exclusive jurisdiction to decide its own jurisdiction. (*Ameer Ali, J.*) BAIJNATH TAMAKUWALLA *v.* TORMULL. 42 C.W.N. 481.

BENGAL COURT OF WARDS ACT (IX OF 1879), S. 10 (c)—*Appointment of receiver—Power of Court.*

Under S. 10 (*c*) of the Court of Wards Act, the Court can appoint a receiver in respect of the property ... e Court of Wards. But ... to take possession until ... the terms of the Act. (*Remfry, J.*) NATIONAL INSURANCE CO., LTD. *v.* GAGANENDRA NATH TAGORE. 42 C.W.N. 374.

——**Ss. 51 and 56**—*Suit filed in High Court—Manager of Court of Wards—If necessary party.*

The manager appointed by the Court of Wards is not a necessary party to a suit filed in the High Court. S 51 of the Court of Wards Act is not applicable to the High Court under S. 56, and therefore the ordinary procedure must apply. Wards of Court are not persons under a disability within the meaning of C. P. Code. (*Remfry, J.*) NATIONAL INSURANCE CO., LTD. *v.* GAGANENDRA NATH TAGORE. 42 C.W.N. 374.

BENGAL ESTATES PARTITION ACT (V OF 1897), S. 81—*Scope—Rent fixed by Batuara officer ... prior to partition ... well as tenant's ... plea of illegal enhancement in suit for rent—If open.*

A party who, having two capacities in a village, both ... ant, allows the partition to ... gets advantage under it, ... claim that his right as a *raiyat* has been interfered with and thereby practically

parent estate, which included five plots out of the holding of the defendants. Under S. 81 of the Estates Partition Act, the Batwara officer fixed the rent payable by the defendants to the plaintiffs on the basis of the enhanced rent. The defendants allowed the partition to proceed on that basis and raised no objection, and got assets in respect of their own share on that basis. In a suit by the plaintiffs for rent fixed under S. 81, the ... rent prior to ... ihar Tenancy ... he advantage of an enhanced asset for the purposes of the partition and having allowed the plaintiffs to get their *takhta* on that basis, could not be allowed to turn round and say

BENGAL LAND REVENUE ASSESSMENT REGULATION (III OF 1828), S. 13—*Grant of waste*

BENG. LOCAL SELF-GOV. ACT (1885), S. 148.

The right of property in the Sunderbans claimed and declared to be vested in the State by S. 13, Bengal Land Revenue Assessment Regulation (III of 1828), is not of the same category as the right of property vested in a private person which may in a sense be regarded as a derivative right. The right of property so asserted in the State in the said section is the right of property in Sovereign by reason of conquest. Such proprietary right in the Government was not of the same class as its property right in what are technically known as khas Mehals, where its position is that of a private proprietor. By the force of S. 13 of the Regulation III of 1828 alone, the State does not therefore become a 'landlord' as defined in the Bengal Tenancy Act, when it grants to a person a tract of the Sunderban forest. If the terms of the actual grant or assignment make it a landlord, that is, another matter, for the State can also grant leases of its property in such a capacity. A lotdar of the Sunderbans was granted a large block of waste land under the Waste Lands Rules of 1853. The potta conferred in terms a "proprietary right in the grant" on the grantee, his heirs, executors and assigns. It gave the grantee a right to engage with Government on conditions applicable to owners of temporarily settled estates. The grant was for a term of 99 years, giving the grantee the right to have the lands measured once and only once between the 20th and 30th year of the grant. The adjustment of the Government demand, which was termed 'revenue' on the results of the said measurements was to be the only adjustment during the currency of the term of 99 years. The grant was included in the Register A maintained under the Land Registration Act as Touzi. The lotdar claimed abatement of the amount payable by him to the Government under his engagement, on account of some portion of his grant being diluviated under the provisions of S. 52, B. T. Act.

Held, that the grant was an 'estate' as defined in S. 3 (4), B. T. Act, and the plaintiff was its proprietor as defined in S. 3 (11), B. T. Act. The relationship between the Government and the grantee not being that of a landlord and tenant, the claim for abatement was not sustainable in Civil Court as what was payable by him was revenue and not rent.

Held also (*obiter*) that the Crown Grants Act applied to grants by Government of Sundarban lands. The Crown had unfettered discretion to impose any condition, limitation or restriction in its grants and the rights, privileges and obligations of the grantee were regulated according to the terms of the grant, notwithstanding any provisions of any statutory or common law. The grant in suit assuming to be a lease was against the right conferred by S. 52 (2), B. T. Act, which must consequently give way in view of the provisions of the Crown Grants Act. (*R. C. Mitter and Biswas, JJ.*) SURJA KANTA ROY CHOUDHURY *v.* SECRETARY OF STATE.
A.I.R. 1938 Cal. 229.

BENGAL LOCAL SELF-GOVERNMENT ACT (III OF 1885), S. 148—*Order of Dt. Magistrate on petition under Rule 1 (A) of Election Rules—Revision, if lies—C. P. Code, S. 115.*

An application in revision under S. 115, C. P. Code, does not lie to the High Court from an order passed by the District Magistrate on a petition filed under Rule 1 (A) of the Election Rules. (*S. K. Ghose and Nasim Ali, JJ.*) TARA PROSAD SUKUL *v.* ABUL KASAM KHUNDKAR. **42 C.W.N. 441.**

BENGAL MUNICIPAL ACT (XV OF 1932), S. 535—*Scope and applicability.*

S. 535 of the Bengal Municipal Act cannot be taken to apply only in those cases where the plaintiff claims

BENGAL TENANCY ACT (1885), S. 104.

damages or compensation for some wrongful act committed by the Commissioners. It is clear from the wording of the section that it applies to all suits for any act purported to be done under the Act. A suit for a mere declaration would, no doubt, be exempted, but not a suit for a declaration combined with a suit for confirmation of possession and injunction. (*Jack, J.*) BIDHU BHUSAN MAJUMDAR *v.* COMMISSIONERS OF THE BARANAGORE MUNICIPALITY. **42 C.W.N. 467.**

BENGAL OPIUM SMOKING ACT (X OF 1932), S. 8—*Presumption under—When arises.*

The fact that the accused and two other persons were sitting in a room together and that one of them was smoking a preparation of opium, establishes the presumption referred to in S. 8 of the Bengal Opium Smoking Act, and if this presumption has not been rebutted in any way, the conviction of the accused under S. 7 of the Act cannot be questioned. (*Bartley and Henderson, JJ.*) PULIN BEHARI DUTTA *v.* EMPEROR.
42 C.W.N. 384.

BENGAL TENANCY ACT (VIII OF 1885), S. 5 (5)—*100 standard bighas—If must be under same title.*

There is nothing in S. 5 (5), which supports the suggestion that the tenant must hold 100 standard bighas under one and the same title. (*Remfry, J.*) KRISHNA CHANDRA MUKHERJEE *v.* MANIK LAL MUKHERJEE.
A.I.R. 1938 Cal. 246.

——**S. 22 (2) (before amendment)**—*Acquisition by co-sharer putnidar of occupancy right in holding by inheritance—Merger.*

The first two sub-sections of S. 22 of the B. T. Act as it stood before the amendment of 1928, should be read together. Where, therefore, a co-sharer putnidar of a holding acquires by inheritance the occupancy right therein, the occupancy interest merges in his proprietary interest under that section. This will be so even if the holding is non-transferable. (*Edgley, J.*) RADHAGOBINDA BISHAYEE *v.* JNANENDRA CHANDRA.
42 C.W.N. 495.

——**S. 26-F**—*Right of pre-emption—Applicant, if must be immediate landlord at time of order.*

The right of pre-emption under S. 26-F of the B. T. Act depends upon the applicant being an immediate landlord of the holding not only at the time he makes his application but also at the time when an order for pre-emption is made under Sub-S. 5 (5). (*Henderson, J.*) RAMENDRANATH RAY CHOWDHURY *v.* JITENDRA NATH CHAKRAVARTY. **42 C.W.N. 382.**

——**S. 26-J**—*Application under—Decision, if res judicata.*

Under S. 11, C. P. Code, no question of *res judicata* arises unless there has been a suit. There can be no question of *res judicata* in connexion with summary proceedings unless Legislature has made express provision on the point. The Legislature by directing that an application should be made under S. 26-J, Bengal Tenancy Act, for landlord's fee, intended that decision on that application would not operate as *res judicata* even in respect of fee payable. (*Remfry, J.*) KRISHNA CHANDRA MUKHERJEE *v.* MANIK LAL MUKHERJEE.
A.I.R. 1938 Cal. 246.

——**S. 52 (2)**—Grant of waste lands in Sunderbans to lotdar under Waste Land Rules—Part of grant diluviated—Claim for abatement—If sustainable. *See* BENGAL LAND REVENUE ASSESSMENT REGULATION, S. 13. **A.I.R. 1938 Cal. 229.**

——**S. 104**—*Assessment of land added to an estate paying revenue—Complaint of wrong inclusion of land in Diara estate—Omission to file suit—Effect of—Bengal Act (IX of 1847).*

BENGAL TENANCY ACT (1885), S. 144.

Where on assessment of land which has been added to an estate paying revenue to Government, the com plaint of the tenant is that his lands have been wrongly included in the Diara estate, he ought to institute a suit within six months of the final publi... of-rights under the provisions of the B. T. Act, and if he does not ... by the rent settled under the pro... provided the Settlement Offic... rent under S. 104. The Settl... tion to settle rent for any land local Revenue Officer to be ...

——S ...
—*One of* ...
Decree in ...

Where one suit for rent claiming two decrees in respect of two plots is instituted as contemplated by S. 144 of the B T. Act and one of the plots alone is within the jurisdiction of the Court but a decree is passed in respect of both the plots, as it relates to the plot within the Court is valid but the decree relating liable to be set aside. (*Mukher,* ... SARAT KUMAR ROY *v.* DHARMAD... JEE.

——**Sch. III, Art. 6, Proviso**—*Interpretation.*

B. ... the ... cut ... if ... and subsequently that sale has been set aside, the intervening period is not to be counted, if he then desires to go on with the execution, provided there is no further ...

BERAR LAND REVENUE CODE (1896), S. 129—*Applicability—Right of way claimed running partly over boundaries and partly through fields of others.*

Where the right of way claimed by the plaintiff does not lie altogether over the boundaries but lies in part through the fields of others S. 129 of the Berar Land ...

... easement acquired under the ordinary civil law. (*Pollock, J.*) BALIRAM SHIWAPPA KOMTI *v.* NARAYAN. 173 I.C. 266=A.I.R. 1938 Nag. 144.

——**S. 129**—*Persons acquiring right of easement under ordinary law—If need apply to Deputy Commissioner.*

S. 129 of the Berar Land Revenue Code can never have been intended to take away a right of easement or any other right acquired under the ordinary civil law. It merely gives the Deputy Commissioner power to give a right of way over the boundaries of other survey numbers, but it ... way acquired by ... not to apply to ... (*Pollock, J.*) I ...

... *trospective.*

BIHAR TENANCY ACT (1885), S. 116.

The amendment of S. 6 (3) of the Berar Patels and Patwaris Law was an alteration by way of limitation of the period within which application for assistance could be made to the Revenue Court. The right under S. 6 prior to amendment was a vested right and hence it ... dment being given ... *F.C.*) MURADBEG ... 1938 N.L.J. 94.

... S. 81. 1938 P.W.N. 147.

——**S. 88**—*Scope—Thicca lease—Amalgamation and subdivision of holdings by* thiccadar—*If binding on* ... *ng creation of new* ...

... amalgamation of ... ubdivisions thereof ... when the *thiccadar* ... ordinary course of ... *thiccadar* has been absolutely *bona fide*, that binds the landlord and it is ... course of business cannot amount to the creation of new rights. (*Manohar Lall and S.C. Chatterji, JJ.*) G. B. SOLANO *v.* UMESHWARI KUER. 19 Pat L T. 157= 1938 P.W.N. 239.

... *tion—Lease for "a term of* ... *to be one for at least two years.* ... years" in S. 116 of the Bihar ... classificatory term and mean ... definite term, any definite term of time may be measured in years though not necessarily at an even number of years. The expression "a term of years" is a generic term and means merely a period of time which can be measured in years, *e.g.*, one year or half a year. A lease for a term of years truly ... to an end ... "a term ... the term must be a term of at least two years (*Courtney-Terrell, C.J. and James, J.*) UMASHANKAR PRASAD *v.* KUNJ BEHARI THAKUR. 19 Pat L.T. 180.

——**S. 116**—*"Lease from year to year"—Meaning of—Zerait land—Lease for one year only ending on fixed date—If one from year to year—Tenant not delivering possession on date fixed—Status of—Liability to ejectment—Plea of occupancy rights—Maintainability.*

A lease for a year certain is not the same as a lease from year to year; where the former expression is used, whether the landlord takes any steps or not, the tenant ... ase comes to an end, ... is used, the tenant ... ain, and if he shall ... to quit his tenancy ... a lease for a year certain. A tenant to whom zerait land

is let out orally for one year only ending on a fixed date, is bound to deliver up possession on that date, as his right to occupy the land ceases on that land, and if he does not so deliver up possession, he becomes a trespasser liable to eviction at any time. He cannot plead acquisition of occupancy rights. (*Courtney-Terrell, C.J. and James, J.*) UMASHANKAR PRASAD *v.* KUNJ BEHARI THAKUR. **19 Pat.L.T. 180.**

——**S. 153**—*Question of title—Suit for rent valued below Rs. 100—Decision by District Judge holding that right to collect rent alleged not made out—Second appeal.*

Certain co-sharer landlords instituted rent suits against the tenants for a certain percentage of the rent on the ground that by an arrangement their co-sharer landlords were entitled to realise the rent to the extent claimed by them. The suit was valued below Rs. 100 and the co-sharers of the plaintiffs were not impleaded as parties to the suit. The tenants-defendants did not claim any interest in the land adverse to the planitiffs. The Munsif and, in appeal, the District Judge held that the arrangement set up by the plaintiffs was not established and that the plaintiffs did not prove separate collection of rent even to the extent of their shares and dismissed the suit. No question of title was decided between the parties.

Held, that no second appeal lay to the High Court, as S. 153 of the Bihar Tenancy Act barred a second appeal. (*Khaja Mohammad Noor, J.*) JAGDAM THAKUR *v.* HIRA THAKUR. **19 Pat.L.T. 212.**

——**S. 174**—Jurisdiction under—Omission to make deposit at time of application—Effect—Power of Court to set aside sale. *See* C. P. CODE, S. 151. **1938 P.W.N. 192.**

BIHAR AND ORRISSA PUBLIC DEMANDS RECOVERY ACT (IV OF 1914), S. 7—*Notice under—Service of—Validity—Form of return by process-server—If material.*

The validity of the service of a notice under S. 7 of the Public Demands Recovery Act does not in any way depend upon the form of the process-server's return of service. Where it is found that the process-server had offered the notice to the party but that he refused it, and that thereupon the process-server affixed it to the darwaza of his house, the service must be held valid according to the statutory rules under Sch. II of the Act. (*Courtney-Terrell, C.J. and James, J.*) RAMKESHWAR SINGH *v.* KESHO PRASAD SINHA. **1938 P.W.N. 202.**

——**Sch. II, R. 25**—*Notice under—Service on debtor's elder brother—Validity—Suit to set aside sale on ground of non service of notice—Burden of proof.*

Where the notice of sale proclamation under R. 25 of Sch. II of the Public Demands Recovery Act is served on the elder brother of the debtor, that is a valid service as required by the rules. In a suit by the debtor to set aside the sale on the ground that he was not informed of such service, it is for him to prove his allegation; it is not for the defendant to prove that the plaintiff knew or was informed of such service. (*Courtney-Terrell, C.J. and James, J.*) RAM KESHWAR SINGH *v.* KESHO PRASAD SINHA. **1938 P.W.N. 202.**

BUDDHIST LAW (Burmese) — *Mortgage — Equitable mortgage by Burman—Burman's wife dying leaving son—Decree passed on mortgage—Burman marrying again—Suit by son for declaration that mortgage decree did not affect his morther's share—Second marriage, if affects mortgagee's rights.*

An equitable mortgage was created by a Burman. His wife died afterwards leaving a son. A mortgage decree was passed. The Burman afterwards married

again and the execution of the mortgage decree was stayed pending the decision of a suit which was brought by the son for a declaration that the mortgage decree did not affect his mother's share of the property.

Held, that the second marriage of the mortgagor did not affect the rights of the mortgagee, the decree having been passed before the marriage and even if the first wife was not consenting party, on her death her husband became absolute owner of the property subject to the mortgage he had created and his interest in property having increasad, the increase enured to the benefit of the mortgagee. A.I.R. 1919 P.C. 14 and A.I.R. 1927 Cal. 665, Rel. on. (*Leach, J.*) MAUNG CHIT KHIN *v.* U BA. **A.I.R. 1938 Rang. 108.**

BURMA FISHERIES ACT (III OF 1905)—*Rules under—R. 45—Meaning of.*

The meaning of R. 45 of rules framed under Burma Fisheries Act is that baling is not allowed. The bar placed by the rule upon baling may be lifted at any moment by the Deputy Commissioner with the Commissioner's sanction and baling thereafter, so long as it has been continuously permitted, can be practiced without infringement of the law until the Deputy Commissioner again prohibits it. (*Roberts, C.J.*) MAUNG MON BIN *v.* THE KING. **A.I.R. 1938 Rang. 104.**

BURMA SUPPRESSION OF BROTHELS ACT (II OF 1921), S. 11 (a)—*Proper sentence.*

Where a person is convicted of an offence of managing a brothel under S. 11 (*a*) of Burma Suppression of Brothels Act, a sentence of fine or in default imprisonment is entirely inadequate in such a case. To stamp out an offence of this kind it is proper that the offender should be sent to prison. (*Roberts, C.J.*) M. ULLA *v.* THE KING. **A.I.R. 1938 Rang. 107.**

CALCUTTA HIGH COURT RULES (Original Side), Ch. XIX, Rr. 1 and 2—*Effect of—Suit filed by certificated guardian of lunatic without affidavit of competency—Jurisdiction of Court to entertain suit—Subsequent filing of such affidavit—Effect of.*

The effect of R. 2 read with R. 1 of Chapter XIX of the Original Side Rules is to require that the next friend of a person of unsound mind, in whose name the suit is instituted, shall make an affidavit to be presented with the plaint that he has no interest directly or indirectly adverse to that of the lunatic. But where a suit is instituted by a certificated guardian of the lunatic, who alone is competent to act as his next friend under O. 32, R. 4 read with O. 32, R. 15, C. P. Code, the failure to present an affidavit of competency by him along with the plaint does not oust the jurisdiction of the Court to entertain the suit. It is no more than a defect of procedure which the Court itself has power and discretion to cure. When the defect is subsequently cured by the filing of an affidavit of competency, the filing of such affidavit relates back to the date when the plaint was presented to the Court and admitted by it. (*Khundkar, J.*) RABINDRA NATH MITTER *v.* PURNA CH. SINHA. **42 C.W.N. 422.**

CALCUTTA POLICE ACT (IV OF 1866), S. 3—*Betting slips—If instruments of gaming.*

As gaming includes wagering or betting, the slips, if they are used for the express purpose of facilitating betting operations, would certainly come within the mischief of the definition of "instruments of gaming" under S. 3. (*Mukherjea, J.*) ABDUL LATIF *v.* EMPEROR. **A.I.R. 1938 Cal. 237.**

——**S. 47**—*Interpretation—If creates a presumption.*

Though the words "until the contrary is made to appear" in S. 47 are rather appropriate to a presumption in the technical sense of the word, yet the absence

C. P. DEBT CONCILITION ACT (1933), S. 21.

of any word like "may presume" or "shall presume" in the section is very much significant; the discovery of the instrument of gaming in the place on a proper search which is contemplated by the Act would be an evidence not only to prove the existence of these instruments in that place, as an element to constitute a common gaming house but it would be an evidence on the other point also, as regards the making of profits or gain by the owner or occupier, etc., of the place, although according to the ordinary law it cannot be treated as an evidence of the other fact. When the prosecution relies upon S. 47, the accused can certainly explain away the whole circumstances and "show the contrary" as the section lays down. If the explanation is sufficient, the evidence practically loses its force; if on the other hand no explanation or evidence to the contrary is coming from the side of the accused, a duty is cast upon the Court, to weigh and appraise the evidence in the best manner possible and he may if he thinks proper convict the accuse[illegible] though he is not bound to do so.
Rel. on. (*Mukherjea, J.*) ABD[illegible]
ROR.

CENTRAL PROVINCES DEBT CONCILIATION ACT (II OF 1933), S. 21 (as amended by Act XIV of 1935)—*Amendment, if retrospective.*

Looking at the question as a whole, it is clear that the amendment of S. 21 by Act XIV of 1935 is not merely procedural, but that it affects substantive rights and so in the absence of express words to that effect, it ought not to be applied to pending proceedings. (*Stone, C.J. and Bose, J.*) GANESH PRASAD *v.* GOPAL.

1938 N.L.J. 101.

CENTRAL PROVINCES TENANCY ACT (I OF 1920)—*Policy of—Gift of sir land—Surrender of occupancy right to donee—Validity—Duty of Court.*

The policy of the C. P. Tenancy Act is to secure and preserve to a proprietor whose proprietary rights are transferred a right of occupancy in his *sir* lan[illegible] policy cannot be defeated by the proprietor gift of his *sir* land and then as part of the sar saction surrendering his occupancy right to th[illegible] Whenever it appears that a transaction is void as con trary to the policy of a statute, the Court should take notice of the nullity and proceed accordingly. (*Stone, C.J.*) SIDNATH *v.* JASODA BAI.

10 R.N. 287=173 I.C. 145 (2).

CERTIORARI—Writ of—Revenue Court—Suit by holder of o[illegible] inam land [illegible] —Decree b[illegible] Applicatior[illegible] petency. *See* MADRAS HER[illegible] OFFICES ACT, SS. 13 AND 21.

CHAMPERTY—Plea of—Person not party to agreement—If can set up champertous nature of agreement. *See* CONTRACT ACT, SS. 201 AND 202.

1938 M.W.N. 259.

CHOTA NAGPUR TENANCY ACT (IV OF 1908), S. 64—Applicability—Land held by occupancy raiyat for purpose of cultivation—Bulk of land brought under cultivation—Trespasser reclaiming part of are[illegible] of—Right to remain in possession as against raiyat. *See* LIMITATION ACT, ART. 142.

1938 P.W.N. 194=19 Pat.L.T. 133.

CIVIL PROCEDURE CODE (V OF 1908), S 11—*Arbitration proceedings—Award filed under Arbitration Act*—Res judicata.

It is difficult to see why an award filed under the Arbitration Act should not have the same force with regard

C. P. CODE (1908), S. 11.

to the question of *res judicata* as a decree based on award under Sch. II, C. P. Code. (*McNair, J.*) BAL KRISHNA MOHTA *v.* BRIJMOHAN BIANI.

42 C.W.N. 367.

———**S. 11**—*Co-defendants—Decision, when* res judicata.

To establish *res judicata* between co defendants it should be established that there was conflict of interests between co defendants; that it was necessary to decide that conflict in order to give plaintiff the relief which he claimed; that the question between the co defendants was finally decided. A.I.R. 1931 P.C. 114, Rel. on. In a suit by *K* for partition against *J* and *X*, *J* who was in possession of the entire property did not put in any appearance and it was decided that *K* was entitled to a certain share in accordance with a particular pedigree table. Thereafter *X* put in applications for their shares under a different pedigree table, whereupon *J* brought a suit for a declaration that *X* would be [illegible] accordance [illegible] suit, which fact [illegible] at point was *res* [illegible] ing co-defendants in *K's* suit.

Per *Bhide and Dalip Singh, JJ; Skemp, J.*, contra. *Held*, that the question of preference between the two pedigree tables was neither raised nor decided as between the co-defendants in *K's* suit, nor was it necessary to decide that in that suit, hence decision in *K's* suit, was not *res judicata* in favour of *J* in his suit against *X*. (*Bhide, J, on difference between Dalip Singh and Skemp, JJ.*) RURA *v.* BANTA.

A.I.R. 1938 Lah. 227.

———**S. 11**—*Co-defendants*—Res judicata—*Conflict of interests between defendants* inter se—*Necessity.*

The doctrine of *res judicata* cannot apply between co-defendants unless it is impossible for the plaintiff to get his right without the matter having been tried and [illegible] question between the co defendants was finally decided. It is not enough if a conflict was merely possible; there must have been an actual conflict between the co-defendants *inter se* before the principle of *res judicata* can apply as between them. Where a defendant allows the [illegible] *anman.* [illegible] W. 374.

———**S. 11**—*Competent Court—Rent suit—Variation in the rent—Compromise decree by Tahsildar—If* res judicata *in subsequent suit—Agra Tenancy Act, S.* 47.

A decree or order which sanctions a variation from the recorded cash rent must be the decree or order of a Court of competent jurisdiction. A Tahsildar is not a [illegible] any decision as [illegible] the provisions of [illegible] ere in a suit for [illegible] providing *inter alia* that the rent payable would be *batai* and not cash rent, an order of the Tahsildar recording the compromise and passing a decree in terms of the compromise is without jurisdiction, especially when the compromise never states the rate at w[illegible] taker confers no benefit at all [illegible] tains

specific admission as to the cash rent recorded being wrong, contains no bargain and makes no change in the papers. Such a decree cannot operate as *res judicata* between the parties in a subsequent suit; and the fact that the tenant has in a subsequent suit remained *ex parte* and allowed a decree to be passed against him on the basis of the compromise decree cannot estop him from challenging the validity of the same in a subsequent suit. (*Darling, S.M. and Bomford, J.M.*) RAJ KUMAR RAI *v.* RAM LAKHAN. 1938 A.W.R. (B.R.) 105 = 1938 R.D. 169.

——S. 11—*Execution proceedings—Application by party to suit under O. 21, R. 58—Dismissal as late and as being not maintainable under O. 21, R. 58—Subsequent application under S. 47—If barred—Constructive* res judicata—*Applicability.*

Where a party instead of applying under S. 47, C. P. Code, applies under O. 21, R. 58, C. P. Code, and such application is dismissed as having been filed late and as being under O. 21, R. 58, C. P. Code, he is not barred by the rule of constructive *res judicata* from afterwards filing proper applications under S. 47, C. P. Code. If suits are filed instead of applications, the suits have to be treated only as applications under S. 47. (*Manohar Lall and S.C. Chatterji, JJ.*) G. B. SOLANO *v.* UMESHWARI KUER. 19 Pat L.T. 157 = 1938 P.W.N. 239.

——S. 11—*Finding on title—Decision on ground that defendant has not shown title to resume as against plaintiff—Subsequent suit—Value of prior decision.*

Where in a suit for recovery of possession against the heir of the jagirdar who had resumed it on the ground that the grantee had died without leaving a male heir, the Court while finding that the plaintiff was the owner of the estate and that the defendant had failed to prove that the plaintiff was the sub-jagirdar of the original jagirdars, decided the case on the ground that the defendant had not shown any right to resume as against the plaintiff, and where the defendant subsequently filed a suit in the Revenue Court against plaintiff for recovery of rent on the ground that he [was] holding the land as his tenant it was *held* [that] though the previous decision may not operate [as] *res judicata* yet as the judgment had been admitted in evidence being *inter partes*, it was unnecessary to repeat the reasons given in the prior judgment for holding that the plaintiff was an owner and not sub-jagirdar. (*Sir Shadi Lal.*) GIRWAR PRASAD NARAYAN SINGH *v.* RAMESHWAR LAL BHAGAT. 1938 O.W.N. 242 = 1938 O.A. 164 = 173 I.C. 447 = 1938 R.D. 321 = 1938 O.L.R. 135 = 1938 A.W.R. (P.C.) 50.

——S. 11—*Heard and finally decided—Judgment set aside in appeal*—Res judicata.

An appeal destroys the finality of the decision of the original Court and the judgment of the original Court is superseded by that of the Court of appeal. Where, therefore, a judgment operating as *res judicata* in a subsequent case is set aside by the appellate Court while the subsequent case is pending in appeal, the matter is not *res judicata* in appeal and the case should be disposed of on the merits. (*Addison and Din Mohammad, JJ.*) JASPAT RAI *v.* KAHAN CHAND. 40 P.L.R. 128 = A.I.R. 1938 Lah. 232.

——S. 11—*Heard and finally decided—Order, when final.*

An order is not final until the time of appeal has lapsed or till the appeal has been finally decided. 48 P. R. 1916, Appr. (*Addison and Din Mohammad, JJ.*) JASPAT RAI *v.* KAHAN CHAND. 40 P.L.R. 128 = A.I.R. 1938 Lah. 232.

——S. 11—*Micellaneous proceedings—Notice of ejectment against non-statutory tenant—Suit to contest—Decree—Effect of—Subsequent ejectment notice by representative of zamindar—Bar of.*

A zamindar having issued a notice of ejectment on his tenant as a non-occupancy tenant under S. 67 (1) (*b*) of the Oudh Rent Act the latter instituted a suit to contest the notice. The suit was decreed and the notice of ejectment cancelled. Some years later the representative in interest of the zamindar sought to eject the successor-in-interest of the prior tenant.

Held, that the cancellation of the notice of ejectment as a result of the previous suit was binding on the present zamindar who was consequently estopped from seeking to eject his tenant on the same ground. (*Darling, S.M.*) PARMAL BISWAS *v.* RATI PAL SINGH. 1938 R.D. 162 = 1938 A.W.R. (B.R.) 90.

——S. 11—*Miscellaneous proceedings—Suit for profits under S. 108 (15) of Oudh Rent Act—Finding that lambardar was guilty of negligence in not getting rent assessed on ex-proprietary tenancy—If* res judicata *in subsequent suit.*

A finding in a suit for profits under S. 108 (15) of the Oudh Rent Act that the lambardar was guilty of negligence in not getting rent assessed on ex-proprietary tenancy, does not operate as *res judicata* in a subsequent suit for profits between the same parties. (*Hamilton, J.*) MUNIR AHMAD *v.* ABDUL KHALIQ. 1938 R.D. 388 = 1938 O.W.N. 306.

——S. 11—*Prior decision—Decree deciding dispute not given effect to by agreement of parties—Effect of—Decision in suit under S. 9, Specific Relief Act—Effect of.*

A decree for partition obtained in 1919 by *A* against her sister *B* and brother (the parties being Christians) was not executed as the parties had agreed not to take any advantage of the decree and they continued to be in joint possession of the properties as if the decree was not in existence. The parties having fallen out in 1932, *A* successfully instituted a suit under S. 9, Specific Relief Act, to recover possession of the properties, of which she was dispossessed by *B* through her husband and her son. *B* thereafter filed a suit for partition and possession of her share which was contested by *A* as being barred by *res judicata* by reason of the decree in the suit of 1919 and the findings in the suit under S. 9, Specific Relief Act.

Held, that the parties not having given effect to the decree in the suit of 1919 and having continued in joint possession of the properties as per subsequent agreement the second suit for partition was not barred. The decision in the suit under S. 9, Specific Relief Act, operated as *res judicata* only to the extent of the finding given therein that *A* was in possession of the properties on the day she alleged in that suit that she was dispossessed and nothing more, and did not operate as a bar to the second suit. (*Leach, C.J. and Varadachariar, J.*) ABHIRAMI AMMAL *v.* CHELLAMMAL. A.I.R. 1938 Mad. 287.

——S. 21—*Applicability—Suit to set aside decree on ground that Court had no territorial jurisdiction—If lies.*

A separate suit would always lie to have a decree set aside or to get it declared a nullity on the ground that the Court passing the decree had no territorial jurisdiction as regards the subject-matter of the suit. The provisions of S. 21, C. P. Code, are inapplicable, as the question does not arise before the Appellate or Revisional

C. P. CODE (1908), S. 24.

Court. (*Mukherjea, J.*) KUMAR SARAT KUMAR ROY *v.* DHARMADAS BHATTACHARJEE.
42 C.W.N. 375.

——S. 24—*Ground for transfer—Judge deciding*

fer in a subsequent case; otherwise a judge would eventually become unfit to decide most cases. If the question is one partly or wholly of fact, still less does ... for a transfer because the

——S. 34 (2)—*Applicability—Maintenance decree creating charge and directing payments in future also—Omission to award interest—Effect—Suit for interest in respect of maintenance accruing due in future—*

suit claiming interest in respect of such ... barred by S. 34 (2). (*Pandrang Row* ... DURGA MADHAVA DEO GARU *v.* ... GARU.
1938 M.W.N. ... 47 L.W. 327=(1938) 1 M.L.J. 437.

——S. 47—*Bar of suit—Application for temporary alienation of judgment-debtor's land—Mortgage created and mortgagee given possession—Decree recorded as fully satisfied by mortgage—Subsequent suit by decree-holder against mortgagee—If barred.*

In execution of his decree the decree holder applied for a temporary alienation of the land of the judgment-debtor. The land was attached and a reference was made

gagee tried to back out from the transaction. Subsequently the decree-holder filed a regular suit against the

which the mortgagee was not a party ... already judicially satisfied. The decr... held to have been satisfied, the question between the decree-holder and the mortgagee ... said to be one "relating to the ... satisfaction of the decree". Thi... of bar by S. 47 could arise. (*T*... *Rashid, JJ.*) ANJUMAN IMDA... SINGH.

——S. 47—*Bar of suit—Mortgage suit—Application for final decree—Objection by judgment-debtor alleging payment—Objection dismissed and final decree passed—*

C. P. CODE (1908), S. 60.

Suit for declaration by judgment-debtor that decree should not be executed—If barred.

In a mortgage suit, the decree-holder made an application for final decree. The judgment-debtor brought an objection that he had made payment in satisfaction of the debt. The objection was disallowed and a final decree was passed Thereupon the judgment-debtor filed a suit for declaration that he had made payment to the decree-holder and hence the decree should not be executed.

Held, that the declaration that the decree should not be executed was barred by S. 47, C. P. Code.

——S. 47—*Bar of suit—Refusal to recognize assignee decree-holder — Separate suit to declare right—If barred.*

... application under O. 21, R. 16 C. P.

... be treated as appl... —*Res judicata. See*
19 Pat.L.T. 157.

——S. 55 (4)—*Surety under—Bond by—Undertaking to produce judgment debtor on date fixed—Surety failing to appear and failing to produce judgment-debtor on date fixed—Plea of illness of judgment-debtor—Absence of evidence to show physical impossibility to appear—Effect—Liability of surety.*

Appellants were sureties for a judgment-debtor and undertook to produce him in Court on a specified date, but failed to produce him on that date. They themselves did not also appear in Court on that date and did ... explanation for the non-production. ...btor ...pear ...sta... ...pos...

Held, that ... for such a contingency or for absolving the sureties from liability in such a contingency, they were not absolved ... hence were liable to be proceeded ... bond in execution of the decree. ... KUMARASWAMY REDDIAR, *In*
47 L.W. 408.

—— ... (n)—*Applicability—Grant in ... as Deshmukh, Deshpandia and*

... used in the C. P. Code implies periodical payments of money by Government to the ... not future or contingent, but present and vested. (*Pollock, J.*) DEORAO *v.* RAMBHAU NILKANTRAO.
1938 N.L.J. 112.

——S. 66—*Purchase benami for plaintiff—Sale set aside with consent of benamidar on application by judgment-debtor—Plaintiff dispossessed by judgment-debtor—Suit against benamidar and judgment-debtor—If maintainable.*

Certain property was sold in execution of a money-decree against defendants 2 and 3 and purchased by the plaintiff's predecessor in the benami of defendant 1 and was taken possession of by him. The sale was subsequently set aside with the consent of defendant 1 on an application under O. 21, R. 90, C. P. Code, filed by defendants 2 and 3 who dispossessed the plaintiff. The plaintiff sued the defendants to recover possession of the property.

Held, that the suit was not barred under S. 66, C. P. Code, as it was not really against any person claiming title under a purchase certified by the Court, as contemplated by that section. Defendants 2 and 3 relied on their original title as judgment-debtors, the execution sale having been set aside. Defendant 1 made common cause with the other defendants and his case was that as the execution sale was set aside, the title of the judgment-debtors had revived and there was no subsisting title in him as a certified purchaser. (*Mukherjea, J.*) THAKUR DAS NATH *v.* KESHAB CHANDRA GHOSH.
42 C.W.N. 497.

——S. 66—*Scope—Purchase benami for plaintiff—Plaintiff dispossessed by certified purchaser—Suit, if maintainable.*

What brings a case within the purview of S. 66, C. P. Code, is that there must be a suit against the certified purchaser or anybody deriving title from him, on the ground that the purchase was made on behalf of the plaintiff or his predecessor. If relief is sought against the certified purchaser or his representative, and the plaintiff claims title on the ground that the purchaser was his *benamidar*, the mere fact that the plaintiff once got possession of the property and was subsequently dispossessed by the certified purchaser or his representative, would not enable him to get round the bar of S. 66, C. P. Code, unless the possession continued for twelve years and thus gave the plaintiff a title quite independent of the purchase made at the execution sale. (*Mukherjea, J.*) THAKUR DAS NATH *v.* KESHAB CHANDRA.
42 C.W.N. 497.

——S. 70—*Sale by Collector—Acceptance of bid after receipt of order of High Court staying proceedings—Validity—Cancellation—Legality.*

Where a Collector accepted a bid after the receipt of the order of the High Court staying proceedings, the acceptance is in contravention of the order of stay and as such its cancellation is quite legal. (*Roughton, F.C.*) SETH BALKRISHNA *v.* GOVERDHANLAL.
1938 N.L.J. 120.

——S. 70 (1)—*Rules framed under by C. P. Government R. 11 (ii)—Procedure to be followed after bid—Collector, if can ignore last bid and hold informal sale himself.*

Rule 11, Cl. (*ii*) of rules framed by the C. P. Government under S. 70 (1), C. P. Code, requires the Tahsildar who conducts the sale to adjourn it to the Collector before the final bill is accepted. It is meant to secure the approval of the Collector. But this does not authorise the Collector, when he does not accept the last bid, to hold an informal sale for the disposal of the property. If he wants to obtain fresh bids, the procedure laid down for holding sales ought to be followed. (*Burton, F.C.*) NARAYAN *v.* KESHAOSA. **1938 N.L.J. 105.**

——S. 80—*Applicability—Mortgage suit—Some of the properties mortgaged to Secretary of State under Land Improvement Loans Act—Secretary of State impleaded as party defendant—Notice of suit—Omission to serve—Effect of—If fatal.*

S. 80, C. P. Code, applies to all forms of suit and whatever the relief sought. The section is express, explicit and mandatory and admits of no implications or exceptions. Where a suit is filed for sale in enforcement of a mortgage to which the Secretary of State for India in Council is a party as being a mortgagee of some of the properties under the Land Improvement Loans Act, notice under S. 80, C. P. Code, is necessary; and in the absence of such notice the suit must be dismissed as against him. (*Pandrang Row and King, JJ.*) SECRETARY OF STATE FOR INDIA *v.* RANGASWAMI NAIDU.
1938 M.W.N. 280.

——S. 91—Scope—Absence of sanction—If bar to maintainability of suit—Failure to raise plea of want of sanction—Effect—Plea in second appeal—If open. *See* TORT—NUISANCE. **1938 M.W.N. 262.**

——S. 96—*Decree in favour of plaintiff imposing conditions—His right to appeal against imposition of conditions—Adverse finding—Applicability—Test.*

Where a decree in favour of the plaintiff allows his claim in its entirety provided a certain condition is fulfilled and dismisses it in its entirety if that condition is not carried out within a specified time, in either event the rights of the parties are conclusively determined by the decree. The plaintiff is entitled to appeal from the order imposing the condition of which he complains. A party in whose favour a decree has been passed may nevertheless have a right to appeal against a finding adverse to him—the test to be applied in each particular case being whether the finding sought to be appealed against is one to which the rule of *res judicata* may be held to be applicable so as to disentitle the aggrieved party to agitate the question covered by the finding in any other proceeding. (*Khundkar, J.*) TARAPADA GHOSE *v.* SAKHI KANTA BEHARA. **42 C.W.N. 492.**

——S. 97—*Appeal from preliminary decree—Final decree passed during its pendency—Appeal, if competent.*

An appeal filed from a preliminary decree is competent, although during its pendency a final decree is passed but it is not appealed against. (*Addison and Din Mohammad, JJ.*) JOTI PARSHAD *v.* GIRNARI MAL. **40 P.L.R. 123.**

——S. 100—*Finding of fact—Fraud in connection with service of sale proclamation—Non-service of proclamation—Finding as to not based on evidence—Finality.*

A finding as to the existence of fraud in connection with the service of a sale proclamation or as to non-service of the same, which is not based on evidence is not binding in second appeal and can be interfered with. (*Courtney-Terrell, C.J. and James, J.*) RAMKESHWAR SINGH *v.* KESHO PRASAD SINHA.
1938 P.W.N. 202.

——S. 100—*Finding of fact—Interference—Absence of evidence.*

A finding on a point of fact is open to consideration in a second appeal when there is no evidence to justify such a finding. (*Hamilton, J.*) BANARSI DAS *v.* KALKA. **1938 R.D. 256 = 1938 A.W.R. (C.C.) 20 = 1938 O.W.N. 171.**

——S. 100—*Finding of fact—Interference—Finding as to relationship vitiated by misapprehension of pedigree table.*

Where a finding of fact as to the relationship of parties is vitiated by an entire misapprehension of the pedigree table, it is a finding not based on any legal evidence, and can, therefore, be interfered with in second appeal. (*Skemp, J.*) GHULAM MOHAMMAD *v.* MIRAJ DIN.
40 P.L.R. 162.

C. P. CODE (1908), S. 100.

——S. 100—New plea—Plea of want of sanction under S. 91, C. P. Code—If may be raised in second appeal. *See* TORT—NUISANCE.
1938 M.W.N. 262.

——S. 100—*Question of fact—Question whether properties attached in execution are personal properties of judgment-debtor's legal representative.*

The question whether certain properties proceeded against in execution of a decree are or are not the personal properties of the legal representative of the judgment-debtor is a question of fact and c raised in second appeal in the High Court. sion of the lower appellate Court is final. (*Fas. Agarwala, JJ.*) SARJU SINGH *v.* SINGH.

——S. 100—*Second appeal—Sur appeal under O. 41, R. 11—Second appeal—If lies.*

Quaere—Whether a second appeal lies to the High Court against the dismissal of an appeal summarily under O. 41, R. 11, C. P. Code? (*Manohar Lall, J.*) CHOTOO LAL *v.* MST. BIBI SEKINA.
19 Pat.L.T. 210.

——S. 102—*Applicability—Money suit* bona fide *framed as mortgage suit.*

S. 102, C. P. Code, does not apply to a suit *bona fide* framed as a mortgage suit, although the only claim which could be established by the plaintiff is a money claim. (*Jack, J.*) KALIPADA BHATTACHARJEE *v* KALI KUMAR PAL.
42 C.W.N. 381.

——S. 109—*Final order—Order dismissing appeal as premature.*

1938 O.A. 231=1938 A.W R
1938

——S. 110—*Affirming judgment—Se matters involved in suit—High Court decre decree of lower Court in respect of some but varing it in respect of others—If reversing judgment—Leave to appeal in respect of subject matters on whic of lower Court was confirmed—If can be gr*

Where there are several subject-matters the lower Court's decree, each should be re rately for deciding whether the High Court's decree is or is not an affirming decree under S. 110, C. P. Code.

the decisions in respect of some, but affirms the decision in respect of others, the decree of the High Court is an affirming judgment and not a reversing on in respect of the subject matters as to which the affirms the decision of the lower Court. held that because the decree has not been entirety, it cannot be regarded as an affirm the ground that it is one and indivisibl *subba Rao and Abdur Rahman, JJ.*) PRESIDENT, H. R. E. BOARD, MADRAS
1938 M.W.N. 298=47 L.W. 393=(1938) 1 M.L.J. 487.

——S. 110—*Substantial question of law—Construction of documents—Question whether property belongs to God or archaka service inam turning upon construction of inam paper*

The questior to the God or upon the effect

C. P. CODE (1908), S. 115.

struction of the various inam papers cannot be held to involve any substantial question of law so as to justify the grant of leave to appeal to His Majesty in Council. (*Venkatasubba Rao and Abdur Rahaman, JJ.*) VELAYYA *v.* PRESIDENT, H. R. E. BOARD, MADRAS.
1938 M.W.N. 298=47 L.W 393=(1938) 1 M.L.J. 487.

——S. 110—*Substantial question of law—Construction of statute—Decision based on clear language of ... Bench decisions—*

is based on the clear

S. 110, C. P. Code. (*Venkatasubba Rao and Abdur Rahman, JJ*) VELAYYA *v.* PRESIDENT, H. R. E. BOARD, MADRAS.
1938 M W N. 298=47 L.W. 393=(1938) 1 M.L.J. 487.

——S. 115—Interference—Grounds—Failure to consider relevant point—If justifies interference. *See* MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, S. 9 (5).
A.I.R. 1938 Mad. 321.

——S. 115—*New case—Execution of instalment decree—Application based on default clause—New case that it relates to unpaid instalments within three years—If can be entertained in revision.*

Where in an application for execution of an instalment decree filed beyond three years from the date of the first

——S. 115—*Order rejecting review application—Revision*

——S. 115—*Other remedy open—Interference.*

Although there is no bar to the exercise of powers

AHMED JOO.
40 P.L.R. J. & K. 29.

——S. 115—*Powers of Court — Amendment of decree*

sional juris- onform with *Hasan, J.*) LAL. (C.C.) 26=
1938 O.W.N. 331.

——S. 115—*Subordinate Court—Appellate officer appointed under S. 40 of Bengal Agricultural Debtors Act.*

There is no connecting authority under which an Appellate officer appointed by the Local Government

C. P. CODE (1908), S. 144.

Nasim Ali and Edgley, JJ.) MD. ABDULLA SHAH v. GIRDHARI LAL MUNDA. 42 C.W.N. 507.

—— S. 144—Limitation—Tenant ejected but restored to possession on appeal or revision—Application for mesne profits for period of dispossession—Limitation—Starting point. *See* LIMITATION ACT, ART. 181.
1938 R.D. 182=1938 A.W.R. (B.R.) 113.

——Ss. 148 and 149—*Discretion of Court—Time for payment of deficit court-fee on plaint—Grant of—Extension—Right of plaintiff to claim.*

When time is fixed by the Court for payment of deficit court-fee on a plaint, it is not open to the plaintiff to demand as a matter of right that the time should be extended. The power to grant extension vests in the Courts either under S. 148 or S. 149, C. P. Code, under either of these sections the question is one of the Court's discretion and not the plaintiff's right. S. 149 expressly provides for defective documents being retrospectively validated. The Court must, however, exercise its discretion, not capriciously, but judicially and reasonably. (*Venkatasubba Rao, J.*) VENKANNA v. ATCHUTARAMANNA. 1938 M.W.N. 259.

——S. 149 and O. 7, R. 11—*Discretion of Court—Plaint presented on last day of limitation with insufficient court-fee—Return for payment of proper court-fee within time fixed—Re-presentation within time fixed with request for further time—Order granting same—Payment of full court-fee and re-presentation in time—Effect of—If barred by limitation.*

Under O. 7, R. 11, C. P. Code, the Court may admit a plaint though written on paper insufficiently stamped; if the plaintiff on being required by the Court supplies the requisite stamp paper within the time allowed by the Court, the plaint is a valid plaint and must be regarded as having been filed on the date on which it was orignially presented. The Court has a discretion under S. 149, C. P. Code, to grant time for payment or to extend the time granted for payment and the discretion of the trial Court in the matter should not be interfered with by the Court of appeal. A plaint was presented on the last day of limitation which was 4—10—1928, with only a one rupee stamp. On 5—10—1928, it was returned directing payment of the deficient court-fee within two weeks. On 19—10—1928, it was re-presented with a prayer for a further two weeks for payment. That was granted on 20—10—1928, and the plaint was re-presented on 3—11—1928 with the required stamp duty, and was accepted.

Held, that the plaint should be regarded as having been presented on 4—10—1928 and not on 3—11—1928, and that reading O. 7, R. 11 with S. 149, the suit was not barred by limitation. (*Madhavan Nair and Stodart, JJ.*) DURAIRANGAM PILLAI v. GOVINDARAJULU NAIDU. 1938 M.W.N. 257.

——S.151—*Execution sale—Setting aside—Power of Court—Sale in execution of mortgage decree without protecting prior mortgagee's rights.*

Where the Court directed that the property should be sold in execution of a mortgage decree free from a prior mortgage but the sale-proceeds should be deposited in Court for payment to the prior mortgagee and that the decree-holder would be entitled to the surplus alone, if any, but the decree-holder who purchased the property did not implead the prior mortgagee in the course of execution proceedings and did not deposit in Court any amount for him, the decree-holder did not conduct himself in an honest manner and the sale is liable to be set aside. (*Addison and Din Mohammad, JJ.*) JASPAT RAI v. KAHAN CHAND. 40 P.L.R. 128=
A.I.R. 1938 Lah. 232.

C. P. CODE (1908), S. 151.

——S. 151—Inherent powers—Injunction to stay execution sale—Grant of. *See* C. P. CODE, O. 39, R. 1.
16 Pat. 738.

——S. 151—*Inherent powers—Payment of money in Court to party entitled—Money realised by execution sale of attached property—Application for payment by Crown towards arrears of income-tax due by judgment-debtor—Powers and duty of Court to order payment—Separate suit by Crown—Necessity—Attaching creditor—If secured creditor—Income-tax Act, S. 46—If a bar to application for payment—Crown debt—Priority.*

The Crown has priority over unsecured creditors in the payment of debts and the Court can, on application and without a formal attachment being issued, order payment of a crown debt due by the debtor where there are funds in Court belonging to the debtor. Where in execution of a decree the judgment-debtor's property is sold in Court-auction and money is realised, the Court can on the application of the Government order payment out of the sale proceeds money due by the judgment-debtor on account of income-tax assessed on and due by the judgment-debtor. It is not necessary for the Crown to file a suit for the amount due, when the debt is not disputed and is indisputable. The right to payment being indisputable, justice requires that it should be paid to the Crown when formal application for payment has been made. Both right and convenience demand that the Court should exercise its inherent power. No special act of the Legislature is required to enable the Crown to apply to the Court for payment of money to which it has an undoubted right. The decree-holder who brings the property to sale is not, by reason of his attachment before sale, placed in the position of a secured creditor. Nor does S.46 of the Income-tax Act operate as a bar to the payment by the Court on mere application. S. 46 is not exhaustive and it cannot, without express words to that effect, take away from the Crown the right of enforcing payment by any other method open to it.

Mockett, J.—The Court under such circumstances can rightly invoke its power under S. 151, C. P. Code, in making the payment to the person entitled to it. (*Leach, C. J., Varadachariar and Mockett, JJ.*) MANICKAM CHETTIAR v. INCOME-TAX OFFICER, MADURA.
47 L.W. 368=1938 M W.N. 197=
(1938) 1 M.L.J. 351 (F.B.).

——S. 151—*Inherent power—Power to go behind order of predecessor.*

Where a presiding officer of a Court has passed an order, his successor cannot and should not go behind that order and hold that order to be *ultra vires*. (*Zia-ul-Hasan and Hamilton, JJ.*) SRI KRISHEN v. JAMNA NARAIN. 1938 O.A. 240=1938 O.W.N. 348.

——S. 151—*Inherent power—Recalling of orders passed by Court—Order passed within jurisdiction and not illegal—Facts rendering order invalid or irregular not brought to notice of Court—Effect—Power to re-call order passed under mistake or by inadvertence—Bihar Tenancy Act, Ss. 26-M and 174.*

Petitioners purchased a certain holdings belonging to their judgment-debtors at a sale in execution of a mortgage sale on 20th May, 1935. The sale was confirmed on 29th June, 1935. In the meantime, however, on 10th June, 1935, the new Bihar Tenancy (Amended) Act came into operation, S. 26-M of which Act provided that a sale should not be confirmed unless the auction-purchasers filed a certain notice and deposited in Court a certain sum for payment to the landlord of the holding. This was not done by the purchaser, and the Court confirmed the sale without probably noticing S. 26-M of the Act. On 24th September, 1936, the respondent obtained a decree for rent and brought the

same holding to sale and purchased it himself on 17th March, 1937. On 12th April, 1937, the petitioners applied under S. 174 of the Act, offering to make a deposit and on 23
Court and the
parte. The lar
on 14th May, 1
the order of 2
under his rent
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their applicatioi
Act. The Court thereupon re-called the order setting aside the sale allowing the application of the landlord-respondent.

Held, in revision, (1) that the order setting the sale passed on 23rd April, 1937, was one which it had jurisdiction to pass though the Court may have taken an erroneous view of the law, or not followed the correct procedure in having proceeded *ex parte*, (2) that the order being within jurisdiction, the Court could not re call it, and the remedy of the respondent, if aggrieved,

Code; and the order of confirmation was
and within jurisdiction in spite of the
S. 26-M of the Bihar Tenancy Amendment
Court,
on-deposit of fees at
did not make the
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that fact
(5) that th
the order
jurisdiction and must be set aside. (*Manohar Lall, J.*) RAM KISHUN LAL *v.* MANZURUL HOQUE.
1938 P.W.N. 192.

——S. 151—Inherent powers—Restoration of case dismissed for default—Grounds. *See* C. P. CODE, O. 9, R. 9. 40 Bom L.R. 238.

——S. 151—*Powers of High Court under—Stay of connected suits.*

The High Court has ample jurisdiction under S. 151, C. P. Code, to stay the proceedings in connected suits. (*Roughton, F. C.*) SETH BALKRISHNA *v.* GOVERDHANLAL. 1938 N.L.J. 120.

——S. 151—Scope of—Powers under, when to be exercised. *See* U. P. ENCUMBERED ESTATES ACT, S. 6. 1938 R.D. 365.

——S. 152—Applicability and scope—Correction of accidental slip in decree—Effect of—Review—Distinction—Order correcting mistake in decree but passe
review application—If falls under S. 152 or O.
Original decree—If superseded. *See* APPEAL—
PETENCY. 1938 M.W.N

——O. 1, R. 10 (2)—*Power of Court to act*
motu—Grounds for adding party.

Under O. 1, R. 10 (2) it is not necessary that there should be an application from the parties; the rule, however, does suggest that the Court will not act on its own initiative unless the presence of the party added is necessary in order to settle effectually and completely and to adjudicate upon and settle all the questions in

——O 3, R. 4 (3) and O. 9, R. 9—*Interpretation of Sub-R. (3) of R. 4 of O. 3—Application for restoration*

of suit dismissed for default—Fresh appointment of pleader—Necessity.

The maxim *expressio uninsest exclusio alterius* can-
e terms of Sub-
s a pleader to
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So a pleader is
without fresh
O BAI *v.* RAM-
938 N L J. 98.

——O. 6, R. 17—Amendment in second appeal—Permissibility—Suit for bare declaration—Plea of non-maintainability raised in trial Court—Application for amendment in second appeal—Competency. *See* SPECIFIC RELIEF ACT, S. 42.
1938 M.W N. 274 = A I R. 1938 Mad. 331.

——O. 6, R 17—*Powers of Court—Suit against two defendants alleging them to be partners in business—Amendment of plaint on basis that defendant 1 carrying on business as guardian of defendant 2—If can be*

e interests of justice even where a question of
n might arise a Court can allow the amendment.
Where a suit was instituted against two defendants
n a business and all the
under which the suit
et out in the plaint and
the amendment as sought and allowed by the lower Court was in accordance with the true facts that defen-
nt 2
wed.
MA-
: 265.

——O. 7, R. 11—*Duty of Court—Appeal—Deficiency in court-fee—Proper procedure—Dismissal without proper order directing appellant to pay deficient court-fee.*

If an appeal presented in time is insufficiently stamped or is otherwise defective, it can only be dismissed after the Court has fixed a day by which the deficiency must be made up or the defect remedied, under penalty of the appeal being dismissed. It is essential that a formal order should issue from the Court informing the appellant of the date fixed for payment of the deficiency in stamps or for remedying the defect. If he fails to comply with that order, the appeal is dismissed for such failure to comply with the order of the Court. There is no question of limitation in such a case. The best course for the Court is to wait till the expiry of the
der of rejection
pellant to com-
ay the deficient
ling, S M. and
HASANKHAN.
R. (B.R.) 112.

——O. 7, R. 11—Power of Court under—Plaint insufficiently stamped—Return for payment of proper court-fee within fixed time—Request for further time granted—Payment within such time—Sufficiency—Suit when deemed to be instituted—Date of original presentation or date of payment of full court-fee. *See* C. P. CODE, S. 149 AND O. 7, R. 11. 1938 M.W.N. 257.

——O. 7, R 11 (c)—*Dismissal under—When justi-*
d—Appeal insufficiently not stamped and presented
time—Duty of Court—Dismissal without order requiring payment of deficiency within fixed period—Legality.

Before a suit or an appeal can be rejected for insufficiency in court-fee under O. 7 R. 11 (*c*), C. P. Code, the the law requires that there shall be a definite order of the Court, fixing a day for payment of the deficiency and non-compliance with such order. The dismissal of the suit or appeal for non-payment of the necessary Court fee before the expiry of the period of limitation is not warranted. If the suit or appeal is filed in time, it is open to the court to give time to the party for paying the necessary court-fee even, in instalments. The fact that the counsel for the plaintiff or appellant promises to pay the deficiency within a period does not take the place of the order of the Court which is prescribed by law. Dismissal under R. 11 (*c*) of O. 7, C. P. Code, should be regarded in the light of a punishment for contempt of Court for failure to comply with the orders of the Court for payment of the deficiency in stamp. (*Darling, S.M. and Bomford, J.M.*) JANARDAN CHAUBE *v.* KANTIKA TEWARI. **1938 R.D. 235=1938 A.W.R. (B.R.) 89.**

——**O. 7, R. 11 (c)**—*Scope and effect of—Plaint insufficiently stamped—Duty of Court—Rejection of plaint—Order of—When to be made.*

Where a plaint is insufficiently stamped, the Court is bound under O. 7, R. 11, C. P. Code, to give the plaintiff time to make up the deficit; only when he fails to comply with the order, the Court can reject the plaint. That the plaint is presented on the last day of limitation makes no difference at all. Whether the payment of insufficient court-fee has been by design or due to inadvertence, the Court is bound by the mandatory terms of it to give effect to the provision of law. (*Venkatasubba Rao, J.*) VENKANNA *v.* ATCHUTARAMANNA. **1938 M.W.N. 259.**

——**O. 9, R. 9 and O. 47, R. 1**—*Applicability—Suit dismissed for default—Remedy for restoration—Review application—Competency.*

Where a suit is dismissed for default, the remedy of the plaintiff is by way of application under O. 9, R. 9, C. P. Code, and not an application for review. (*Darling, S.M. and Bomford, J.M.*) BALWANTI *v.* BADAL. **1938 R.D. 184=1938 A.W.R. (B.R.) 115.**

——**O. 9, R. 9**—Application under—Pleader on record, if can make—Fresh appointment, necessity. *See* C. P. CODE, O. 3, R. 4 (3) AND O. 9, R. 9. **1938 N.L.J. 98.**

——**O. 9, R. 9**—"*Sufficient cause*"—*Case dismissed for non-appearance — Restoration — Considerations—Duty of Court—Discretion—Exercise of—Principle—Slight negligence of party—If ground for refusing to restore—Discretion exercised on wrong basis—Interference on appeal—Inherent powers of Court, S.* 151.

Per *Beaumont, C.J. and Rangnekar, J.*—In cases of discretion it is very undesirable to act on precedents, as every Judge has to deal with the cases which come up before him on the particular facts of each cases. If a person whose case has been dismissed for non-appearance summarily, appears on the same day, and produces some not unreasonable excuse for his absence, *prima facie* the Court ought to exercise its discretion in his favour. Of course the applicant has no absolute right to ask the Court to waive its rules in his favour, but it is a good working rule that if he applies at once, and thereby shows that his failure to appear was not due to a desire to cause delay, but was *bona fide*, he ought generally to be given the right to have his case restored on payment of costs thrown away. It is, after all, a very serious matter to dismiss a man's suit or summons or whatever it may be, without hearing it, and that course ought not to be adopted unless the Court is really satisfied that justice so requires. There is nearly always some degree of negligence or carelessness on the part of

an applicant whose case has been dismissed for non-appearance, but that by itself would not disentitle him to have his case restored to the file. Where the negligence is exceedingly slight, the case ought to be restored, if he is not guilty of either conduct or gross negligence. If the Court exercises its discretion on a wrong basis, the Appellate Court will interfere and make the necessary orders.

Blackwell, J.—Whether the matter is to be dealt with as falling under O. 9, R. 9 or under S. 151, C. P. Code, and the inherent jurisdiction of the Court, it is in every case a matter for the discretion of Court. If the Court dealing with the matter cannot be said to have acted either capriciously or in disregard of any legal principle in exercise of its discretion, the appellate Court ought not to interfere, though it may come to a different conclusion if it were to deal with the same matter.

Rangnekar, J. O. 9, R. 9, C. P. Code, does not take away the inherent power of the Court to restore a suit or summons, if there is just and reasonable cause for restoring it, even if no sufficient cause is shown within the meaning of the rule for the non-appearance of the plaintiff. The code is not exhaustive and it is for that purpose that the Legislature by S. 151, has indicated that the Court has an inherent power to act *ex debito justitiae* in order that real and substantial justice may be done. Rules of procedure are meant to secure the ends of justice and not override them. (*Beaumont, C.J., Blackwell and Rangnekar, JJ.*) P. D. SHAMDASANI *v.* CENTRAL BANK OF INDIA, LTD. **40 Bom.L.R. 238 (S.B.).**

——**O. 11, R. 18**—*Order providing for inspection "forthwith"—Meaning of order not drawn up—If takes effect.*

An order providing for inspection "forthwith" contemplates that it would be given without unreasonable delay. The order takes effect although it is not drawn up. (*Lort Williams, J.*) GULRAJ SHROFF *v.* KANIRAM SUREKA. **42 C.W.N. 457.**

——**O. 11, R. 21**—*Conditional order of dismissal of suit—Propriety.*

The terms of O. 11, R. 21, C. P. Code, seem to contemplate that ordinarily there will be two orders; first an order for discovery, and second, on default, an order of dismissal of the suit for want of prosecution. But where there has been a previous order for discovery, it is proper and also according to the practice both in England and India, to make a subsequent conditional order, for example, an order for discovery within a prescribed time, and upon default that the suit be dismissed or stand dismissed. There is no difference in effect between the terms "stand dismissed" and "be dismissed". The order becomes on default a final order dismissing the suit. (*Lort Williams, J.*) GULRAJ SHROFF *v.* KANIRAM SUREKA. **42 C.W.N. 457.**

——**O. 17, R. 3**—Order of dismissal under—Remedy—Appeal or review. *See* C. P. CODE. O. 47, R. 1. **1938 R.D. 184=1938 A.W.R. (B.R.) 115.**

——**O. 20, R. 12**—*Partition suit—Preliminary decree passed on compromise—No provision for mesne profits—Power of Court to direct enquiry into mesne profits.*

It cannot be denied that a decree can be varied by consent of parties. Although the preliminary decree passed on a compromise in a partition suit makes no provision for payment or ascertainment of any mesne profits, the Court would be justified in appointing a commissioner to determine the amount of mesne profits, when the applications and the proceedings of the Court

clearly show that the intention of both the parties was that mesne profits should be paid to each other. (*Zia-ul-Hasan and Hamilton, JJ.*) SRI KRISHEN *v.* JAMNA NARAIN. 1938 O A. 240 = 1938 O.W.N. 348.

——O. 20, R. 12—Scope—Award of mesne profits without inquiry being directed—Award at time of decree itself—If in contravention of rule—Executability of such decree without fresh final decree. *See* COURT-F

ing purchaser of decree—Subsequent objection that he is benamidar for one of judgment debtors—If barred by res judicata.

An objection by a judgment-debtor under the second proviso to O. 21, R. 16, C. P. Code, that the purchaser of the decree whose name has been order to be substituted is a benamidar for one of the judgment-debtors, is not barred by *res judicata* by his failure to raise that

——O. 21, Rr. 18 and 19—*Scope—If exhaustive—Different claims arising at different stages in same suit or proceeding—Set off—Inherent powers of Court.*

Rr. 18 and 19 of O. 21, C. P. Code, are not exhaustive of the cases in which a set off may be allowed in execution proceedings. The Court, apart from these rules, has inherent jurisdiction on equitable principles to allow

final decree in a partition suit can be set-off against the amount payable by that party to the other under final decree, when the latter applies to execute the decree in his favour. (*Rupchand and Bilaram, Ag. J. C. and Lobo, J.*) MT. NONIBAI *v.* JETHANAND. 173 I C. 574 = A I.R. 1938 Sind 31.

——O. 21, R. 19—*Applicability—Mortgage suit—Decree for amount recoverable from mortgaged properties—Decree for smaller sum by way of costs in favour of mortgagor personally against mortgagee—Set off—Right of mortgagor—Defendant to execute decree.*

O. 21, R. 19, C P. Code, only requires that the parties must be held entitled to recover sums of money from each other. A decree by *A* against *B* for a sum of money to be recoverable from his property is as much a decree to recover the sum of money from *B*. The decree need not necessarily be a decree directing *A* to recover the sum of money from *B* personally. The section does not say or provide in what manner the decree is to be executed. The rule would apply even to the case of a decree for sale in enforcement of a mortgage or charge. Where a decree for sale in a mortgage suit provides that shall recover certain sums of money from certain properties belonging to *B* and mortgaged by *B* to *A*, and also provides that *B* should be entitled to recover a smaller amount of money from *B* personally for the proportionate costs decreed in *B's*

favour, O. 21, R. 19, C. P. Code, would apply, and *B* is not entitled to execute the decree in his favour The two decrees can be set-off under O. 21, R. 19, C. P. Code. (*Burn and Venkataramana Rao, JJ.*) DAMODAR SHANBHOGUE *v.* GANGE. 1938 M.W.N. 277 = 47 L.W. 382 = (1938) 1 M L J. 417.

——O. 21, R. 22—"*Against the party*"—*Meaning.*

Expression "against the party" means adverse to the party. Hence an order directing the execution proceed-

I.R. 1938 Pat. 162.

gainst property of tution of wrong final—Jurisdiction

It is a serious irregularity to proceed in execution against the property of a deceased judgment-debtor in the absence of his proper legal representative. The executing Court is not precluded from deciding that a person is not the proper legal representative by reason of the fact that the Court which passed the decree has already substituted that person has legal representative after notice to him but in his absence. When the

other person, namely the order substitut- to be a decision to legal representative *Ali and Agarwala, JJ.*) SARJU SINGH *v.* BHAGWAT PRASAD SINGH. 19 Pat.L.T. 193.

——O. 21, R. 22—*Notice—Absence of—Objection as to—When to be raised.*

As the absence of notice under O. 21, R. 22 goes to the root of the jurisdiction of the executing Court, the objection can be taken at any time. (*Fazl Ali and Rowland, JJ.*) BRAJOBALA DEBI *v.* MADHUSUDAN A.I.R. 1938 Pat. 162.

O 21, R. 53 (4) and (6)—*Sale of attached efore receipt of notice of attachment—Right of purchaser to execute decree.*

A purchaser of an attached decree has no right to execute that decree for himself, although no notice of attachment was served upon his vendor previous to the sale by him of his decree. Sub cl. (6) of R. 53 of O 21, C. P. Code, affords no help to the purchaser at all. Its purpose is to protect payments made by the judgment-debtor of the attached decree to his creditor before he receives notice of the attachment. Nor is

DAS *v.* JATINDRA NATH CHAKRAVARTI. 66 C L J. 459.

——O. 21, Rr 85, 86 and 90—*Failure to deposit 75 per cent. of purchase-money within fortnight—Duty of Court*

The 'publishing' of the sale has reference to all proceedings that take place till the sale is actually held. Any proceedings that take place after the deposit of 25 per cent. of the purchase-money has been made cannot be regarded as falling within the meaning of the words 'publishing' or 'conducting the sale.' The failure to deposit 75 per cent. of the sale price within a fortnight as required by O 21, R 85, C. P. Code, does not therefore amount to a material in ing or conducting a sale within the 90.

C. P. CODE (1908), O. 21, R. 89.

When default is made by the auction-purchaser in paying into Court full amount of the purchase-money within the time allowed by O. 21, R. 85 the Court has no jurisdiction to extend the time but must order a re-sale under R. 86. The only discretion given by R. 86 is in the matter of forfeiture of the deposit of 25 per cent. made by the auction-purchaser, and not in the matter of re-sale. (*Tek Chand and Abdul Rashid, JJ.*) A. R. DAVAR *v.* JHINDA RAM.

A.I.R. 1938 Lah. 198.

——**O. 21, R. 89**—*Judgment-debtor depositing five per cent. for payment to auction-purchaser—Allegation that decree satisfied out of Court—Sale, if can be set aside.*

A judgment-debtor can deposit five per cent. of the purchase-money in Court to be paid to the auction-purchaser and get the sale set aside without depositing the decretal amount and contending that the decree is satisfied out of Court. The auction-purchaser has no right to restore the sale on the ground that the alleged satisfaction of the decree was untrue because such application could only be made by the decree-holder. (*Henderson, J.*) MAHENDRA CHANDRA DAS *v.* PARASHMANI DASYA. **A.I.R. 1938 Cal. 252.**

——**O. 21, R. 90, proviso (Lahore)**—*Setting aside sale—Omission to state value of property in sale proclamation—Effect of.*

Objections to a sale on the ground that the value or the rent of the houses which were to be sold was not given in the proclamation of sale and that the dimensions of the houses were not stated in the proclamation and the houses were not otherwise sufficiently described, ought to be raised before the sale and cannot be considered after the sale under the proviso to R. 90 of O 21, C. P. Code, added by the Lahore High Court. Even according to the law as it stood before the amendment, a sale could not be set aside merely because of the omission to give the approximate value or rental of the properties. (*Tek Chand, J.*) KISHAN KAUR *v.* CHANNU MAL. **40 P.L.R. 201.**

——**O. 21, R. 92**—*Application under—Notice to auction-purchaser—If mandatory.*

Before the objection application of the judgment-debtor under O 21, R. 92 is adjudicated upon, it is mandatory on the execution Judge to send notice to the auction-purchaser and his omission to do so makes the order illegal. (*Mir Ahmad, J.*) GELA RAM *v.* MAKHAN SINGH. **A.I.R 1938 Pesh. 14.**

——**O. 21, R. 95**—*Second application by auction-purchaser—If lies — Limitation — Starting point—Limitation Act, Art. 167.*

A second application for delivery of possession under O. 21, R. 95, C. P. Code, can be made by the auction-purchaser, if it is otherwise within time. The period of 30 days under Art. 167 of the Limitation Act is to be counted from the date of the resistance or obstruction of which complaint is made and not from the date of the first resistance in respect of which an application for delivery of possession was made and dismissed for default. (*M. C. Ghose, J.*) SURAMA SUNDARI DEVI *v.* KIRAN SASHI CHOWDHURANI. **42 C.W.N. 478.**

——**O. 21, R 103**—Suit under—Prayer for possession—Court fee payable. *See* COURT-FEES ACT, SCH. II, ART. 17. **1938 N.L.J. 107.**

——**O. 21, R. 103**—*Suit under—Proper parties.*

As it is essential for the plaintiffs in a suit under O. 21, R. 103, C. P. Code, to establish their right not only against the decree-holder, but also against the judgment-debtor in such cases the judgment debtor would be a proper if not a necessary party. (*Niyogi, J.*) DINKARRAO *v.* RATANSI ASARAM. **1938 N.L.J. 107.**

C. P. CODE (1908), O. 22, R. 12.

——**O. 21, R. 139 (1) and (2)**—*Scope and distinction between—Court-fee to be paid on garnishee's appeal.*

Sub-R. (2) of R. 139 of O. 21, C. P. Code, is intended to cover the case where the decision is that the application should be dismissed and Sub-R. (1) is intended to cover the case where the application is allowed. The object of the distinction may be to exempt a decree-holder who has already paid court-fee on his plaint from a further *ad valorem* payment, where he has to appeal from a dismissal of a garnishee application. But where the appeal has to be brought by a garnishee when his liability is held to exist, the garnishee may have been intended to pay *ad valorem* court-fee, as he has not paid any court-fee in the lower Court. Where the liability of a garnishee has been held to exist and an appeal is preferred, it is on account of the special provision in O. 21, R. 139(1). The words refer to those conditions of an appeal as if it were a decree—and one of such conditions of an appeal from a decree for money if the payment of *ad valorem* court-fees. (*Bennet, A.C.J.*) RAM CHANDRA *v.* RAM LAL. **1938 A.W.R. (H.C.) 158 = 1938 A.L.J. 232.**

——**O. 22, Rr. 3 and 8**—*Suit by daughter for possession of father's estate—Dismissal—Appeal by plaintiff—Death of appellant leaving insolvent son—Application by Official Receiver to be impleaded—Subsequent withdrawal—Subsequent application by insolvent son for permission to continue appeal in his own right as reversioner—Maintainability.*

K brought a suit for possession of certain properties as constituting the estate of her deceased father. The suit was dismissed and *K* appealed to the High Court pending the appeal she died, and her son, the petitioner applied to be allowed to continue the appeal as the actual reversioner of his mother's father in his own right and not as claiming through his mother. He was, however, an insolvent when he filed the application. Before his application, the Official Receiver had applied to be brought on the record, but later on withdrew the application as he was not placed in possession of funds to meet the costs.

Held, that this was a case of an after-acquired property of the insolvent petitioner, and though the petitioner might maintain a suit to recover the after-acquired property in the hands of a stranger unless the receiver intervened, the Official Receiver having already intervened, he alone could maintain the appeal; since the rights of the petitioner, whatever they were, had devolved on the Official Receiver, the law did not permit the petitioner to maintain or continue the appeal. Once the property had vested in the receiver, the latter could not by withdrawing his intervention divest himself of the property and re-vest it in the insolvent.

Varadachariar, J., Quaere:—Whether the same result would follow if the petitioner applied for leave to continue the appeal as a legal representative in the strict sense of the term, *i.e.*, as claiming through his deceased mother? (*Leach, C. J., Varadachariar and Pandrang Row, JJ.*) SOBHANADRI SASTRULU *v.* NAGAYYA SASTRY. **1938 M.W.N. 272 = 47 L.W. 363 = (1938) 1 M.L.J. 413 (F.B.).**

——**O. 22, R. 4**—Applicability—One of the impleaded non-appealing plaintiffs and a *pro forma* defendant dying—Legal representatives not brought on record—Appeal if abates. *See* C.P. CODE, O. 41, R. 4—APPLICABILITY. **1938 A.W.R. (H.C.) 138.**

——**O. 22, R. 12**—*Scope and effect—Execution proceedings, if abate—Procedure to be followed in case of decree-holder's death.*

C. P. CODE (1908), O. 23, R. 1 (3).

Abatement does not apply to execution proceedings. The result of that is, however, that the heirs need not take steps for substitutions under O. 22, R. 3, but may apply to carry on the proceedings or may file a fresh application. (*Stone, C.J. and Bose, J.*) TEJRAJ *v.* MT. RAMPYARI. 1938 N.L.J. 99.

——O. 23, R. 1 (3)—*Applicability—"Subject-matter"—Meaning—Prior suit to eject mortgagee of tenant alleging latter's death—Withdrawal on tenant turning up—Subsequent suit on surrender by tenant—If barred.*

The bar in O. 23, R. 1 (3) is in respect of the subject-matter and not the cause of action; subject-matter means

defendant, a mortgagee of the tenant, as a trespasser on the ground that the tenant-mortgagor was dead and hence the tenancy had terminated. The tenant, however, turned up alive in Court, and the suit was therefore withdrawn. Subsequently on 24—9—1935 the tenant surrendered his holding to the zamindar who again sued the defendant mortgagee as a trespasser.

Held, the suit based on the surrender by the tenant was not barred under O. 23, R. 1 (3), C. P. Code, by reason of the withdrawal of the prior suit based on his alleged death. (*Darling, S.M. and Bomford, J.M.*)

——O. 23, R. 3—*Matter "relating to suit"—Meaning of.*

Where a widow who was a party to a partition suit was held by mutual agreement entitled to maintenance from a date prior to the date of the suit, a provision in a compromise between the parties for payment of mesne profits from that date was a matter "relating to the

1938 O.W.N. 348=1938 O.A. 240.

——O. 33, R. 5 (e)—*Construction—"Interest"—Meaning—If to be vested and completed interest under T. P. Act and Registration Act.*

The word "interest" in O. 33, R. 5 (*e*), C. P. Code, is used in its ordinary and general sense, and not in the technical sense of an interest of a transferee gagee, co-owner or charge holder under the operation of the T. P. Act and Registration. "interest" need not be a vested and completed The provisions of O. 33 are intended to aid a pauper suing for his own benefit, but not to enable an ostensible pauper to figure as plaintiff, when in the fruits of the litigation a third party has been given an interest. (*Venkatasubba Rao and Abdur Rahman, JJ.*) KAYAMBU PILLAI *v.* LAKSHMI AMMANI AMMAL. 47 L.W. 405

——O. 33, R. 9 (c)—*Construction—"Plaintiff"—Meaning—If includes his representative in interest—Representative—If may be dispaupered for agreement by predecessor-in interest.*

The word "plaintiff" in O. 33, R. 5 (*c*) means, in both places in which it occurs, "the plaintiff or his representative." The application of the clause is not confined to the party who has entered into the agreement. A

C. P. CODE (1908), O. 39, R. 1.

KAYAMBU PILLAI *v.* LAKSHMI AMMANI AMMAL. 47 L.W. 405.

——O. 34, R. 3 (4) (Rangoon High Court)—*Cause of action for personal remedy—When accrues—Suit on mortgage by deposit of title deeds filed more than three years after date of promissory note—Fresh note executed after three years—Mortgagee's right to personal decree—Limitation Act, S. 19—Contract Act, S. 25 (3).*

There is only one cause of action on a mortgage giving rise both to a relief by way of final decree for sale and also to an additional remedy by way of a personal decree for the balance. There is no separate cause of action for the personal remedy accruing after the mortgaged property is found on sale to be insufficient to satisfy the mortgage debt. Accordingly a decree under O. 34, R. 3 (4), C. P. Code, as amended by the Rangoon High Court, cannot be obtained when at the date of filing of the suit the personal remedy in the mortgage suit is barred. Where, therefore, a suit on a mortgage by deposit of title deeds is filed more than three years after the date of the promissory note given by the morteagor for the amount of the mortgage debt, the personal remedy is barred by limitation. A fresh promissory note given by the mortgagor will be of no assistance to the mortgagee by way of an acknowledgment under S. 19 of the Limitation Act, if such note was executed more than three years after the date of the first promissory note. The fresh promissory note, no doubt, constitutes . 25 (3) of the Contract Act, but existing cause of action though it one. The failure of the mortgagee to bring an action on the new promissory note would, therefore, be fatal to his cause of action for a personal remedy. (*Roberts, C.J. and Sharpe, J.*) SMITH *v* HEPTONSTALL. 1938 Rang.L.R. 6.

——O. 34, R. 5—*Payment made out of Court—Court if can take into consideration.*

A payment which is made out of Court, whether or P. Code, cannot rt at the time of (*Almond, J. C.* GUL *v.* GOPI CHAND SINGH. A.I.R. 1938 Pesh. 12.

——O. 38, R. 5—*Applicability—Conditions of.*

Before the provisions of R. 5 of O. 38 would come into play, the Court has to be satisfied that transfers were going to be made by the defendant after the suit had been filed and that such transfers were with the if he won the suit in egations to this effect be positively proved *and Varma, JJ.*) BEDANAND RAI *v.* NABOKUMAR SINGH. A.I.R. 1938 Pat. 161.

——O. 39, R. 1—*Applicability—"Wrongfully sold in execution of a decree"—Sale of property under mortgage decree—Injunction to restrain at instance of unsuccessful claimant—If can be granted.*

Where in execution of a good and valid mortgage decree, the decree-holder proceeds to sell the property mortgaged as the property of his judgment-debtor, and another person having been defeated in a claim case institutes a suit to declare that the property is his, O. 39, C. P. Code, R. 1 cannot be applied to the case so as to entitle the latter to apply for a temporary injunction to prevent the sale. The property cannot, at the moment Court, be said to be in danger old in execution of a decree. if balance of convenience nor be granted in such a case.

C. P. CODE (1908), O. 39, R. 1.

Manohar Lal, J. (*Obiter.*)—It may be that the Court will invoke its inherent powers to stay the execution of the decree if the circumstances are coercive that the balance of convenience is in favour of the applicant or that the stay is necessary to prevent an abuse of the process of the Court. (*Wort and Manohar Lal, JJ.*) DALIP NARAYAN SINGH *v.* AMARBAS KUER.

16 Pat. 738 = 1938 P.W.N. 232.

——O. 39, R. 1—*Suit by unsuccessful claimant under O. 21, R. 63—Temporary injunction restraining execution sale—Power of Court to grant.*

In a suit filed by an unsuccessful claimant under O. 21, R. 63, C. P. Code, the Court has power to grant a temporary injunction under O. 39, R. 1, C. P. Code, restraining the decree holder from selling the property, which is the subject-matter of the suit, in execution of his decree. The principle underlying O. 39, R. 1 is to prevent multiplicity of judicial proceedings, and in each case the Court will have to consider whether there is a danger of the property being wrongfully sold in execution of the decree. The mere fact that the plaintiff lost the claim case is not enough to indicate that the suit is a frivolous one or that it is an abuse of the process of the Court. (*Bartley and Nasim Ali, JJ*) JODHANPRASAD BHAKAT *v.* HEERALAL AGARWALLA & CO.

42 C.W.N. 409.

——O. 39, R. 1—*Temporary injunction under—Sale in contravention of—If a nullity.*

A temporary injunction under the provisions of Rule 1, O. 39 is not a stay order issued by a Court competent to stay execution proceedings under any provision of the Code authorizing such an ordor. The effect of non-compliance with an injunction issued under O. 39, R. 1 is to make the offender liable to the punishment prescribed in O. 39, R. 2 (3) and a completed sale in contravention of an injunction under O. 39, R. 1 is not a nullity as being without jurisdiction. A temporary injunction under O. 39, is not a mandatory direction to a Court, as is a stay order of the kind provided for by the Procedure Code, but is an order directed against a particular person which can be issued only in the circumstances described in R 1. (*Coldstream, J.*) LAL CHAND *v.* SOHAN LAL. A.I.R. 1938 Lah. 220.

——O. 39, R. 1—"*Wrongfully sold in execution*"—*Meaning of—Sale in execution of decree by person entitled to execute same—Injunction to restrain—If can issue.*

It is impossible to contend that a person who has got a decree, and is entitled to execute it, can be said to be wrongfully selling in execution because some other person has brought an action through which he hopes to succeed in getting possession of the property which is being sold; an injunction to restrain such a sale cannot be granted. (*Wort, J.*) RAMKESHWAR DAS *v.* BALDEO SINGH.

1938 P.W.N. 220.

——O. 39, R. 1 (as amended in 1937), Proviso—Scope and effect—If adds to the law under Specific Relief Act. *See* SPECIFIC RELIEF ACT, S. 56 (*b*).

1938 P.W.N. 220.

——O. 41, R. 2, proviso—*Power of Court under—Decision of case on point raised by Court* suo motu—*If justified.*

It is no doubt open to a Court of appeal to decide a case on any rule of law which it considers applies, but it is not entitled to decide a case on a point taken by itself without giving the parties to the appeal an oppotunity of meeting it. (*Leach, C. J., Varadachariar and Mockett, JJ.*) RAMACHANDRA NAIDU *v.* VENGAMA NAIDU.

1938 M.W.N. 269 (F.B.).

——O. 41, R. 4—*Applicability—Some only of the plaintiffs appealing—Others impleaded — Common*

C. P. CODE (1908), O. 43, R. 1 (m).

interest—One of the non-appealing plaintiffs and a pro forma *defendant dying—Legal representatives not brought on record—Appeal, if can continue as against the rest—O. 22, R. 4.*

When a question arises as to the applicability of O. 41, R. 4 there is no essential difference between (1) a case where some only of the plaintiffs or defendants, as the case may be, have appealed without impleading others; (2) a case where all the plaintiffs or defendants have appealed and one of them dies and his heirs are not substituted; and (3) a case where some only of the plaintiffs have appealed and have impleaded the other non-appealing plaintiffs and the *pro forma* defendants having the same interest as the plaintiffs and one of the non appealing plaintiffs or *pro forma* defendants dies and the heirs are not brought on record. Where some only of the plaintiffs appealed impleading a non-appealing plaintiff and a *pro forma* defendant having the same interest as the plaintiff, and a non-appealing plaintiff and a *pro forma* defendant die and their legal representatives are not brought on record, the appeal is not rendered incompetent on that account. (*Collister and Bajpai, JJ.*) ABDUL REHMAN *v.* GIRJESH BAHADUR PAL. 1938 A.L.J. 159 = 1938 R.D. 312 = 1938 A.W.R. (H.C.) 138.

——O. 41, R. 11—*Procedure—Case involving elaborate questions of law and fact—Summary dismissal—Propriety.*

In a case where elaborate questions of fact and of law have to be decided, an appellate court is not justified in dismissing the appeal summarily under O. 41, R. 11, C.P. Code. The appellate Court in such a case should admit the appeal, hear arguments on both sides, apply its mind to the oral and documentary evidence in the case and then come to a decision, which in many cases would be final between the parties. (*Manohar Lall, J.*) CHOTOO LAL *v.* MST. BIBI SEKINA.

19 Pat.L.T. 210.

——O. 41, R. 20—*Applicability—Omission to implead owing to no fault of party—Power of appellate Court to add after expiry of period of limitatiom.*

Where omission to add a party was not deliberate, but the error was due to the Collector's office in not including the party's name in the decree the power given under O. 41, R. 20 should be used and the party allowed to be added though beyond the period of limitation. (*Darling, S. M. and Bomford, J. M.*) MATHURA *v.* RAM DATTA. 1938 A.W.R. (B.R.) 140 = 1938 R.D. 270.

——O. 41, R. 33—*Powers under Defendant exonerated by trial Court—No appeal by plaintiff as against him—Power of appellate to grant relief as against such defendant.*

The powers of an appellate Court under O. 41, R. 33, C. P. Code, are sufficiently wide to enable it to grant a relief to a plaintiff against a defendant, though as against him the plaintiff has not appealed. (*Wort and Varma, JJ.*) KESHWAR SAO *v.* GUNI SINGH.

19 Pat.L.T. 198 = 1938 P.W.N. 211.

——O. 43, Rr. 1 (m) and 2—*Consolidated order recording compromise and granting decree—Appeal—Filing of copy of such order—Sufficiency.*

Where a Court passes one consolidated order recording a compromise and granting a decree in terms thereof, an appeal lies from the order recording the compromise under the provisions of O. 43, R. 1 (*m*), C. P. Code. If a copy of the consolidated order is filed by the appellant with the memorandum of appeal, the requirements of O. 41, R. 1 read with O. 43, R. 2 are fully complied with. (*Tek Chand, J.*) MST. CHAWALI *v.* KIDAR NATH.

40 P.L.R. 138.

C. P. CODE (1908), O. 45, R. 4.

——O. 45, R. 4—*Consolidation of appeals—Power of High Court—R. 7 of Schedule to Rules of Indian Order in Council.*

CHANDAR BHAN *v.* FATEH SHER.
A.I.R. 1938 Lah. 207.

——O. 45, R. 7—*Extension of time for giving security—Power of Court.*

Court cannot extend time for giving security beyond the period prescribed by O. 45, R. 7, C. P. Code. (*Coldstream and Bhide, JJ*) CHANDAR BHAN *v.* FATEH SHER. **A.I.R. 1938 Lah. 207.**

——O. 47, R. 1—*Application—Suit dismissed for default under O. 9, R. 8 or under O. 17, R. 3—Remedy of plaintiff.*

Where a suit has been dismissed for default or under O 17, R. 3, C. P. Code, there is no ground for any application in review. The remedy of the plaintiff lies either in an appeal if the order of dismissal is

for material irregularity—Omission—If fatal—Procedure.

An application for review cannot be said to be bad for material irregularity on the ground that no copy of the order sought to be reviewed is filed along with the application. The omission to file a copy of the order is not fatal and when the Court accepts the application without a copy of its order, it may be taken as dispensing with the same. (*Darling, S. M. and Bomford, J. M.*) BALWANTI *v.* BADAL.
1938 A W.R. (B.R.) 115=1938 R.D. 184.

——O. 47, R. 7—*Order allowing review—Non-compliance with O. 47, R. 3—If a ground of appeal.*

An order allowing an application for review is not appealble on the ground that the application was not in compliance with R 3 of O. 47, C. P. Code. An appeal can lie only on the grounds mentioned in R. 7. (*Darling, S.M. and Bomford, J.M.*) BALWANTI *v.* BADAL. **1938 R.D. 184=1**

——Sch. II, para 14

legality of award apparent

amounts to—Award in arbitration in favour of unregistered firm—Application to file—Maintainability — Partnership Act, S. 69 (1).

Sch. II, C. P. Code, is exhaustive, and no Court has jurisdiction to go beyond the provisions of this schedule in order to determine whether an award made in an arbitration on reference in accordance with the provisions of the schedule can be filed or not. An award made in favour of an unregistered company can be filed on the application of that company, and such an application is not barred under S. 69 (1) of the Partnership Act. The fact that it is in favour of an unregistered company does not make the award illegal on the face of it within the meaning of para. 14 (*c*) of Sch. II, C. P. Code. (*Wort and Manohar Lal, JJ.*) SATISH CHANDRA CHAKROVARTY *v.* P. N. DAS & Co.
16 Pat. 742=1938 P.W.N. 228.

ndu family— r—If negoti-

CONTRACT.

Share certificates are not negotiable instruments, so as to make the person in whose name they stand the sole owner of the shares; when the shares are held by

der for balance of contributions from member—Death of respondent—Effect—Liability of legal representatives—Omission to implead latter within 90 days—If fatal—Limitation Act—Applicability. *See* LIMITATION ACT, ART 177. **19 Pat L T. 214.**

CONTRACT—*Executory agreement—Such agreement to be carried out by subsequent deed—Contract, if merged in deed.*

It is well settled that where parties enter into an executory agreement which is to be carried out by a deed afterwards to be executed, the real completed contract is to be found in the deed. The contract is merged in the deed. The most common instance perhaps of this merger is a contract for the sale of land followed by conveyance on completion. All the provisions of the contract which the parties intend should rformed by the conveyance are merged in the ance, and all the rights of the purchaser in rela hereto are thereby satisfied. There may, no be provisions of the contract which from their or from the terms of the contract, survive after completion. (*Lord Russell.*) THE KNIGHT SUGAR CO., LTD. *v.* ALBERTA RAILWAY AND IRRIGATION CO. **10 R P.C 192=173 I C. 88 (P.C.).**

——*Hire agreement—Fitness of article for purpose required—Implied warranty.*

As a general rule, if a person contracts for the hire and use of a specific article, there is no implied warranty by the owner that it is fit for the purpose for which it is required. He undertakes to deliver it in the state agreed for, but the hirer obtaining the thing agreed for, takes the risk of its fitness and efficiency for his purpose. (*Lort Williams, J*) BHARAT BIKASH HALDER *v.* BHARAT LUXMI PICTURES.
A.I.R. 1938 Cal. 248.

——Party performance—Applicability—Maintenance decree creating charge on immovable property—Transfer of property by judgment-debtor — Agreement between decree-holder and alienee for release of pro-

1938 M.W.N. 263.

——*Penalty—Owner of land selling mining rights over it—Covenant in sale deed providing that in case of default by vendor to pay assessment on land vendee by paying it should be absolute owner of property—If penal—Relief against.*

An owner of land sold mining rights over it. A covenant in the sale deed provided that the vendor should pay the assessment on the land and in case he committed default in any year the vendee or his heirs would on payment to Government of such land assessment be entitled to hold and possess with full and absolute rights the property in respect of which such payment had been made. The vendor committed default in payment of land assessment and the vendee on payment of the same brought a suit for declaration that he was an absolute owner of the property.

Held, that the covenant was more or less a clause *in terrorem* and in the nature of a penalty which was out of proportion to the possible injury which the vendee

ONTRACT ACT (1872), S. 16.

night have suffered by reason of the non-payment of ssessment. The covenant therefore should be relieved gainst. (*Pandrang Row and Venkataramana Rao, J.*) MALAYALAM PLANTATIONS, LTD. *v.* N. VEERA-AGAVIAH. A.I.R. 1938 Mad. 304.

ONTRACT ACT (IX OF 1872), S. 16—*Undue influence—Proof required.*

To establish a case of undue influence it is not ufficient to raise an atmosphere of suspicion, but there ust be clear and definite evidence of the case propounded. 9 Luck. 178 (P.C.), Rel. on. (*Bhide, J.*) MST. CHANDRAVAKI *v.* JANTI PRASHAD. 40 P.L.R. 146.

——**S. 25 (3)**—*Agreement to pay barred debt—Express reference to barred debt—If necessary.*

Per *Roberts, C. J.*—It is not necessary that an agreement to pay a debt barred by the law of limitation hould refer in terms to the barred debt. (*Roberts, C. J. and Sharpe, J.*) SMITH *v.* HEPTONSTALL. 1938 Rang.L.R. 6.

——**S. 25 (3)**—*Balance struck and interest fixed—If amounts to promise to pay.*

Wherever there is a balance struck and interest has been fixed or agreed to be paid, the words have always been construed to mean a promise to pay within the meaning of S. 25 (3). (*Coldstream, Dalip Singh and Din Mohammad, JJ.*) SHANTI PARKASH *v.* HARNAM DAS. A.I.R. 1938 Lah. 234 (F.B.).

——**Ss. 78, 108 and 121**—*Certificates of shares in company—If goods—Transfer — Effect — Right of transferor to rescind.*

Share certificates are goods within the meaning of S. 78 of the Contract Act when the person in whose name the shares stand sells or transfers them to another, the title to the same passes to the transferee who gets a valid title to them; and the transferor is precluded from rescinding his contract of sale or transfer. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) AKKITHIMMIAH *v.* RANGAPPA. 16 Mys.L.J. 115.

——**S. 124**—*Contract of "indemnity"—Undertaking by second mortgagee to pay off prior mortgage—Breach—Suit by mortgagor for damages—Breach—Limitation—Starting point—Limitation Act, Arts.* 83 *and* 116.

An undertaking by a second mortgagee to pay of a prior mortgage cannot be held to be a contract of indemnity in the absence of an express provision in the deed of mortgage to the second mortgagee to be indemnify the mortgagor; a suit for damages based on the breach of the undertaking to pay off the first mortgage is governed by Art. 116 of the Limitation Act, when the contract is registered. Limitation commences to run from the time the contract is broken and not from the time at which any damage arising therefrom is sustained by the plaintiff. (*Wort and Varma, JJ.*) KESHWAR SAO *v.* GUNI SINGH. 19 P.L.T. 198= 1938 P.W.N. 211.

——**Ss. 201 and 202**—*Applicability—Hindu reversioners—Document by in favour of stranger authorising him to file a suit for possession of estate and to conduct it—Provision for division of estate between them and stranger after recovery in suit in case of success—Death of one reversioner—Effect—Suit by stranger on behalf of all—Maintainability—Agency — If coupled with interest—Right transferred—If mere right to sue.*

On the death of a Hindu widow who held her husband's estate, the estate, vested in *R* and *B*, sons of two brothers. After *R's* death, his sons (plaintiffs 1 to 5), along with *B*, executed on 21-11-1916, a document in favour of the 6th plaintiff who was a stranger. The said document provided for the 6th plaintiff filing a suit for possession of the estate on behalf of all the plaintiffs and *B*, and conducting it, and for the properties when recovered by the suit, being divided in two equal halves between him and the reversioners, *i.e.*, plaintiffs 1 to 5 and *B*. *B* himself had a half-share in the properties to be recovered. On 27-9 1926 which was the last day of limitation, the suit was brought, the plaint was in fact signed and verified only by the 6th plaintiff who described himself as the authorised agent under the document of plaintiffs 1 to 5, though it purported to have been filed by all the plaintiffs. *B* died previous to the filing of the suit, and his two sons were impleaded as defendants 6 and 7.

Held, (1) that the document in favour of the 6th plaintiff executed by plaintiff's 1 to 5 and *B* could be construed as a power-of-attorney in favour of the 6th plaintiff; (2) that since *B* one of the executants of the power died before it was acted upon, the power-of-attorney was no longer in force and the agency terminated on his death under S. 201, Contract Act; (3) that the agency was not one coupled with interest and was not saved by S. 201 of the Contract Act, as that section applied only to cases in which authority is given for the purpose of being a security or a part of the security and not to cases where the interest of the donee arises afterwards and incidentally; (4) that the 6th plaintiff's agency having become revoked before the date of the suit, the plaint filed by him was an invalid and ineffectual document; (5) that there was no present transfer of a moiety of the reversioner's interest in favour of the 6th plaintiff, but only an assignment of a mere right to sue under S. 6 (*d*), T. P. Act, and hence it was inoperative and invalid; (6) that though the transaction might be an unfair and unconscionable bargain, that was a question between the assignors and the assignee, and the defendants who had no concern with that could not plead that the agreement was champertous so as to bar the maintainability of the suit. (*Venkatasubba Rao, J.*) VENKANNA *v.* ATCHUTARAMANNA. 1938 M W.N. 259.

CO-OPERATIVE SOCIETIES ACT (1912), S. 43.

CO-OPERATIVE SOCIETIES ACT (II OF 1912), S. 33—*Resolution passed at annual general meeting sanctioning dividened—Considerable portion of profits unrealised—Resolution, if* ultra vires.

A resolution passed at an annual general meeting of the shareholders sanctioning the payment of dividend is not in any way illegal or *ultra vires* so long as it does not contravene any of the provisions of the Co-operative Societies Act or any of its bye-laws, although a considerable portion of the profits out of which the dividend could be paid are unrealised interest income. (*Mukherjea, J.*) HARA DAYAL NAG *v.* CHANDPUR CENTRAL CO-OPERATIVE BANK, LTD. 42 C.W.N. 461.

——**S. 42**—*Award against a society —Liquidator appointed for such society — Execution against—If available.*

Where the award is against a society, the fact of liquidation of that society cannot make any difference, so far as the executability of that award against the members are concerned. He is the only person competent to collect the assets of the society from its members and distribute them rateably among the creditors. So he cannot be proceeded against in execution of an award against the society. (*Bose and Puranik, JJ.*) NARAYAN *v.* CO-OPERATIVE CENTRAL BANK OF MALKAPUR. 1938 N.L.J. 82.

——**S. 43**—*Bengal Government Rules, R. 22—Suit for dividend on declaration that resolution passed at extraordinary general meeting refusing dividend was* ultra vires—*Jurisdiction of Civil Court.*

Where the plaintiff sues a Co-operative Society for recovery of a certain sum alleged to be due to him as dividend on certain preference shares held by him, on a

CO-OPERATIVE SOCIETIES ACT (1912), S. 43.

refused was illegal and *ultra vires*, the matter is not one which is withdrawn from the Courts by R 22 of the Rules framed by the Local Government under S. 43 of the Co operative Societies Act, and a su[illegible] maintainable in a Civil Court. (*Mukhe*[illegible] DAYAL NAG v. CHANDPUR CENTRAL [illegible] BANK, LTD.

——S. 43—*Rule-making powers—Extent of—Bengal Government Rules, R.* 28 (3)—*If* ultra vires.

The limits withir [illegible] the Local Governme [illegible] in Sub S. (1) of S. [illegible] Sub-S. (2) of that section simply sets out by way of illustration certain matters, on which rules are considered desirable. It does not in any way limit the powers given by Sub-S. (1) and the items mentioned therein do not exhaust the list of matters on which rules might be framed by the Local Government. Accordingly R. 28 (3) of the Rules framed by the Local Government which relates to distribution of profits in case of societies with limited liability and which is framed with a view to carry out the purpose of the Act as laid down in S. 33 is not *ultra vires*, although there is no specific item mentioned in S. 43 (2) relating to distribution of profits in case of Societies [illegible] liability. (*Mukherjea, J.*) HARA DAY[illegible] CHANDPUR CENTRAL CO-OPERATIVE BAN[illegible] 42 C[illegible]

——S. 43—*Rule-making power of Local* [illegible] —*Extent of*—*R.* 22, *Sub Rr.* (2), (5) *and* (6 [illegible] vires.

The different clauses of Sub-S. (2) of S. 43 of the Co-operative Societies Act are only illustrative and do not restrict the general rule-making power to implement the avowed objects of the Act conferred upon the Local Government by Sub-S. (1) of the said section. Sub-Rr. (2), (5) and (6) of R. 22 framed by the Local Government under the powers conferred by S. 43 of the Act are not *ultra vires*. (*Mitter and Biswas, JJ.*) DACCA CO-OPERATIVE INDUSTRIAL UNION, LTD. v. DACCA CO-OPERATIVE SANKHA SILPA SAMITIES, LTD. 42 C W.N. 391.

——S. 43 (1)—*Rules framed under—Award against a Co-operative Society—Construction—Society consisting of, members mentioned declared liable—If an award against the members.*

Where an award under the rules framed under S. 43 (1) of the Co operative Societies Act was in these terms, 'I therefore in this my award order that the J. Co-operative Society consisting of the following members or past members all of whom are jointly and severally liable for the debts of the Society, pay at once' and proceeded to give a list of members, the decree on the face of it is only an award against the J. Society alone and not against its members. Moreover it is not legally possible for a Registrar to make an award against the members personally for a debt of the Society. (*Bose and Puranik, JJ.*) NARAYAN v. CO OPERATIVE CENTRAL BANK OF MALKAPUR. 1938 N.L.J. 82.

——S. 43 (2) (l)—*'Dispute'—Meaning of.*

There would be [illegible] by one party an[illegible] false or a true one [illegible] be false or true. CO-OPERATIVE [illegible]

CO-SHARER.

[illegible] SAMITIES, LTD. 42 C.W.N. 391.

[illegible] *between member and* [illegible] *ation of member—If*

The words "concerning the business of a Society" occurring in S. 43 (2), Cl. (*l*) and in R. 22 (1) framed by the Local Government, cannot be limited to disputes [illegible] The [illegible] ce its [illegible] tions [illegible] concerning the business of the Society. The use of the word "committee" in S. 43 (2), Cl. (*l*) and R. 22 (1) is [illegible] the Society itself and [illegible] carried on before [illegible] in the name of the [illegible] (*Mitter and Biswas, JJ.*) DACCA CO-OPERATIVE INDUSTRIAL UNION, LTD v. DACCA CO-OPERATIVE SANKHA SILPA SAMITIES, LTD. 42 C.W N. 391.

——S. 43 (2) (l) and (s)—*R.* 22 (5) *and* (6) *framed by Bengal Government — Arbitration and award— Jurisdiction of Civil Court.*

Where an award is made by a person appointed as arbitrator who could not be appointed such an arbitrator under the law, the award is null and void and the Civil Court has jurisdiction to declare it void. But where the award is made by a person validly appointed [illegible] Societies Act and the jurisdiction of the Civil Court is barred. 37 C.W.N. 843, Expl. (*Mitter and Biswas, JJ*) DACCA CO OPERATIVE INDUSTRIAL UNION, LTD v. DACCA CO-OPERATIVE SANKHA SILPA SAMITIES, LTD. 42 C.W.N. 391.

CO-SHARER. *Lease—Co-sharers in leasehold rights in colliery granting sub-lease—Demise not joint but separate—Sub-lessee paying each co-sharer his share of royalty—Right of co sharer to sue for his share of royalty.*

Certain persons had undivided shares in the leasehold rights in respect of a colliery. A sub-lease of the colliery was granted. The demise was not joint but was made separately by each co sharer in respect of his respective share. For a certain period, the sub-lessee paid separately to each co-sharer his respective share of the royalty but for certain reason the payment was stopped. Thereupon one co sharer brought a suit for recovery of his share of the royalty and joined his co-sharers as defendants.

Held, that apart from the nature of the demise which was initially not a joint demise, the subsequent conduct of the parties showed that there was an implied agreement between the parties that each co-sharer's share of the royalty should be paid to him separately. Hence one co-sharer could sue separately for the recovery of his respective share of the royalty. (*Lort Williams, J.*) [illegible]

Forum—Remedies. [illegible]

CO-SHARER.

eject the lessee within 12 years of the lease. (*Darling, S.M. and Bemford, J. M.*) SUKHNA *v.* SHIAM KRISHNA. 1938 A.W.R. (B.R.) 142=1938 R.D. 272.

——*Partition—Portion of Mahal held jointly with other Mahals—Procedure—Alternatives open.*

Where a portion of a Mahal is held jointly with other Mahals, if a co-sharer of that Mahal applies for partition, there are two alternatives open. Either the partition can proceed of the area in that particular Mahal apart from the '*Minjumla*' area or else the applicant must first apply for partition of the area held jointly with the other Mahals and then he can proceed with the partition of the Mahal in which he is a co-sharer. (*Darling, S.M. and Bomford, J.M.*) BANSI RAM *v.* DURGA PRASAD. 1938 A.W.R. (B.R.) 132=1938 R D. 243.

COSTS—*Solicitor's charges—Claim to more than scale fee—Sustainability—Duty of solicitor to support claim by affidavit—Discretion—Interference.*

The guiding principle as regards costs is that costs are given as an indemnity and the costs allowed ought to be sufficient to cover the client in respect of the costs due to his solicitors which would be allowed on taxation between party and party. But the Judge must be given some materials on which to form an opinion. It does not follow that because the out-of pocket costs are heavy, therefore the solicitor's charges also will have to be heavy. If solicitors want to satisfy the Judge that they have done a substantial amount of work which will not be covered by the scale fee, they ought to put in an affidavit shortly stating what work has been done. It is not necessary to go into minute details, but the Judge should be given some material on which he can form an estimate as to the proper sum to be allowed for work which the solicitors have done. The appellate Court will not, in the absence of evidence, interfere with the order made by the trial Judge in his discretion. (*Beaumont, C.J. and Blackwell, J.*) GOPILAL *v.* KOSHAL KISHORE. 40 Bom.L.R. 256.

COURT-FEES ACT (VII OF 1870), S. 7 (iv) (c)—*Suit for declaration that defendant was not entitled to execute certain decree—Valuation of relief.*

A suit for a declaration that the defendant was not entitled to execute a certain decree falls under S. 7 (*iv*) (*c*) of the Court-Fees Act, and it is for the plaintiff to value the relief at such a figure as he chooses and the Court much accept the figure put by the plaintiff. (*Dalip Singh and Jai Lal, JJ.*) R. H. SKINNER *v.* THOMAS SKINNER. 40 P.L.R. 204.

——Ss. 7 (iv) (c) and 8-C—*Plaintiff suing for declaration, and praying for injunction besides other reliefs—Power of Court to revise plaintiff's valuation.*

Where the plaintiff sues for a declaration and prays for, besides other reliefs, a perpetual injunction as a consequential relief flowing from the declaration, the suit, so far as it relates to these two relief's, is a suit for a declaration with a consequential relief within the meaning of S. 7 (*iv*)(*c*) of the Court Fees Act. Under S. 8-C of that Act, the Court has power to revise the valuation put by the plaintiff and determine the correct valuation for the purposes of court-fees. The Court for that purpose may hold such enquiry as it thinks fit. (*Bartley and Nasim Ali, JJ.*) ANATH NATH BANERJEE *v.* KALIMATA THAKURAIN. 42 C.W.N. 504.

——Ss. 7 (iv) (c) and (d) and 8-C—*Suit to obtain declaratory decree and injunction—Power of Court to correct plaintiff's valuation.*

In a suit for a declaration of title to a certain property and for an injunction falling within Cls. (*c*) and (*d*) of S. 7 (*iv*) of the Court-Fees Act, the amount of court-fee is, no doubt, computed according to the amount at wh[ich] the relief sought is valued in the plaint. But wher[e it] is possible for the Court on the facts stated to quest[ion] the plaintiff's valuation, it can exercise its powers [of] correction under S. 8-C of the Act. (*M. C. Ghose, [J.]*) ANNAPURNA GHOSE *v.* RAMESWAR GUHA. 66 C.L.J. [...]

COURT-FEES ACT (1870), Sch. I, Art. 1.

——(as amended in Madras). S. 11—*Applicab[ility] —Suit for possession and mesne profits past and fu[ture] —Decree awarding specific sum for past profits [and] also awarding future profits at definite rate per yea[r] —Non-direction of inquiry into mesne profits—If in [con]travention of O. 20, R. 12—"Final decree"—Appl[ica]tion for execution—Court-fee on future profits—P[ay]ment of—If condition precedent.*

In a suit for recovery of immovable property [with] mesne profits, past and future, the Court by its de[cree] awarded a sum of Rs. 60 for profits prior to suit, [and] also awarded profits from date of suit until delivery of possession at the rate of Rs. 60 per annum, with[out] directing any inquiry at all. Plaintiff applied for d[eli]very of possession, for the past profits award and [also] for a sum of Rs. 540, being the amount of mesne pro[fits] due for 9 years from the date of suit.

Held, (1) that para. 1 and not paras. 2 and 3 of [the] Court-Fees Act, as amended in Madras, applied to [the] case, and under that paragraph the plaintiff was bo[und] to pay the court-fee on the amount of future me[sne] profits claimed before the decree in respect thereof co[uld] be executed; (2) that it was perfectly competent to [the] Court under O. 20, R. 12, C. P. Code, without directi[ng] an inquiry, to pass a decree finally determining [the] amount of profits payable subsequently to the suit, if [it] was made out that it was not necessary to make such [an] inquiry and it could not be said that such a decree is [not] final or incapable of execution or that it is in contrave[n]tion of O. 20, R. 12, C. P. Code. (*Venkataramana R[ao] and Abdur Rahman, JJ.*) VEERAN CHETTI *v.* VE[E]RAN CHETTI. 1938 M.W.N. 2[...]

——Sch. I, Art. 1—*Appeal from mortgage dec[ree] for interest disallowed—Court-fee paid sufficient o[nly] to cover interest disallowed on one of two mortgages [—] Duty of appellate Court.*

Where the plaintiff appealed from a mortgage dec[ree] as regards the amount of interest disallowed and did [not] pay the full *ad valorem* court-fee, but the court-[fee] paid was, however, sufficient to cover the amount [of] interest disallowed on one of the two mortgages [on] which the decree was passed, it is the duty of the app[el]late Court to ask the appellant what portion of [the] appeal he wished to have decided, having regard [to] the amount of court-fee paid. (*Addison and [Din] Mohammad, JJ.*) JOTI PARSHAD *v.* GIRNARI MAL. 40 P.L.R. 1[...]

——Sch. I, Art. 1—Inapplicability—Appeal fr[om] order granting or refusing letters of administration [—] Court-fee payable. *See* COURT-FEES ACT, SCH. [I,] ART. 11. 1938 Rang. L.R. [...]

——Sch. I, Art. 1—"*Subject-matter"—Appea[l—] Demand for additional court-fee—Failure to com[ply] with—Dismissal of appeal—Second appeal from [dis]missal—Valuation— Subject-matter—If subject-mat[ter] of suit—Court-fee payable.*

In a second appeal from a dismissal of an appeal [for] non-payment of deficient court-fee, the dispute in [the] lower Court having reference only to the court-[fee] payable, the subject-matter in dispute in second appeal [is] the amount of stamp in dispute between the parties, [in] other words, the difference between the court-fee p[aid] and the court-fee demanded is the matter in dispute [in] second appeal. The appellant in his appeal to the fi[rst]

COURT-FEES ACT (1870), Sch. II, Art. 1.

appellate Court paid a court-fee of Rs. 100, but the Court held that the correct court-fee was Rs. 412-7 0 the appellant having failed to pay the balance of the [illegible]

[illegible]

demanded, and the appellant, not having complied with that demand, had his second appeal dismissed.

Held, in Letters Patent Appeal, that the dispute in the lower Court had reference only to the court fee payable, and the difference between the court-fee paid and the court fee demanded was the matter in dispute in second appeal, and the court-fee paid in second appeal was therefore correct and consequently the second appeal must be restored a[illegible]

Abdur Rahman, [illegible] does not necessaril[illegible] the suit in regard to which the appeal has been filed. (*Venkatasubba Rao and Abdur Rahman, JJ.*) KALIAPPA GOUNDAN *v.* KANDASWAMI GOUNDAN.

1938 M.W.N. 264 = 47 L.W. 356.

——**Sch. II, Art. 1**—Inapplicability—Appeal from order granting or refusing letters of administration—Court-fee payable. *See* COURT-FEES ACT, SCH. II, ART. 11. 1938 Rang L R. 72.

——**Sch. II, Art 11**—*Appeal from order granting or refusing letters of administration—Court-fee payable.*

The court fee payable on a memorandum of appeal presented to a High Court from an order refusing or granting letters of administration or probate of a will is Rs. 2 under Art. 11, Sch. II of the Court-Fees Act. Neither Art 1 of Sch. I, nor Art. 1 c[illegible] II, is applicable to such a case. (*L*[illegible] KHAN *v.* MOHAMED EUSOOF. [illegible]

——**Sch. II, Art. 17**—*Applicability—Suit under O. 21, R. 103, C. P. Code—Relief of possession asked for—If necessitates a levy of* ad valorem *court fee.*

A suit under O. 21, R. 103, C. P. Code, though the plaintiff claims possession of property of which he had been dispossessed, nevertheless falls under Art. 17 of Sch. II to the Court Fees Act. The restoration of possession is implicit in the setting aside of the executing Court's order. The consequential relief in substance is not one to seek possession but reversal of the executing Court's order. (*Niyogi, J.*) DINKARRAO *v.* RATANSI ASARAM. 1938 N L.J. 107.

——Sch. II, Art. 17 (vi) [illegible]

[illegible]

S. 35—*Conviction for theft and mischief—Separate sentenc*[illegible]

Whe[illegible] jungle, [illegible] killed [illegible] and mischief, the imposition of separate sentences is legal and justified. (*Mosely, J.*) PAW DIN *v.* THE KING. 1938 Rang.L.R. 63.

——**S. 35**—*Separate sentences—Legality—Offences, if need be distinct.*

It is not necessary under S. 35, Cr. P. Code, as amended in 1923, that in order to give separate punishments the offences should be distinct, and a man can be convicted of and separately p[illegible] to the provisions [illegible] PAW DIN *v.* THE [illegible]

——**Ss 54 and** [illegible] *under S. 54—If li*[illegible]

CR P. CODE (1898), S. 145.

S. 56—Substance of order not given out to accused before arrest—Arrest if illegal.

The issue of a written order under S. 56, Cr. P. Code, does not [illegible] [confe]rred by S. [illegible] be held to [illegible] f the com[illegible] [accu]sed before [illegible] [Ma]dan, JJ.*)

JIWO MIAN *v.* EMPEROR. 16 Pat. 763 = 1938 P.W N. 216.

——**S 56**—Scope—Issue of order under—Effect on power of arrest under S 54. *See* CR. P. CODE, SS. 54 AND 56. 16 Pat. 763.

——**S. 106**—*Order under — Legality—Conviction under Ss. 147 and 323, I. P. Code.*

S. 106, Cr. P. Code, as amended, no doubt, excludes S. 149 [illegible] of the Penal [illegible] s not exclude [illegible] involving a breach of the peace. Where, therefore, the accused who are convicted under S. 325 read with S. 149 I. P. Code, are also convicted under Ss. 147 and 323, I. P. Code, both of which involve a breach of the peace, an order under S. 106, Cr. P. Code, could properly be made owing to their conviction under Ss. 147 and 323. (*Zia ul Hasan, J.*) MANNI LAL *v.* EMPEROR.

173 I C. 386 = 1938 O.A. 158 = 1938 A. Cr.C. 14 = 1938 O L R. 117 = 1938 O.W.N. 218 = A.I.R. 1938 Oudh 95.

——**S. 110 (e) and (f)**—*Applicability—Leaders of rival factions arming themselves and their supporters and settling disputes by force—If can be bound over.*

Clauses (*e*) and (*f*) of S. 110, Cr. P. Code, are not [illegible] to arm [illegible] to settle [illegible] [bre]aches of the peace often result and are still more frequently threatened. Such persons can be bound over under S. 110 (*e*) and (*f*) A man is not any the less dangerous to the community because he lives in a house and owns lands. (*Horwill, J.*) MANA *v.* EMPEROR.

1938 M W.N. 213.

——**S. 117, proviso 4**—*Scope and effect—Charge under S. 110 (f)—Evidence of general repute—Sufficiency for action being taken—Police evidence—Admissibility.*

In view of proviso 4 to S. 117 of the Cr. P. Code, a finding in regard to a charge under S. 110 (*f*) of the [illegible]

[illegible] question as to what is a man's reputation is a question [illegible] knows [illegible] [Ve]nkata[illegible] [illegible] 313.

——**S 145**—*Procedure—Claim by landlord and by different sets of tenants separately in respect of several plots of land—Single joint inquiry—Legality—Proper procedure.*

In a case in which a landlord claims a large number of plots of land to be in his possession while different sets of tenants claim different plots in their respective possessions separately, a single inquiry under S. 145, [illegible]

plots is claimed by which tenant. The Magistrate must apply his mind to individual holdings and should not draw general conclusions in respect of specific plots of land on general evidence. Lands claimed by each set of tenants should be separately specified in the proceeding, and the Magistrate must come to a conclusion in respect of each holding separately. (*Noor, J.*) GULAB KUER *v.* GANOURI KOERI. 1938 P.W.N. 149.

——S. 145—*Scope—Dispute between parties claiming joint possession—Jurisdiction of Magistrate to deal with.*

A dispute between two parties claiming to hold joint possession of the property in dispute is not outside the scope of S. 145, Cr. P. Code, and a magistrate has consequently jurisdiction to deal with the matter under the section. (*Madan, J.*) RAJKISHORE NARAIN SINGH *v.* AMIRUL HASAN. 19 Pat.L.T. 211.

——S. 145 (1)—"*Actual possession*"—*Meaning—If includes constructive possession.*

The words "actual possession" in S. 145, Cr. P. Code, can only mean possession in fact as distinguished from possession implied by law, *i.e.*, constructive possession. (*Pandrang Row, J.*) RANGA RAZU *v.* JAGANNATHA RAO. 1938 M.W.N. 252=47 L.W. 340= (1938) 1 M.L.J. 453.

——S. 147—*Applicability—Dispute about right to worship as pujari in temple—Order in respect of—Jurisdiction of Magistrate.*

A dispute about the right to worship as pujari in a temple is a dispute which comes within the provisions of S. 147, Cr. P. Code, as it is a dispute regarding an alleged right of user of any land as explained in S. 145 (2). Where the dispute is regarding a right which is inseparably connected with the use of any land or building it must be regarded as being within the purview of S. 147. The dispute in actual fact may have more to do with what a man does in the temple after entering into it and not so much with his actual entry into the temple; but since the right is inseparably connected with the right to enter a building and cannot be dissociated from it, the dispute about that falls within S. 147; and the Magistrate has therefore jurisdiction to pass an order under S. 147 regarding it. (*Pandrang Row, J.*) VELAPPA GOUNDAN *v.* RAMASWAMI GOUNDAN. 47 L.W. 305.

——S. 154—*First information report — What amounts to—Evidentiary value of such report.*

S. 154, Cr. P. Code, does not necessarily contemplate that only one information of the crime should be recorded as first information report but all information given to police before investigation is started may amount to first information report within the meaning of that section. The first information report is not substantive evidence but can only be properly used to corroborate or contradict the maker thereof. If the name of the accused is not mentioned in that report, mere absence of his name is not by itself a sufficient proof of his innocence. (*Kichlu and Wazir, JJ.*) INDER SINGH *v.* EMPEROR. 40 P.L.R. J. K. 23.

——S. 192—*Sub-Divisional Magistrate—Powers of—Calendar case pending before him and triable by First Class Magistrate—Transfer to Second Class Magistrate to enable committal to sessions—Propriety.*

It is not proper for a Sub-Divisional Magistrate to transfer Calendar cases triable by a First Class Magistrate from his file to the file of a Second Class Magistrate with a direction to treat them as preliminary register case, when the intention of such transfer is that the cases should be committed for trial to the Sessions Court. The Sub-Divisional Magistrate has really no power to direct a Second Class Magistrate to treat the Calendar cases which are triable by a First Class Magistrate as sessions cases. If he thinks that those cases ought to be tried by the Court of Session he should himself proceed to commit them to the Sessions Court under S. 347, Cr. P. Code. If he orders a transfer to the Second Class Magistrate, that amounts to a refusal to exercise his jurisdiction and to perform his duty, and the order of transfer will be set aside in revision by the High Court. (*Pandrang Row, J.*) RAMASUBBAYYA, *In re.* (1938) 1 M.L.J. 403.

——S. 215—*Quashing of commitment—Power of High Court Judge presiding over Sessions.*

The Judge of the High Court presiding over the Sessions of the High Court has power under S. 215 to quash a commitment made to him by a competent Magistrate. (*Mackney, J.*) M. I. MAMSA *v.* THE KING. A.I.R. 1938 Rang. 105.

——S. 233—*Joint trial—Legality—Test—Offences under Ss. 148 and 333, I. P. Code.*

The legality of a joint trial depends upon whether the whole affair constituted one transaction; and with reference to that, unity of time, place and purpose ought to be looked to. Where the offences charged are Ss. 148 and 333, I. P. Code, and where the affair took place in one village, one incident succeeding another rapidly and where the houses concerned were all in the neighbourhood of each other, the joint trial of such accused is legal. (*Gruer, J.*) NANA *v.* EMPEROR. 1938 N.L.J. 90.

——S. 235—*Charges under S. 147 and under Ss. 323 and 325, I. P. Code—Joinder of—Legality.*

An offence under S. 147, I. P. Code, has been made a substantive offence by the Indian Penal Code and there is no illegality in the accused being charged under that section in addition to charges under Ss. 323 and 325, I. P. Code. (*Zia-ul-Hasan, J.*) MANNI LAL *v.* EMPEROR. 173 I.C. 386 =1938 O.A. 158= 1938 A.Cr.C. 14=1938 O.L.R. 117= 1938 O.W.N. 218=A.I.R. 1938 Oudh 95.

——S. 250—*Order under—Omission to record reasons—If vitiates proceedings.*

It is the duty of the Magistrate ordering compensation to be paid to the accused under S. 250, Cr. P. Code, to record his reasons for passing such an order. The recording of the reasons is a condition precedent to the proper exercise of the power under the section. An order for compensation passed without recording reasons is, therefore, illegal and is liable to be set aside. (*Thomas, C.J.*) BHAGWAN DIN *v.* JAGDAT. 173 I.C. 643= 1938 O.L.R. 132=1938 O.A. 224= 1938 O.W.N. 288.

——Ss. 297 and 298—Duty of Judge—Charge under S. 411—Interval between commission of offence and finding of property with accused—Duty of Judge to direct jury to consider interval—Presumption under S. 114, Ill. (*a*), Evidence Act—When justified. *See* EVIDENCE ACT, S. 114, ILL. (*a*). 1938 M.W.N. 215.

——S. 307—*Interference with verdict of jury—Powers—Scope and extent of.*

In cases where there has been a verdict of not guilty, it is the practice not to reverse the verdict unless it is perverse or manifestly wrong. On the other hand, where the jury has returned a verdict of guilty, the matter stands in a different footing. Having regard to the language of S. 307, Cr. P. Code, and to the duty which is enjoined on the High Court and to the powers conferred upon the High Court, it cannot be held that, so long as the verdict is not perverse or palpably erroneous the High Court must act against its own judgment and convict a person in respect to whose guilt it entertains grave doubts. It is the clear duty of the High Court in

CR. P. CODE (1898), S. 342.

the interests of justice to reverse the verdict of a jury when it considers that the prosecution has fails to establish the charge and the verdict of the jury is not sustainable upon the evidence. (*Collis* [illegible] *JJ.*) EMPEROR *v.* BANSI. 1 [illegible]

———S. 342—*Examination of accu* [illegible] *with—Complicated case—Procedure to be adopted—Prejudice to accused—Representation of accused by Counsel —If affects question.*

Where the offences alleged are under Ss. 148 and 333, [illegible]

v. EMPEROR. 1938 N.L.J. 90.

———S. 342—*Witness examined under S.* 540—*Accused, if should be examined again.*

S. 540, Cr. P. Code, is not controlled by S. 342 and therefore where the accused is once examined as required by S. 342, Cr. P. Code, and then a witness is examined under S. 540, the Court is not bound to examine the accused again after recording the s[illegible] witness. (*Kichlu and Wazir, JJ.*) I[illegible] EMPEROR 40 P.[illegible]

———Ss. 346 and 350 (2)—*Proceedings stayed under S.* 346—*Magistrate by whom case is taken up—If must hold* de novo *trial.*

Where proceedings had been stayed under S. 346, Cr. P. Code, the Magistrate by whom the case is subsequently taken up is to hold a *de novo* trial. (*Henderson and Khundkar, JJ.*) SASTHIGOPAL *v.* HARIDAS BAGDI. 42 C.W.N. 508.

———Ss. 349 and 350 (2)—*Proceedings submitted to superior Magistrate—Right of accused to* de novo *trial.*

[illegible]

hold otherwise would be to [illegible] effect. (*Henderson and Kh*[illegible]) [illegible]GOPAL *v.* HARIDAS BAGDI.

———S. 350 (1)—*Construction—More than one transfer—Waiver of* de novo *trial—Last Magistrate, if act on the evidence of the first Magistrate—Predece*[illegible] *if means 'predecessors'.*

Where a Magistrate had recorded the evidence, [illegible] the second Magistrate merely recorded the claim for a *de novo* trial and where before the third Magistrate the claim for *de novo* trial is waived by the accused's Counsel, [illegible]

———S. 417—*Appeal against acquittal—Delay in filing—When excusable.*

An accused was convicted on one charge and acquitted on another charge. On appeal from his conviction, High Court suggested that proper conviction should have been on charge on which he was acquitted. Hence, Crown filed an appeal from the original order of acquittal on that charge. The appeal was filed three months and eight days after the date of acquittal.

CR. P. CODE (1898), S. 443.

Held, that although Government should file an appeal with all reasonable expedition, yet when the *interim* time had been occupied by another appeal from convic[illegible] the appeal by Crown was filed in the order in appeal by the [illegible]ling the Crown appeal was excusable. (*Mackney, J.*) THE KING *v.* NGA TOK HLA. A.I.R. 1938 Rang. 109.

———S. 423 (b) (2)—*Powers of appellate Court—Conviction under S.* 414, *I. P. Code, by Second Class Magistrate—Appeal—Alteration into one under S.* 409, [illegible]

A.I.R. 1938 Mad. 315.

———S. 439— *Competency of revision — Order of District Magistrate under S.* 195 (5) *directing withdrawal of complaint.*

Making of a complaint under S 195 (1) (*a*) is not a judicial act but is the act of a public servant. Hence no revision lies under S 439 from the order of the [illegible]

———S. 439—*Finding of fact—Interference.*

No doubt the revisional jurisdiction of the High Court can always be exercised in order to prevent a gross and palpable failure of justice. But this exercise of revisional jurisdiction refers to such an error of facts as is obvious upon the face of the record and is not in effect a mistake by the Magistrate as to the question of which set of facts should be deemed more acceptable but a blunder relating to the question as to whether some fact has been proved or not. But where there was [illegible] believed it [illegible] the accused [illegible] machinery of [illegible] be invoked. [illegible] *C. J.*) U PANDITA *v.* MAUNG TINT. A.I.R. 1938 Rang 103.

[illegible] 439—*Interference—Refusal to take further evidence—Proceedings under S.* 145—*Claimant admit-* [illegible]

dispute or any portion thereof, it cannot be said that the refusal of the Magistrate to take further evidence on his behalf results in any failure of justice justifying interference in revision, in view of the provisions of S 537, Cr. P. Code [illegible] JAGANNAT[illegible]

———S. [illegible] Divisional Magistrate transferring calendar cases from his file to Second Class magistrate to be treated as sessions cases—Propriety—Revision—Interference. *See* CR. P. CODE, S. 192. (1938) 1 M.L.J. 403.

———S. 443—*Omission to record finding—If vitiates proceedings.*

The omission of the District Magistrate to record his finding on the application under S. 443, does not vitiate his proceedings where he implies in [illegible]

CR. P. CODE (1898), S. 476.

that he has come to a finding. It is sufficient that he has decided under S. 443 that the case ought to be tried under the provisions of Ch. 33 and consequently has under S. 446 (1) committed the case for trial to the Court of Session. (*Mackney, J.*) M.I. MAMSA *v.* THE KING. **A.I.R. 1938 Rang. 105.**

——S. 476—*Complaint under—Time limit—Motive of application—Relevancy.*

While, no doubt, a Court may properly hesitate to make a complaint on an application which is presented long after proceedings have ended and which is obviously not prompted by any other motive than personal grudge, there is nothing in the Code warranting the proposition that action under S. 476 is only to be taken before the close of the proceedings in which the perjury is alleged to have been committed, or in strict continuation of them, or within any particular time after their termination. Nor is there justification for the view that only applications prompted by high motives are to be entertained. (*Coldstream, J.*) JAHAN KHAN *v.* THE KING. **40 P.L.R. 136.**

——S. 476-A—*Application for making complaint dismissed in default by lower Court—Jurisdiction of superior Court to make complaint.*

The word 'rejection' in S. 476-A, Cr. P. Code, includes rejection on the ground that the complainant did not appear to prosecute the application. Where, therefore, an application for making a complaint under S. 476 was dismissed in default by the lower Court, the superior Court has no jurisdiction to make a complaint. (*Coldstream, J.*) JAHAN KHAN *v.* THE KING. **40 P.L.R. 136.**

——S. 488 (3)—*Order for imprisonment—Person sentenced already adjudged insolvent—Protection order under S. 31 of the Provincial Insolvency Act obtained—If avails as against the order of imprisonment of a Criminal Court.*

An order passed by a Magistrate under S. 488 (3), Cr. P. Code, for the imprisonment of a person who fails to pay a maintenance allowance, is a sentence of imprisonment. An order for the protection already obtained by such a person under S. 31 of the Provincial Insolvency Act protecting him from 'arrest or detention', cannot protect him from arrest in execution of a Criminal Court process or detention under a sentence of imprisonment passed by a Criminal Court. The 'arrest or detention' must mean arrest or detention in pursuance of an order of a Civil Court passed in execution of a decree of such Court. A person who is sentenced to fine and in default to imprisonment could not escape imprisonment under a protection order passed by the Insolvency Court. (*Allsop, J.*) SHYAMA CHARAN *v.* ANGURI DEVI. **1938 A.W.R. (H.C.) 157 = 1938 A.L.J. 225.**

——S. 514—*Forfeiture of bond—When not proper.*

The accused executed a bond for appearance before a certain Court under S. 514, Cr. P. Code. On a certain date of hearing, the Court sat at a place different from its usual place of sitting. The accused did not appear on such date and so his bond was forfeited. It was found that the bond had not been executed as such by the accused as the bond was nowhere signed by him. Moreover, the order sheet also did not show that the accused had knowledge of the change of venue of the Court.

Held, that the bond could not be forfeited under such circumstances. (*Biswas, J.*) IMARAT MALLICK *v.* EMPEROR. **A.I.R. 1938 Cal. 255.**

——S. 526—*Ground for transfer—Magistrate having interview with one of parties.*

CUSTOM.

The fact that the Magistrate had an interview with one of the parties to the case privately and out of Court and heard from that party his version of the facts, is sufficient to disqualify him from subsequently trying the case, and the case should, therefore, be transferred to another Court. (*Blacker, J.*) PRAN NATH *v.* EMPEROR. **40 P.L.R. 157.**

CRIMINAL TRIAL—*Cross cases—Circular No. 52 of Judicial Commissioner's Court, N.W.F. Province—Interpretation.*

By Circular No. 52 of the Court of the Judicial Commissioner, N.W.F. Province, it is intended that in cross-cases relating to same transaction the trial Judge should bring on each record separately the whole story complete by itself and should give findings on the issues involved in that case independently from those which arise in the other. But it is never intended that a part of the story should be admitted in each case and the other part shut out. (*Almond, J. C. and Mir Ahmad, J.*) IBRAHIM *v.* EMPEROR. **A.I.R. 1938 Pesh. 10.**

——*Duty of prosecution—Improbabilities—Effect.*

Whatever the real facts may be and whatever opinion may be held as regards the credibility of the defence story it is for the prosecution to establish the charge. Where the case presented by the prosecution was full of discrepancies and inconsistencies and the improbabilities in the story were such as to deprive it of all claim to credibility, and it was suspect from start to finish, a conviction based on such evidence, cannot be made to stand. (*Collister and Bajpai, JJ.*) EMPEROR *v.* BANSI. **1938 A.L.J. 282.**

——*Evidence—Value of—Prosecution witnesses not mentioned in first information report and not independent.*

The fact that none of the prosecution witnesses was mentioned in the first information report and most of them are not independent and made some statements which are contrary to what was stated before the committing Magistrate or the police, is not always sufficient to totally discard their evidence, though they are sufficient to raise a suspicion against their truthfulness and to lead the trying judge to scurtinize the evidence with caution. If oral evidence of witnesses is corroborated by medical or other reliable evidence there is no reason why it should not be believed though the witnesses were not named in the first information report or are not totally independent. (*Zia ul-Hasan, J.*) DILDAR KHAN *v.* EMPEROR. **173 I.C. 339 = 1938 O.A. 154 = 1938 A.Cr C. 11 = 1938 O L R. 108 = 1938 O.W.N. 184 = A I.R. 1938 Oudh 88.**

——Transfer—Jurisdiction—Calendar case triable by First Class Magistrate on the file of Sub-Divisional Magistrate—Transfer by latter to Second Class Magistrate with direction to treat them as preliminary register cases—Propriety. *See* CR. P. CODE, S. 192. **(1938) 1 M.L.J. 403.**

CROWN DEBT—Priority—Property sold in execution at instance of attaching creditor—Income-tax due by judgment-debtor — Application by Crown for payment out of sale proceeds—Competency. *See* C. P. CODE, S. 151. **1938 M.W.N. 197 = (1938) 1 M L J. 351 (F.B.).**

CUSTOM—*Validity—Essentials—Custom of negotiability of "pahunch" or ordinary receipt—Enforceability of.*

Before a Court of Law can give effect to a custom as a valid one it must have the following attributes: (1) reasonableness ; (2) certainty ; (3) it should not offend against provision of law ; (4) its immemorial usage must be capable of being proved by evidence of positive instances ; (5) it should not offend against public policy.

CUSTOM (Punjab).

... to establish a custom ...

terring it. ... CHETUMAL BULCHAND. 173 I C 691= A.I.R. 1938 Sind 24.

——(Punjab)—*Riwaj-i-am—Entry in—Onus—Discharge of onus by earlier riwaj-i-am supported by instances.*

Although a riwaj-i ...

(*Dalip Singh and B* ... ZUL FAQAR.

——(Punjab)— ... *tenant on abadkari t.* ... *rights on succeeding* ... *such rights.*

Where a widow o ...

... and ... cts ... v. RAJ DEVI. 40 P.L.R. 153 (2).

——(Punjab) ... *bequest.*

According to the custom among the *Sials* of Jhang, a proprietor can by will favour one of his sons as against the others, although the property is ancestral (*Dalip Singh and Bhide, JJ.*) SHER MOHAMMAD *v.* ZUL FAQAR. 40 P.L.R. 145.

CUTCHI MEMONS—*Will executed by codicil—Law applicable.*

A Cutchi Memon is governed by the Mahomedan Law so far as the execution of his will and a codicil is concerned. 43 Bom. 641, Rel. on. (*Wadsworth, J.*) MAHOMED YOONUS *v.* ABDUR SATTAR ISMAIL. (1938) 1 M.L.J. 444

DECLARATORY DECREE. *See* SPECIFIC RELIEF ACT.

DECREE—*Conditional decree—Time limit imposed for fulfilment of condition—Appeal filed—Running of time.*

Where a decree directs something to be done by way of a condition and imposes a time limit, the time will run, when an appeal is filed, not from the date of the original decree but from that of the appellate decree,

DECREE.

... the position is different in cases where the ... rried into execution before the appeal is ... *Khundkar, J.*) TARAPADA GHOSE *v.* SAKHI ... HARA. 42 C.W.N. 492.

... *ruction—Executability—Decree containing* ... *instalments—Execution application* ... *payment—Subsequent compromise* ... *payment—Liability of surety* ... *pt on foot—Original decree, if* ...

... mposing a decretal liability of a ... ain rate. It did not provide for ... liability by instalments. It con- ... payment of instalments amount- ... and at a lower rate of interest upon the observance ... which provisions the judgment-debtors could escape the decretal liability. On the judgment-debtors failing to observe these provisions, an application for execution of the decree was taken out and a compromise was again arrived at modifying only the provisions upon the observance of which the full ...

——*Payment under—Compromise decree providing for instalments to fall due on specified dates—Specified date happening to be holiday—Deposit in Court next day—If sufficient compliance.*

... that the money ... due on ... cree for ... nday or ... osit the ... ed there ... *Rao and* ... VEN- ... 388= ... J. 342.

——Setting aside—Right to sue—Court passing decree having no territorial jurisdiction. *See* C. P. CODE, S. 21. 42 C.W.N. 375.

——*Setting aside—Right to sue*—Ex parte *decree—Defects in service of summons.*

Defects in service might be grounds for setting aside an *ex parte* decree under O. 9, R. 13, C. P. Code, but unless there was fraud with regard to service which kept the defendant in ignorance of the suit or unless by putting in a false return the plaintiff kept the Court in ignorance of the real state of affairs and thus enabled it to pass a decree which otherwise it could not have passed, no suit for setting aside the decree would lie. (*Mukherjea, J.*) KUMAR SARAT KUMAR ROY *v.* DHARMADAS BHATTACHARJEE. 42 C.W.N. 375.

DEED—*Construction—Conveyance—Land conveyed excepting "all coal and other minerals"—Vendee's right to petroleum and natural gas.*

A deed of conveyance of land contained an exception in the following terms:—"Excepting therefrom all coal and other minerals in and under the said land and the right to use so much of said land or the surface thereof

DEED.

as the company may consider necessary for the purpose of working and removing the said coal and minerals."

Held, that the words "all coal and other minerals" meant grammatically "all coal and all other minerals." All minerals were, therefore, excepted and there was no room for the inclusion in the transfer of any *genus* of mineral. Even if the word "all" was to be restricted in its application to the word "coal," it would still be impossible out of the single ingredient "coal" to construct a *genus* of minerals to which the succeeding general words could be confined. Petroleum and natural gas which come within the definition of, "minerals" are therefore, excepted, and the vendee is not entitled to them. (*Lord Russell.*) THE KNIGHT SUGAR CO., LTD. *v.* ALBERTA RAILWAY AND IRRIGATION CO.

10 B.P.C. 192=173 I.C. 88 (P.C.).

———*Construction—Gift—Gift by Hindu woman in favour of grand-daughter—Rules for construction of wills—If applicable.*

Rules for the construction of wills made by a male in favour of a female do not necessarily apply to gifts *inter vivos* made by a Hindu woman to her grand-daughter. The presumption in the case of a will made by a male in favour of a female turns on the estate which, on the death of a male, a woman normally takes. In the case of a deed of gift *inter vivos*, it is necessary to consider the terms of the gift and only in case of ambiguity to fall back upon the surrounding circumstances. Where the operative words in a deed of gift by a Hindu woman in favour of her grand-daughter were:—"I have gifted away to her all my rights and privileges pertaining to the above estate......that is, all the rights which I hold at present......No person whosoever has any claim to this share, gifted away; nor shall any body have any hereafter."

Held, that the gift amounted to a gift of all the donor's right, title and interest, whatever that might be. (*Stone, C.J.*) SIDNATH *v.* JASODA BAI.

10 R.N. 287=173 I.C. 145 (2).

———*Construction—Principles—Lease—Plan attached to deed—Value of—Conflict between boundaries and area—Which to prevail.*

A plan of the demised land attached to a lease-deed must be treated as forming part of the deed. Though the words of the description in the deed are primarily relied on, in case of ambiguity the plan may control the body of the deed. Where the lessee does not deny that he actually possesses the land which is depicted on the plan and there is no doubt that the land is within the boundaries which are well defined, if in such a case there is a question as between boundaries and area, the former should prevail. (*S.K. Ghose and Patterson, JJ.*) KESHABJI LALJI *v.* PIRAMALL GAYENKA.

42 C.W.N. 405.

———*Construction—Sale deed—Owner of a 16 pie share in mahal mortgaging 3 pies—Subsequent sale by him of 8 pies share—Portion of sale consideration left with vendee for payment of mortgage—Sale deed, if includes mortgaged share.*

An owner of a 16 pie share in a mahal mortgaged 3 pies and subsequently sold 8 pies share. It was stated in the sale deed that the vendee should pay up the amount of the mortgage debt with a certain sum left with him for that purpose and should obtain a receipt. Nothing was said about this receipt being made over to the vendor, whereas if, in fact, this payment was being made on his behalf, it was obviously necessary that on payment being made, the receipt should be handed over to the vendor as it would not have been of any value to the vendee.

ELECTRICITY ACT (1910), S. 39.

Held, that the use of the words in "shall obtain a receipt" implied that the receipt was being obtained for the benefit of the person who made the payment and who would retain it, and would equally take back the mortgage deed from the mortgagee and that, therefore, the only reasonable conclusion was that the 3 pies share mortgaged was included in the 8 pies share covered by the sale deed. (*Yorke, J.*) BRIJ BHUKHAN *v.* BHAGWAN DAT.

1938 O.W.N. 290.

EASEMENT—*Acquisition—Tree standing on plot of land of one—Branches overhanging land of neighbour—Right of former to prevent latter from cutting overhanging branches—Adjacent plots of land belonging to same owner—Sale of one with old tree thereon—Branches overhanging on land not sold—Right of vendor to cut off—Vendee's right to prevent cutting by vendor.*

No right of easement can be acquired in respect of a tree which gradually projects over his neighbour's land insensibly and by slow degrees. The owner of tree has consequently no right to prevent a person lawfully in possession of land into which or over which its roots or branches have grown, from cutting away so much of them as project into or over his land. But it is a settled maxim that a grantor shall not derogate from his grant. Where an owner of two adjacent plots of land transfers or sells one of them together with a tree standing thereon, which is not a tiny plant or sapling, but an ancient tree of about 100 years old whose growth has practically ceased, it must be held that a right to project the existing boughs of the tree over the vendor's land is also transferred to the vendee. To allow the transferor to cut off the branches overhanging his land (which has not been transferred) would be to violate the maxim that the grantor shall not derogate from his grant. If he intends to reserve to himself the right to lop off the projecting branches, he should expressly reserve. It is not necessary that the vendee should be given under the sale deed an express right to project the branches, in order to entitle him to prevent the vendor from cutting off the branches. (*Venkatasubba Rao and Abdur Rahman, JJ.*) ARUMUGHA GOUNDAN *v.* RANGASWAMI GOUNDAN. 1938 M.W.N. 282=47 L.W. 324.

ELECTRICITY ACT (IX OF 1910), S. 2 (c)—*"Consumer"—Meaning of—Manager of company.*

Where the registered consumer and the person supplied with the energy is the proprietor of a company, the manager of the company cannot be held to be a consumer within the meaning of S. 2 (c) of the Electricity Act. The premises of the company are not the premises of the manager. The fact that the manager receives the electric bills, signs them and pays the bills cannot make him a consumer. (*Dhavle, J.*) BHAGALPUR ELECTRIC SUPPLY CO., LTD. *v.* PROFULLA KUMAR GHOSAL.

1938 P.W.N. 182=19 Pat.L.T. 141.

———Ss. 39 and 44 (c)—*Scope and effect—Charge under—Presumption of abstraction and of tampering with meter—Conditions for raising of—Accused not proved to be consumer—Effect of.*

S. 39 of the Electricity Act dispenses with direct proof of abstraction by the accused person, but does not indicate the person who is to be held liable for the constructive abstraction. S. 44 (c, also enables a presumption to be raised, under certain circumstances, that the prevention of a meter from duly registering itself has been knowingly and wilfully caused by the consumer in whose custody or control the meter is proved to be. But the prosecution cannot avail itself of this statutory presumption as against an accused person unless that person is shown to be a consumer within the meaning of S. 2 (c) of the Act. (*Dhavle, J.*) BHAGALPUR ELEC-

ELECTRICITY ACT (1910), S. 44.

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If avai...
See ELECTRICITY ACT, Ss. 39 AND 44 (*c*)
1938 P.W.N. 182=19 Pat.L.T. 141.

ESTOPPEL—Conduct—Tenant illegally ejected and dispossessed by some only of co sharers—Suit by latter under wrong section of Act—Subsequent ejectment suit by same co sharers against heir of tenant—Plea by

and Abdur Rahman, JJ.) RAMASWAMI v. VENKATA KRISHNAYYA. 1938 M.W.N. 224 (2)= 47 L.W 374.

EVIDENCE—*Partition entries—Evidentiary value of —Holding of trespasser entered as non-occupancy holding in* qurra *of some co-sharers—Effect—Right of latter to sue in ejectment.*

Entries in partition, while not constituting *res judicata*, are evidence on behalf of the persons in whose favour they are. If certain co-sharers in a patti are able to get a trespasser's holding included in their *qurra* as a non-occupancy holding of over twelve years, they are entitled to the benefit of the negligence of their co-sharers in the partition, and are entitled to eject the persons in possession of such holding as ... tenants. (*Darling, S. M and Bomford,* ...)
TELI v. RAJ NARAIN SINGH.
1938 A.W.R. (B.R.) 117=...

EVIDENCE ACT (I OF 1872), S. 32
...of verbal statements—Admissibility—...ted in result of litigation.

S. 32 of the Evidence Act speaks of statements both written and verbal, and a Court cannot refuse to admit

KUMAR SAHA v. JOGNESWAR SAHA.
42 C.W...

——S. 32 (3)—*Part of statement against interest—Entire statement, if admissible.*

Where a part of a statement is against the pecuniary or proprietary interest of the person making it within the meaning of S. 32 (3) of the Evidence Act, and the rest of the statement is necessary to explain the part which is against interest, the statement ... would be admissible. Where during a quarr... a husband and wife, the wife stated "I have ... this property because I purchased it ...out ornaments given to me by my father at the time of my marriage",

Held, that the statement that she mortgaged the property was a statement against her pecuniary or proprietary interest, that the rest of the statement explained how it became possible for her to create the mortgage, and that, therefore, the entire statement was admissible in evidence. (*Khundkar, J.*) SISIR KUMAR SAHA v. JOGNESWAR SAHA. 42 C.W.N. 359.

——S. 32 (5)—*Evidence of family bard as to events before his birth—Admissibility.*

The evidence of a family bard as to the relationship of parties is *prima facie* inadmissible if it relates to

EVIDENCE ACT (1872), S. 92.

their representatives-in-interest"—Meaning of.

The term "representatives in interest" in the proviso to S 33 of the Evidence Act would include persons who have derived title from another. *It also* includes persons having the same interest in the subject matter of the litigation and comprises all persons on whose behalf,

——Ss 35 and 79—*Municipal death registers—Admissibility—Correctness of copies—Presumption—Object of such registers.*

The death register maintained under S. 298 (2), Cl. (*j*) (*b*) of U. P. Municipalities Act are admissible in evidence under S. 35 of the Evidence Act. The correctness of the copies has to be under S. 79 of the Evidence Act. The object of maintaining such a register is to keep a fairly full record of the person whose death is reported. (*Collister and Bajpai, JJ.*) KOMAL v. GUR CHARAN PRASAD. 1938 A.W.R. (H.C.) 168= 1938 A.L.J. 235.

——S. 90—*Presumption under—When to be raised—Discretion and duty of Court in raising.*

of the possession being given by the party relying upon the document. The custody may not be in the strictest ... whether it originated in right ... be explained. The soundest ...le of expediency necessitates

whom the document should naturally have been.

Thakor, J.—S. 90 confers no right on any party to compel the Court to draw a presumption as regards any document purporting to be thirty years old and pro-

ed will—Revocation by an unregistered document.

Ss. 91 and 92 do not apply to a will as it is neither a contract, nor a grant nor a disposition of property until the death of the testator makes it operative. S. 92 (4) does not prevent the revocation of a registered will by an unregistered document. (*Wadsworth, J.*) MAHOMED YOONUS v. ABDUR SATTAR ISMAIL.
(1938) 1 M.L.J. 444.

——S. 92—*Partition—Oral evidence—Admissibility—Test—Receipts referring to partition 'lists'.*

It is perhaps a most point whether oral evidence is admissible to determine the intention of the parties. It is certainly not admissible if the document is unambiguous,

EVIDENCE ACT (1872) S. 109.

but if there is doubt then it is permissible. Though mere lists of property do not form instruments of partition, it has to be determined in each case whether these documents are mere lists or in themselves purport 'to create, declare, assign, limit or extinguish . . . . . any right, title or interest' in the property. The question is whether these lists merely contain the recital of past events or in themselves embody the expression of will necessary to effect the change in the legal relation contemplated. (*Bose and Puranik, JJ.*) NARAYAN *v.* CO-OPERATIVE CENTRAL BANK OF MALKAPUR.

1938 N.L.J. 82.

——**S. 109**—*Tenant admitting tenancy—Presumption of its continuance.*

Where a tenant at will admits the tenancy, S. 109 comes into operation and there is a presumption against him that he continues as a tenant till he proves that the relationship has ceased to exist. (*Mehta and Lobo, JJ.*) DAYARAM PARSUMAL *v.* SIRUMAL MANGHANMAL.

173 I.C. 222=10 R.S. 199=A.I.R. 1938 Sind 16.

——**S. 114, Ill. (e)**—*Attachment—Compliance with formalities—Presumption.*

Where the bailiff who carried out an attachment was examined as a witness and he has stated that the attachment was made in accordance with law, it is for the party asserting the contrary either to question the bailiff or to lead evidence on the point. (*Dalip Singh and Bhide, JJ.*) LACHHMAN SINGH *v.* DASAUNDHI RAM BABU RAM. **40 P.L.R. 142.**

——**S. 114, Ill. (a)**—*Interval between commission of offence and recovery of property stolen or robbed—Presumption of receipt of stolen property—If justified—Duty of Judge to direct jury to consider interval—Accused absconding knowing of search—If justifies presumption.*

When property stolen or robbed are recovered from a person after the lapse of more than a month from the commission of theft or robbery, the interval between the two has got to be considered, and the Judge must tell the jury that they should consider for themselves whether the date of arrest of the accused and the finding of the property with him are sufficiently near to the date of the offence to justify their making the presumption under S. 114, Ill. (*a*) of the Evidence Act. But where the accused is found to have kept out of the way and absconded, knowing of a search, that entitles the jury to bridge over the interval. (*Horwill, J.*) THEVAR SERVAI *v.* EMPEROR.

173 I.C. 450=1938 M.W.N. 215.

——**S. 115**—*Estoppel by record—Judgment creating charge on property*—Bona fide *purchaser for value without notice—If bound by charge.*

A judgment not only creates a right, it works an estoppel. A judgment creating a charge on immovable property binds not only the parties to the suit but also privies. The term "privy" is a term of the law meaning a partaker who is not a party, that is, in this connection, it includes all who derive title to the land, the subject of the charge from one who was a party to the suit by the decree in which the land was charged. It follows, therefore, that the charge is effective against a *bona fide* purchaser of the land for value without notice by reason of the law of estoppel by record. (*Stone, C. J. and Digby, J.*) AHSAN HUSSAIN *v.* MAINA.

10 R.N. 264=172 I.C. 949=
A.I.R. 1938 Nag. 129.

EXECUTION—Sale—What passes—Property sold by judgment-debtor with direction to vendee to discharge decree debt out of consideration reserved with vendee—Non-payment of decree-debt by vendee—Sale of property in execution—Rights of purchaser—Lien of

GUARDIANS AND WARDS ACT (1890), S. 7.

judgment-debtor for unpaid purchase-money—Charge—Right of purchase to enforce against vendee. *See* T. P. ACT, S. 55 (4) (*b*). **(1938) 1 M.L.J. 316.**

GRANT—Grantor's right to derogate from—Owner of land selling same with old tree—Right to cut branches overhanging his own adjacent plot—Right of vendee to prevent cutting—Easement. *See* EASEMENT—ACQUISITION. **47 L.W. 324.**

——*Lost grant—Presumption, when arises—Right to irrigate plot by cutting channel across public pathway—Lost grant, if can be presumed—Entry in C. S. records recording irrigation rights in respect of plot—Value of—Distinction between public and village pathway.*

No presumption of a lost grant is possible when the circumstances are such that no lawful grant could be made. A right to irrigate a plot from a tank by cutting a channel across a public pathway amounts to an infraction of the rights of the public, and no presumption of its legal origin could be made. There can, therefore, be no presumption of a lost grant in such a case. An entry in the C. S. records recording irrigation rights in respect of the plot in question, cannot by itself give rise to a presumption that the grant of the irrigation rights was anterior to the commencement of the pathway. Where, however, the pathway is not a public pathway but a village pathway, the rights to which are vested in the villagers only, no question of injury to public rights would arise by obstruction of the same. A presumption of a lost grant can, therefore, arise in respect of a right to take water by cutting a channel along a village pathway. (*Mukherjea, J.*) JATINDRA NATH MULLICK *v* SATYA KINKAR SAIN. **42 C.W.N. 445.**

——*Presumption—Zamindari—Irrigation tank within boundaries of zamindari—Tank not communal property—Government not exercising ownership for over a century—If to be presumed excluded from zamindari settlement—Ownership of tank.*

A tank within the boundaries of a zamindari, which is not communal property but which is an irrigation tank cannot be held to belong to the Government merely because it is referred to in the Survey and Settlement Register as "poramboke", or that it is described as a village tank or that it has not been taken into account in fixing the assessment payable by the zamindar. Where it is shown that the Government during a period of over a century never exercised any acts of ownership over the tank in question, it must be held to belong to the zamindar and not to the Government. (*Venkatasubba Rao and Abdur Rahman, JJ.*) VENKATAPATNAM *v.* SECRETARY OF STATE. **1938 M W.N. 305.**

GUARDIANS AND WARDS ACT (VIII OF 1890), Ss. 7 and 12—*Powers of Court—Hindu father—Will appointing guardian for minor child—Effect of—Application for probate—Order pending application giving custody of minor to person other than guardian appointed by will—Validity.*

A Hindu father has the absolute right of appointing by will the guardian of his minor child, and the will so far as the appointment of the guardian is concerned speaks from the date of the testator's death. And when there is a testamentary guardian, the Court has no power to appoint another person as the guardian or to give another person the custody of the minor child, unless it be temporary custody under S. 12 of the Guardians and Wards Act, until the testamentary guardian is removed from his office. In such a case the fact that the will remains unprobated and that there is a contest as to its validity may be a ground for the Court passing an order for the temporary custody of the minor child, but the Court cannot say that it will refuse to take notice of the will and pass an order for the custody of the minor in

GUARDIANS AND WARDS ACT (1890), S. 29.

favour of a person other than the
(*Leach, C. J. and Lakshmana Ra*
AMMAL v. SIRONMANI AMMAL.
(1938) M.W.N 267=(1938) 1 M L.J. 422.

——S. 29—*Applicability—Temporary guardians.*

S. 29 of the Guardians and Wards Act refers to the powers of guardians appointed and declared by the Court whether they are permanent or temporary guardians. An order of Court directing the sale of property by a temporary guardian is, therefore, not *ultra vires.* (*Dalip Singh, J.*) RAMESH CHANDRA JOSHI v. MURLI MANOHAR JOSHI, 40 P L R. 153 (1).

HINDU LAW—*Adoption—Right to make—Unmarried man.*

It is not necessary for the validity of an adoption that the adopter should have been married. (*Bomford, J. M.*) RAJ NATH PANDE v. BENI MADHO PANDE.
1938 R D. 328.

——*Alienation—Widow—Necessity—Proof—Consent by reversioner—Presumption.*

Consent of the reversioner to an alienation made by the widow is presumptive proof of necessity and the presumption may be controverted by other evidence. (*Madhavan Nair and King, JJ.*) THIMMANNA BHATTA v. RAMA BHATTA.
A.I.R. 1938 Mad. 300.

——*Alienation—Widow—Necessity—Proof—Recitals in document—Value of—Absence of recitals of necessity—Lapse of time—Effect of.*

The recitals in old documents are sufficient proof in support of the deed. Where the validity of an alienation made by a Hindu widow of her husband's property

fill in the details which have been obliterated by time

necessity. (*Madhavan Nair and King, JJ.*) THIMMANNA BHATTA v. RAMA BHATTA.
A I R. 1938 Mad. 300.

——*Debts*—Avyavaharika—*Damages for malicious prosecution—Debts to pay off such decrees—Binding nature.*

Where there were several decrees against the father for damages for malicious prosecution his acts in making the malicious complaints are tortious acts. They are

——*Debts*—Avyavaharika—*What constitutes—Binding nature.*

In order to determine whether a debt is a *vyavaharika*

rule can be laid down. The best rendering of the word *avyavaharika* debt is that it, is a debt for a cause 'repugnant to good morals'. Such debts are not binding on the descendants. (*Thom and Bajpai, JJ.*) RAGHUNANDAN SAHU v. BADRI TELI.
1938 A.L.J. 268.

——*Debts of father—Award against Co-operative Society in which father is a member—Liability in respect of—Pious obligation, if attaches to.*

Where an award is passed against a Co operative Society and a father is proceeded against, because of his being a member of such a society the rule of the pious obligation of the son to pay cannot obtain to such a case,

HINDU LAW—Gift.

is sought to be en-
elf and so cannot be
(*Bose and Puranik, JJ.*) NARAYAN v. CO-OPERATIVE CENTRAL BANK OF MALKAPUR. 1938 N.L.J. 82.

——*Debts of father—Son's right to question—Scope and extent of—Award executable against father as a decree—Son not a party to award, if can challenge it in execution.*

If a Hindu father represented, or can be assumed to have represented the family, and the decree or award is against him in that capacity, all the members would be bound, but when those conditions do not obtain the others are not bound and they can fight the decree or award in exactly the same way as they could have done, if they had been joined in the first instance. Where there is an award under the Co-operative Societies Act which is executable as a decree and which is being enforced against the father of a joint Hindu family and where the father raises no objection whatever, the son who was not a party to the award, can challenge it at the execution stage of the proceedings. Though the son can attack it on all the grounds available to him including those that would have been open to the father to urge, he could obtain relief only to the extent of his share in the family property. (*Bose and Puranik, JJ.*) NARAYAN v CO OPERATIVE CENTRAL BANK OF MALKAPUR. 1938 N.L.J. 82.

——*Debts — Guardian — Testamentary guardian carrying on business started by minor's father—Debts contracted by—Liability for—Creditor's right to proceed against minor's estate.*

of a minor constituted under the
itinues the business started by the
directions in the will and incurs
debt on behalf of the minor in the course of carrying on
ave recourse
to proceed
before the
creditor can get a decree directly against the assets it must be shown that the guardian has a right of indemnity in respect of such assets and the principle upon which the creditor is given a decree against the estate is by

ing due and owing by him to
if any of his transactions.
PERUMAL AYYAR v. RAMA-
R. A.I.R. 1938 Mad. 265.

——*Family settlement—Essence of—Property admittedly belonging to one of parties allotted to other—Ownership, if transferred—T. P. Act S. 123*

ence of a family settlement is a mutual re-
of a pre existing right of the parties to the
A transaction by which some property, the admitted title to which rests in one of the parties, is transferred to one of the other parties, does not come within the definition of a family settlement It may be that *qua* that property there would be a transfer of ownership. But the transfer must be effected by a registered and duly signed and attested instrument under S 123 of the T. P. Act. (*Zia ul-Hasan, J.*) WAJID ALI v. GANGA DIN. 173 I.C. 610=1938 O.L.R. 122=1938 O.A. 211=1938 O W N. 226.

——*Gift—Validity—Delivery of possession — If necessary.*

Under Hindu Law, a gift is not valid unless it is accompanied by delivery of possession. Where the

HINDU LAW—Joint family.

donor, who is in possession at the time of making the gift, does not deliver possession of the property to the donee in pursuance of the deed of gift, but subsequently sells the property to a third person, the gift passes no valid title to the donee. (*Pollock, J.*) CHANDRABHAGA *v.* ANANDRAO. 173 I.C. 85=
10 R.N. 274=A.I.R. 1938 Nag. 142.

——*Joint family—Co-parcener—Decree against—Execution sale—⅙th share of property sold when coparcener's share was only ⅐th—Title of purchaser.*

Where in execution of a money decree against a coparcener of a joint Hindu family ⅙th share in the family property was sold when as a matter of fact the coparcener's share at that time was only ⅐th, the purchaser acquires nothing under the sale and the sale cannot be deemed to be a sale of the right, title or interest of the co-parcener. A co-parcener's share in the co-parcenary property is not a fixed or certain thing, it is a fluctuating interest which on partition may or may not lead to a share falling to a particular co parcener. (*Dalip Singh, J.*) NANAK CHAND *v.* GANDU RAM.
40 P.L.R. 202.

——*Joint family—Joint property—Brothers acquiring property by joint exertions—Absence of ancestral nucleus—Brothers, if tenants-in-common or joint tenants.*

Where brothers who have not inherited any ancestral nucleus acquire property by their joint personal exertion, it depends entirely on their intention whether they should hold the property as tenants-in-common like strangers entering into a partnership, or as members of a joint family, clothing the same with the legal qualities and incidents of joint family property, chief among which is survivorship. (*Pollock, J.*) CHANDRABHAGA *v.* ANANDRAO. 173 I.C. 85=
10 R.N. 274=A.I.R. 1938 Nag. 142.

——*Joint family—Joint or separate property—Property acquired by coparcener out of his separate income.*

A member of a joint Hindu family can acquire property for himself out of his own separate income, and it is his own separate property unless it is proved that such member has blended his income with that of the other members of the family. (*Coldstream and Din Mohammad, JJ.*) MOOL RAJ *v.* MANOHAR LAL.
A.I.R. 1938 Lah. 204.

——*Joint family—Member, party to litigation—Death during pendency—His son added—Compromise decree—Disappearance of that son—His eldest son, if can execute compromise decree.*

Where a member of joint Hindu family died during the pendency of a litigation to which he was a party, his son was brought on record in his place and a compromise decree is passed, and a portion due was realised and where after the son so added disappeared, his eldest son as the manager of the family is entitled to apply for the execution of the decree for the balance due. (*Bennet, A.C.J. and Ganga Nath, J.*) NARAIN SARUP *v.* DAYA SHANKER. 1938 A.L.J. 308=
1938 A.W.R. (H.C.) 160.

——*Joint family—Presumption—Punjab.*

There is an initial presumption that a Hindu family is joint in estate and that where a joint Hindu family owns ancestral property which has not been partitioned, the presumption is that all the property possessed by the members is joint. In Punjab however the fact that the family owns undivided ancestral land is not inconsistent with its separation. In Punjab it is usual to find Hindu families in which disruption has taken place without any formal division, and members have separated without the execution of the formal deed. The sons go away by mutual understanding, one or two perhaps carry on their father's business, others start new trades of their own, and others enter service, yet there is no partition, no drawing up of deeds of any kind, a certain number of ancestral shops, houses or gardens remain and these are admittedly joint, while in all other respects the family is disrupted. 102 P.R. 1889, Rel. on. (*Coldstream and Din Mohammad, JJ.*) MOOL RAJ *v.* MANOHAR LAL. A.I.R. 1938 Lah. 204.

HINDU LAW—Partition.

——*Marriage— Ceremonies—Saptapadi—Bride and bridegroom walking round sacred fire seven times—Validity.*

The essential thing for the performance of saptapadi ceremony in a Hindu marriage is that the bride and bridegroom must take seven steps. Where therefore the bride and bridegroom walked round the sacred fire seven times,

Held, that the saptapadi ceremony was duly performed and the mere fact that they took more than seven steps did not make the marriage invalid. (*Leach, J.*) A. BULLI APPANNA *v.* SUBAMAL.
A.I.R. 1938 Rang. 111.

——*Partition—Presumption as to completeness—Allegation of property having been excluded and left as common—Burden of proof.*

According to the Hindu Law, a partition once effected is presumed to be complete. If a partition is proved to have taken place, the burden of proof lies on that party who alleges that certain family property was left as common property and excluded at that partition. If that party succeeds in proving that there was only a partial partition, that is sufficient in itself to establish that certain other parcels of property claimed as common must partake of the character of common property. (*Wassoodew and Thakor, JJ.*) RUDRAGOUDA *v.* BASANGOUDA. 40 Bom. L.R. 202.

——*Partition — Separation of one coparcener—Status of others—Presumption as to—If any—Question as to—Test to decide.*

While there can be no doubt that the presumption of union under the Hindu Law cannot continue after the separation of one member from a joint family, it does not follow that on the separation of one coparcener the presumption is that the rest are separated. There is no presumption either way. When one coparcener separates from the others, the latter, if so disposed may remain joint and enjoy their shares as joint owners in whatever property that remains after the separation of the share of the outgoing member. The intention to remain united can be inferred from their conduct even without any express agreement to that effect. The mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to the inference that the whole family has separated. There is therefore no warrant for holding that when one coparcener separates from the rest there is a presumption that there is a complete severance or separation in interest as to the rest which must be displaced by proof of re-union or of an agreement to continue joint. The question as to their status is one of fact and of intention, to be decided on the evidence, including the conduct of the parties without any presumption either way. (*Wassoodew and Thakor, JJ.*) RUDRAGOUDA *v.* BASANGOUDA. 40 Bom.L.R. 202.

——*Partition—Suit for—Coparcener kept out of possession and enjoyment for long time—Mesne profits—Interest on—Right to be awarded.*

In an ordinary suit for partition of properties belonging to a joint Hindu family interest will not be awarded on the mesne profits awarded, though under special circumstances the Court may award interest on the mesne profits awarded. Where the claimant has been kept out of possession of his share of the family pro-

HINDU LAW—Reversioners.

perties for a long period during which the suit was pending in the trial Court and in the Courts of appeal, and the opposite parties have not only enjoyed the profits of the properties throughout but have placed every obstacle in the way of the claimant and have persisted in trying to defeat his right in spite of his success in the trial Court, that is, a proper case for awarding interest on the mesne profits awarded to the claimant. (*Leach, C.J. and Madhavan Nair, J.*) RAMAKRISHNA AIYAR v. PARAMESWARA AIYAR. **(1938) 1 M L J. 439.**

——*Reversioners—Right of to challenge alienation by widow—Nature of—Cause of action—Omission of presumptive reversioners to sue within time limited—Effect on remote or after-born reversioners—Suit barred before 1929—Reversioners under Act II of 1929—Suit by—Maintainability.*

Art. 120 or Art. 125, as the case may be, of the Limitation Act. If not brought within such period, the whole body of reversioners, whether remote or newly born, are precluded from suing altogether, the remedy of the presumptive reversioner having become time barred. Where, therefore, the remedy of the then reversioners has already become barred by time, persons who become reversioners subsequently by reason of the Hindu Law of Inheritance (Amendment) Act of 1929, cannot maintain a suit to declare the alienation void or not binding. (*Agarwala, J.*) DEBAL MAHTON v. MOTI MAHTON. **19 Pat.L.T. 145.**

——*Stridhan—Succession—Property inherited from mother.*

Stridhan inherited by a daughter from her mother passes on the daughter's death to the next heir of the mother. (*Khundkar, J.*) SISIR KUMAD SAHA v. JOGNESWAR SAHA. **42 C W.N. 359.**

HINDU LAW OF INHERITANCE (AMENDMENT) ACT (II OF 1929)—Scope of—Right to challenge alienation by widow already barred by time—Persons becoming reversioners by reason of Act—Right of suit. *See* HINDU LAW—REVERSIONERS. **19 Pat.L.T. 145.**

INCOME-TAX ACT (XI OF 1922), Ss. 7 to 12—*Taxable income—Executors spending amounts out of income—Exemption.*

Where the executors made payments for the *shradh* expenses and for the costs of probate, out of the income of the estate coming into their hands as executors and in pursuance of obligations imposed on them by the testator, it is simply a case in which the executors having received the whole of the income of the estate apply a portion in a particular way pursuant to the direction of the testator and as such no allowance could be made in respect thereof in computing the taxable income. (*Lord Russell of Killowen.*) P. C. MULLICK v. COMMISSIONER OF INCOME TAX, BENGAL. **1938 A L J. 261 (P.C.).**

——**S. 10 (2) (ix)**—*Newspaper company—Editor prosecuted for contempt of* [illegible] *by company—Expenses, if* [illegible]

When a limited company [illegible] editing and publishing a newspaper spends money to defend its Editor and Printer on a charge of contempt of Court brought against them for publishing an article in its paper,

Held, such expenditure could not be incurred solely for purpose of earning [illegible] gain and cannot be exempted. (*Costello, Ag.C.J., Panckridge and Edgley, JJ.*) AMRITA BAZAR PATRIKA, *In re.* **A I.R. 1938 Cal. 241 (S.B.).**

——**S. 23 (2) and (3)**—*'Evidence'—If confined to direct evidence—Omission of transactions from account books—Rejection of such books by Income-tax Officer—If justified.*

The word 'evidence' as used in Sub-S. (2) of S. 23, Income-tax Act, is not confined to direct evidence but it is comprehensive enough to cover circumstantial evidence. The assessee who was a cap manufacturer, carried a whole sale trade in that commodity. The assessee had omitted to enter into his account books certain purchase transactions amounting to Rs 1,39,000. The Income tax Officer disbelieving the account books of the assessee, fixed the sales at Rs. 1,50,000 in the [illegible]

account books was the same. The assessee had himself showed that he had made a profit of 15 per cent. on the sales in the subsequent year.

Held, that the omission of the transactions from the account books of the assessee did provide some material for the Income-tax Officer justifying the rejection of account books and the High Court could not go into the question of sufficiency of the material.

Held also, that there was material for fixing the sale at Rs. 1,50,000 and applying a flat profit rate of 15 per cent. on the sale. A.I.R. 1930 P.C. 108, Foll. (*Tek Chand and Abdul Rashid, JJ.*) PARAS DASS-MUNNA LAL v. COMMISSIONER OF INCOME TAX, PUNJAB. **A.I.R. 1938 Lah. 209.**

——**S. 26**—*Reconstitution of firm—Evidence.*

It is open to any person to reduce the incidence of his income-tax in any legitimate way, and the mere fact that a reconstitution of the firm has reduced the incidence of the tax is by itself no evidence that the reconstitution is not real. At the time of the reconstitution of a firm, the new capital was not introduced. Nor was there the valuation of assets. After registration had been refused the firm reverted to its old constitution.

Held, that these were not sufficient grounds for supposing that the reconstitution was a bogus arrangement. (*Coldstream and Din Mohammad, JJ.*) MOHD. MOHSIN MAULA BUX v. COMMISSIONER OF INCOME-TAX. **A.I.R. 1938 Lah. 194.**

——**S. 46**—Scope—If exhaustive—Money realised by sale in execution of assessee's property—Application by Crown for payment out towards income tax due by assessee—Competency—Power of Court to order payment. *See* C. P. CODE, S. 151. **1938 M.W.N. 197 = (1938) 1 M.L.J. 351 (F.B.).**

——**S. 59**—*Income-tax Rules, R. 25—Life Insurance Company—Actuarial valuation balance sheet showing deficiency—Power of department to go behind balance sheet.*

Where in the case of an assessee who is a Life Insur[illegible] balance sheet on [illegible] valuation shows a [illegible] under S. 59 of the Income-tax Act does not permit the department to go behind the said valuation balance sheet to find out if [illegible] the last [illegible] *and* [illegible] *In the* [illegible] 410.

——S. 66 A—*Powers of High Court under—Grant of leave to Income-tax Commissioner—Power to impose conditions.*

In granting leave to appeal to His Majesty in Council on the application of the Income-tax Authorities the High Court has no power to impose a condition to the effect that the Income tax Authorities should pay the costs of the assessee-respondent. The powers of the High Court are confined in this respect to those conferred by S. 66-A of the Income-tax Act and the provisions of the Civil Procedure Code which have been made applicable to such appeals. Though the Privy Council have, on occasions, stipulated in granting special leave that the appellant shall bear the costs, the High Court has no such powers. (*Leach, C.J. Varadachariar and King, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* S. L. MATHIAS.

47 L.W. 350 (F.B.).

——S. 66 A (2)—*Leave to appeal to Privy Council—Fit case—Substantial question of law—Question as to effect of S. 4 (2), proviso 2.*

The question as to the effect of the second proviso to S. 4 (1) of the Income-tax Act is a substantive question of law, and is a fit one for appeal to His Majesty in Council. (*Leach, C.J., Varadachariar and King, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* S. L. MATHIAS. **47 L.W. 350 (F.B.).**

——S. 66-A (2) and (3)—*Valuation—Annual assessment of income-tax less than Rs. 10,000—Leave to appeal—If to be granted.*

In an application for leave to appeal to His Majesty in Council in respect of an assessment to income-tax involving only Rs. 3,500, leave ought not to be refused merely because the assessment in question is less than the required amount of Rs. 10 000. Where the assessee carries on a large business and the question is likely to arise every year while he remains in the business, the amount in the end would be very considerable; a certificate of leave to appeal should therefore be granted in such a case. (*Leach, C.J., Varadachariar and King, JJ.*) COMMISSIONER OF INCOME TAX. MADRAS *v.* S. L. MATHIAS. **47 L.W. 350 (F.B.).**

INSURANCE—*Life insurance policy—Construction—Money payable to wife of deceased—If for her own benefit or as trustee for heirs of deceased—Ordinary rule.*

In the case of policies of life insurance the well-established canon of construction is that the words used in the policy must be construed in their plain, ordinary and popular meaning. A promise to pay a sum of money to a named person generally means that it is payable to such person for his own benefit. In the case of a policy under which the money is made payable by the insurance company to the wife of the assured who is the person named, there is no reason to depart from the ordinary rule that it is payable to her in her personal capacity and for her own benefit. There is no warrant for holding that it is payable to her as trustee for the heirs of the assured. (*Rupchand Bilaram, Ag. J.C. and Lobo, J.*) PARMESHWARIBAI *v.* NEHAL CHAND.

173 I.C. 457=A.I.R. 1938 Sind 20.

INTEREST—Discretion of Court—Interest *pendente lite* and future interest—Refusal to award—Omission to give reasons—Interference on appeal—If justified. *See* SUCCESSION ACT, S. 353.

1938 P.W.N. 186=19 Pat.L.T. 202.

INTERPRETATION OF STATUTES—*Alterations in law—Substantive rights, if affected—Test.*

In determining whether an alteration in the law affects substantive rights or not, one must view the matter broadly and not confine oneself to the actual

detail which has been altered; everything must be considered. General rules of interpretation are not applied in any hard and fast way. In every case the spirit of the rule must prevail rather than the letter. The law must not be applied in such a way as to do injustice, or as to affect existing rights, unless that is the clear meaning and intention of the Act. (*Stone, C. J. and Bose, J.*) GANESH PRASAD *v.* GOPAL.

1938 N.L.J. 101.

——*Bye-laws—Scope of.*

The Bye-laws of a statutory corporation cannot travel beyond the powers vested in it by the Act. (*Bose and Puranik, JJ.*) NARAYAN *v.* CO-OPERATIVE CENTRAL BANK OF MALKAPUR. **1938 N.L.J. 82.**

——*Court-Fees Act—Construction in favour of subject—Natural and plain meaning of words.*

The Court-Fees Act is a taxing statute and it is settled law that the intention to impose a charge upon the subject must be shown by clear and unequivocal language. If two constructions of a fiscal enactment are equally possible and reasonable, the construction more favourable to the subject must be enforced. The natural and plain meaning of the words must be taken and it is wrong to put a forced construction on the language. (*Venkatasubba Rao and Abdur Rahman, JJ.*) KALIAPPA GOUNDAN *v.* KANDASWAMI GOUNDAN.

1938 M.W.N. 264=47 L.W. 356.

——*Jurisdiction of Civil Court—Presumption in favour of—When excluded or taken away.*

The general principle of law is that every presumption shall be made in favour of the jurisdiction of a Civil Court and that it shall not be taken away except by express words or by necessary implication. (*Venkatasubba Rao and Abdur Rahman, JJ.*) VEERANNA *v.* MOCHARAMMA. **1938 M.W.N. 284=(1938) 1 M.L.J. 406.**

JURISDICTION—Cause of action—Promissory note payable on demand anywhere—Place of payment—Option to fix—If rests with creditor or debtor—Demand by creditor for payment at his place—Effect of—Suit at that place—Maintainability. *See* LETTERS PATENT (BOMBAY), CL. 12. **40 Bom.L.R. 252.**

LAND IMPROVEMENT LOANS ACT (XIX OF 1883)—*Mortgagee under—Right to priority over other mortgagees of mortgagor—Extent of.*

A mortgagee under the Land Improvement Loans Act cannot be given priority in respect of lands other than those for whose benefit the loan was granted. There is no justification for giving priority in respect of a mortgage of properties which are not intended to be benefited by the loan granted under the Act. (*Pandrang Row and King, JJ.*) SECRETARY OF STATE FOR INDIA *v.* RANGASWAMI NAIDU. **1938 M.W.N. 280.**

LANDLORD AND TENANT — *Abadi — House occupied by tenant—Appurtenance to tenancy—Presumption—Right of ejected tenant to compensation for house and adjacent trees.*

Where a tenant is found occupying a house in the abadi of an agricultural village, there is a presumption that he holds the house appurtenant to his tenancy and he has no right to retain it against the wishes of the landlord on ceasing to be a tenant in the village. Where, therefore, a tenant has been ejected from his holding, the burden of proof is on him to show that in spite of his ejectment he has a right to remain in occupation of the house. The fact that the landlord gave his consent to the erection of the house does not estop him from ejecting the tenant without giving him compensation for the value of the house. Nor is the tenant entitled to any compensation for trees of spontaneous growth adjacent to his house when he is ejected from his house.

LANDLORD AND TENANT.

(*Hamilton, J.*) BANARSI DAS *v.* KALKA.
1938 R D. 256=1938 A.W R. (C.C.) 20=

——*Abadi—Tenant in possession* ... *his house as Sahan darwaza—Effect* ... *—Right to construct varandah there*...

The long enjoyment by a tenant of land lying in front of his house on the abadi as his sahan-darwaza, gives him the right to retain the land in his possession for being enjoyed as such. The landlord is to be deemed in proprietary possession of such land and he is not entitled to eject the tenant by taking actual possession though the tenant has no right to put up any structure thereon without the express permission of the landlord. If the tenant puts up a varandah on such land without the landlord's consent the landlord can obtain a decree for its demolition but not a decree for actual possession of the land. If, however, the land can be of no practical use to the landlord and the latter can derive no advantage by the demolition of the varandah, it would be equitable to let the varandah stand over the land on condition of the tenant paying compensation to the landlord. (*Zia-ul-Hasan, J.*) HANUMAN PERSHAD *v.* INDRA BIKRAM SINGH. 1938 R D 335= 1938 O W.N 285

——*Co-sharers—Suit by some only for ejectment—Maintainability.*

Where the fields are khalsa it must be regarded as held in common in a joint mahal, when there are no separate pattis recorded therein. A suit by some only of the co-sharers to eject a trespasser does not become maintainable, merely ... in which the particu... partition from two pa... had sole possession. ... *M.*) RAM KARAN SINGH *v.* RAM BARAN DUBE. 1938 R.D ...

——*Ejectment—Defendant occupying dual role Heir of one tenant and mortgagee of another—separate demarcation—If can be ejected.*

Where the defendant occupies the dual role of ... to a statutory tenant and mortgagee of another ... cannot be ejected from that portion of the lands which he holds as heir to a tenant, if such portion has not been demarcated from the remaining lands which he holds as mortgagee of another tenant. (*Darling, S.M. and Bomford, J.M.*) BISHWA NATH PRASAD *v.* MAHARAJA OF BENARES. 1938 R.D. 383.

——*Ejectment—Forum—Tenant paying sayar.*

In the case *sayar*, though the rent payable can be realized by the Revenue Courts, yet the tenant paying *sayar* cannot be ejected by the Revenue Courts, but only by the ... *M.*) ... LALJI ...

——... *charge debt due under a bond—Bond and lease executed on the same date—Lessee, if can be ejected as a sub-tenant.*

Where a lease of an occupancy holding to discharge a debt due under a bond, and the said bond are executed on the same day and in favour of the same person, there is a most undenial connection between the lease and the bond and the lessee cannot be ejected as a sub-tenant. But if there is no mortgage and no obvious connection between the lease and the bond, the lessor can eject the lessee. (*Darling, S.M. and Bomford, J. M.*) THAKUR DAS *v.* NATHU RAM.
1938 R.D 249=1938 A.W.R (B.R.) 85.

——*Ejectment—Right of suit—Transferee from grove-holder as such purchasing share in patti—Grove*

LANDLORD AND TENANT.

loosing character as such—Effect—Tenants admitted by original grove-holder—Suit by transferee to—Eject— ...

The grove had, however, lost its character as such. Plaintiff subsequently purchased a share in the patti, and allowed the defendants to remain as his sub-tenants, and collected rent from them. In a suit by the plaintiff to eject the defendants by virtue of his rights as transferee from the former grove holder, the defendants denied the plaintiff's right to sue as landholder.

Held, that the plaintiff, as the transferee was entitled to sue the defendants for ejectment, and that neither the defendants nor the heirs of the former grove-holder could deny the right of the plaintiff to be the landholder.

Held, further, that the plaintiff should not, in equity, be deprived of the rights for which he had paid his transferor *A.* (*Darling, S.M. and Bomford, J.M.*) NAZIR UDDIN *v.* PIROO. 1938 R.D. 183=
1938 A.W.R. (B R.) 114.

——*Enhancement—Validity.*

The enhancement of Rs. 9 8 0 on a Khata of Rs. 15 8 0 is of doubtful validity and it should be left to the zamindar to sue for a declaration as to the correct rate of rent. (*Darling, S.M. and Bomford, J.M.*) BADRI *v.* MARIAM BIBI. 1938 A.L J (Suppl.) 32.

——*Grove—Grove-holder's right to sell trees.*

Where according to the Wajib-ul-arz of a taluqa the ...

——*Grove—Lessee of—Rent paid—When sayar.*

Where the rent is clearly payable not for the land, but for the right to half the fruit and wood, it is not rent but sayar. (*Darling, S.M. and Bomford, J.M.*) RAM CHANDRA SINGH *v.* SRI THAKUR GOPAL LALJI.
1938 R.D. 371.

——Khudkasht *land—Lease by* khudkasht *holder—Co-sharers, if and when bound.*

Admission to a plot held in *khudkasht* would ordinarily be made by the *khudkasht* holder and not by all the co-sharers jointly. The rent on which the tenant is ... fair economic rent, if the ... bound. (*Bomford, J.M.*)
1938 R D. 251=
1938 A.W.R. (B.R) 87.

——Khudkasht—*Letting out—Right of—Co sharer, not being the sole* khudkasht *holder—If can let.*

Though *khudkasht* is by usual village custom let out by the holder, unless a co-sharer is a sole *khudkasht*-holder, he would not have the right to dispose of the fields concerned by any village custom. (*Darling S.M. and Bomford, J.M.*) RAM DAYAL *v.* BUDH SINGH.
1938 R.D. 323.

——*Lease—Bond and lease executed on the same day by occupancy tenant—Status of lessee—Liability to ejectment.*

Where a bond and a lease are executed by an occupancy tenant on the same day but there was no question of setting off ... and

reference is made to the bond, the lessee, cannot be regarded as a mortgagee but only as a sub-tenant liable to ejectment. (*Darling, S.M. and Bomford, J.M.*) NANDAN *v.* ZAHUR. **1938 R.D. 381.**

———*Non-occupancy tenant—Ejectment—Damages—Measure of*—Roster rates—*Applicability.*

In a suit to eject a non-occupancy tenant, damages should not be awarded against the defendant on the basis of the *roster rates*, such rates having been fixed when prices were at their peak. (*Darling, S.M. and Bomford, J.M.*) BACHAI TELI *v.* RAJ NARAIN SINGH. **1938 R.D. 186 = 1938 A.W R. (B.R.) 117.**

———*Rent—Dispute as to—Registered agreement and remission slip—Preference.*

Where the zamindar claimed an enhanced rent based on a registered agreement and the tenant relied on the figures in a remission slip, it was held that it was impossible to go behind the remission slip, issued as it was with the knowledge of both parties. (*Darling, S.M. and Bomford, J.M.*) BADRI *v.* MARIAM BIBI. **1938 A.L.J. (Suppl.) 32.**

———*Rent—Enhancement—Ejectment suit against non-occupancy tenant under Agra Tenancy Act of* 1901 *—Compromise—Tenant agreeing to pay enhanced rent in return for promise of occupancy rights—Effect of—Enhanced rent—If legally recoverable after Act of* 1926.

In a suit for ejectment of a non-occupancy tenant paying a rent of Rs. 6, a compromise was effected under which the defendant undertook to pay a rent of Rs. 12 and the plaintiff in return specifically promised him occupancy rights. That was in fasli 1332, before the introduction of the Agra Tenancy Act of 1926. The compromise was acted upon by both the parties. In a subsequent suit after Act III of 1926, by the plaintiff for rent at Rs. 12 the defendant pleaded that the legal rent was only Rs. 6.

Held, that the compromise having been acted upon there being nothing in the Act of 1901 to prevent the landlord and tenant from contracting in the manner they did, the rent legally payable after the compromise was Rs. 12, which became the rent payable. (*Darling, S.M. and Bomford, J.M.*) MAHOMED MUSTAFA ANSARI *v.* RAM SARUP AHIR. **1938 R.D. 202 (2) = 1938 A.W.R. (B.R.) 59.**

———*Rent—Suit for—Allegation of new agreement of lease—Burden of proof.*

Where in a suit for rent, the landlord contends that a new agreement of lease had been entered into from a certain date, the burden of proving the terms of the new tenancy is on the landlord. (*C. Mehta and Lobo, JJ.*) DAYARAM PURSUMAL *v.* SIRUMAL MANGHANMAL. **173 I.C. 222 = 10 R S. 199 = A.I.R. 1938 Sind 16.**

———Sir *land—Acquisition of character of—Requisites—Sub-tenants not shown in certain fields—Inference.*

The law requires that to acquire the character of *Sir*, the land should be recorded as khudkhast in one fasli and personally cultivated in the next. If in the fields no sub-tenants are shown in those two faslis it should be regarded as having been cultivated in khudkhast in those two years. (*Darling, S.M. and Bomford, J.M.*) GAYA SINGH *v.* BHAGWAN DAS SINGH. **1938 R.D. 386.**

———Sir *land—Grove planted on*—Sir *character, if altered.*

The mere fact that grove has been planted in *Sir* land, will not affect the *Sir* character of the plot. (*Darling S.M. and Bomford, J.M.*) RAM CHANDRA SINGH *v.* SRI THAKUR GOPAL LALJI. **1938 R.D. 371.**

———Sir *land—Mortgage of—Subsequent sale—Lease by vendee—Relative rights of original sub-tenant and new lessee.*

Where a *Sir* plot is at first mortgaged and subsequently sold to pay off that mortgage, and the vendee leases it, such a lease is invalid as on the mortgage of the *Sir* land, the *Sir* rights became extinguished and the original sub-tenants became tenant-in-chief of the mortgagee. (*Darling, S.M. and Bomford, J.M.*) CHANDRADEO AHIR *v.* MAHOMED NAZIR KHAN. **1938 R.D. 342.**

———Mookassa *and* vritee *tenures—Incidents.*

Lands conferred on *Mookassa* or *vritee* tenure were theoretically revenue-free. They were granted in charity, for the support of the sovereign's relatives or supporters, or in reward for military, religious or other services. If the grant comprises a whole village it is known as *Mookassa* and if less as *vritee.* (*Pollock, J.*) DEORAO *v.* RAMBHAU NILKANTRAO. **1938 N.L.J. 112.**

LEASE—*Construction—Lease for discharging prior debt by adjustment—No rent fixed—Nature of transaction—Lessee, if could be sued for rent as sub-tenant.*

Where a tenant leases his holding for a period of years under an arrangement to wipe out his prior debt to the lessee, the transaction is not one on the basis of which the tenant debtor could sue his creditor as a sub-tenant for arrears of rent, for there is no contract of rent on the basis of which realization can be made. (*Darling, S.M. and Bomford, J.M.*) BHUP NARAIN *v.* UDAI NARAIN. **1938 A.L.J. (Supp.) 22 = 1938 A.W.R. (B.R.) 151 = 1938 R.D. 300.**

———*Power to grant—Manager of family of co-sharers.*

The manager of a family has powers to give leases which are in the interest of the family. The rent must be a fair and reasonable rent. (*Bomford, J. M.*) NATHU RAM *v.* SALIG RAM. **1938 R.D. 251 = 1938 A.W.R. (B.R.) 87.**

———*Rights of lessee—Area of leasehold less than that stated in lease-deed*—Selami *and royalty—If liable to be reduced.*

Where no measurement took place at the time of the creation of the lease and the area which is mentioned in the schedule annexed to the lease-deed was taken for granted, and the lease-deed does not contain any provision for refund or abatement in case of deficiency in area, the lease is not based on the area as stated in the schedule, and if the area of the leasehold is less than that stated in the schedule, the *selami* and the minimum royalty fixed in the deed is not liable to be reduced. (*S.K. Ghose and Patterson, JJ.*) KESHABJI LALJI *v.* PIRAMALL GAYENKA. **42 C.W.N. 405.**

———Validity of—Lease for cultivation during pendency of partition. *See* PARTITION—PROCEEDINGS FOR. **1938 R.D. 285.**

LEGAL PRACTITIONERS ACT (XVIII OF 1879), S. 13—*Misconduct—Pleader suggesting bribery—Offences.*

For a legal practitioner to suggest that an official or any one should be bribed amounts to professional misconduct, and professional misconduct of a grave nature. The fact that bribes of this nature have been given by others is no excuse. The fact that proceedings in respect of such offence are instituted against a pleader as the result of a grudge makes no difference to the gravity of the offence, and cannot be pleaded in excuse. (*Leach, C.J., Varadachariar and Mockett, JJ.*) N. G. PLEADER, MANNARGUDI, *In the matter of.* **1938 M.W.N. 219 = A.I.R. 1938 Mad. 264 = (1938) 1 M.L.J. 410 (F.B.).**

LEGAL PRACTITIONERS ACT (1879), S. 13.

——S. 13—*Unprofessional conduct—Pleader appearing for opposite party in another suit or proceeding—Offence—Pleader purchasing client's decree in contravention of R. 16 of the rules—Execution of decree against own client for higher amount than actually due—Misconduct.*

The petitioner sued his mother for an account of her management of his estate during his minority and obtained a decree for money against her on 15-12 1920 In 1924, the mother of the petitioner sued him for past and future maintenance *in forma pauperis* and got a decree, which directed that the Court fee for the plaint should be paid by the petitioner and his mother, half and half equally. The petitioner paid his half of the Court-fee but his mother did not pay and the Government in consequence attached her decree against the petitioner. P.L., a pleader acted for the mother in her maintenance suit and was her legal adviser in 1924—1925. In 1925 P.L., agreed to act for the petitioner and on 14-12 1932, he filed on behalf of the petitioner an application for execution in respect of his decree against his mother. On 18-1-1935, he filed a behalf of the mother in the maintenance several payments which had been m (petitioner) towards the decree obtained the amount shown as still due under the decree was not, however, correct, there being an understatement of the payments made by the petitioner. On 21-7 1935, the pleader brought the mother's maintenance decree against the petitioner, and proceeded to execute it for an amount which was actually more than was in fact due without making an adjustment in respect of a payment made by the petitioner.

Held, (1) that P.L., was not guilty of unprofessional [illegible]

professional conduct in having instituted execution proceedings against his own client (the petitioner) with full knowledge of the real position and in having obtained a larger sum than was in fact due by him; (3) that the offence became graver and more serious having regard [illegible]

their clients or others any interest in any decree passed by the Court in which they practised (*Leach, C.J., Varadachariar and Pandrang Row, JJ.*) P. L. PLEADER, RAJAM, *In the matter of*

1938 M.W.N. 220 (F.B.).

LETTERS PATENT (Bombay), Cl 12—*Cause of action — Promissory note made payable in Poona, Bombay or elsewhere—Place of payment—Option—If rests with creditor or debtor—Demand by creditor to pay in Bombay—Effect—Suit in Bombay—Leave to sue—If to be granted.*

Plaintiff advanced to the defendant at Poona moneys for which the defendant executed a promissory note at Poona, promissing to pay the plaintiff or order the amount advanced either in Poona, Bombay or elsewhere. [illegible]

demand not having been compl[illegible] applied to the High Court for [illegible] dant in Bombay.

Held, that the promissory note was payable anywhere, and since the creditor who had the option to demand payment at such place as he chose, demanded payment in Bombay, the place of payment was fixed once and for all, and the moneys became payable in Bombay, the cause of action or part of the cause of action arose in Bombay and leave under Cl. 12 of the Letters Patent should be granted. In the case of demand promissory note payable anywhere the option rested with the creditor and not with the debtor as to the place of payment. (*Beaumont, C.J. and Blackwell, J.*) CHUNILAL MYACHAND *v.* MILLARD.

40 Bom.L R. 252.

——(Calcutta), Cl. 12—*Suit for administration—Assets situated within jurisdiction—Cause of action, if arises within jurisdiction.*

Where at the time when a suit for administration is filed, the whole of the assets to which it relates, so far as they are ascertained, are situated within the original jurisdiction of the High Court, the cause of action arises within that jurisdiction. (*Khundkar, J.*) RABINDRA NATH MITTER *v.* PURNA CH. SINHA.

42 C W.N. 422.

[illegible] *for land—Principal* [illegible] *properties and alter-* [illegible] *on—Nature of suit—*

Where the principal prayer in a suit is for possession of immovable properties situated outside the local limits of the territorial jurisdiction of the High Court, and the prayer for administration is an alternative prayer, the suit is not in essence an administration suit at all but a suit for land, and the High Court has, therefore, no jurisdiction to entertain the suit. The questions of the residence of the defendant and of the place where the cause of action or any part of it arose, are irrelevant in [illegible] *J.*) SAILESH KUMAR [illegible]

42 C.W N. 371= A.I.R. 1938 Cal. 271.

[illegible] *uit for land—Test—Suit for construction of will and administration—Claims to residuary estate incidentally put forward—Suit, if a suit for land.*

Where the relief of which the plaintiff is in direct pursuit is either right or title to, or possession of immovable property, the suit is a suit for land within the [illegible] s Patent, but where his [illegible] of another order, and [illegible] secondarily or incidentally, the suit is not a suit for land within the meaning of that clause. Where, therefore, a suit is purely and simply a suit for construction of a will and for administration, and claims to the residuary estate are put forward in the suit only as questions incidental, thereto, the suit is clearly excluded from the category of "suits for land". (*Khundkar, J.*) RABINDRA NATH MITTER *v.* PURNA CH. SINHA **42 C.W.N. 422.**

——(Calcutta), Cl. 12—*Suit for possession of movables situate outside jurisdiction—Defendant also residing outside jurisdiction—Possession obtained by defendant under letters of administration granted by High Court—Jurisdiction to entertain suit.*

The High Court has no jurisdiction to entertain a suit for recovery of movable properties, where such proper- [illegible]

SAILESH KUMAR SINGH *v.* NARSING PANDEY.

42 C.W.N 371

——(Calcutta), Cl. 16—*Civil Court—Appellate officer appointed under S. 40 of Bengal Agricultural Debtors Act.*

An Appellate Officer appointed by the Local Government under S. 40 of the Bengal Agricultural Debtors Act is not a Civil Court within the meaning of S 16 of the Letters Patent. The civil Courts contemplated by that clause do not cover Courts which are created by a special statute for a special purpose. (*Nasim Ali and Edgley, JJ.*) MD. ABDULLAH SHAH *v.* GIRIDHARI LAL MUNDRA. 42 C.W.N. 507.

LIMITATION—*Review—Strict calculation of time—Necessity.*

Where in a particular case the new evidence that was sought to be produced was an order of the Board, which might not have been passed for some months more, it is impossible to hold that the period of limitation must be calculated strictly under such circumstances. (*Darling, S.M. and Bomford, J.M.*) DWARIKA SINGH *v.* MUZAFFAR HUSAIN. 1938 R.D. 364.

LIMITATION ACT (IX OF 1908)—*Applicability—Suits and applications under Agra Tenancy Act.*

The provisions of the Indian Limitation Act do not govern suits and applications provided for by the Agra Tenancy Act. (*Iqbal Ahmad, J.*) FAKHRUDDIN HUSAIN *v.* ABDUL WAHID.

1938 A.W.R. (H.C.) 145=1938 R.D. 367= 1938 A.L.J. 208.

——S. 3, Expl.—Plaint presented on last day of limitation with insufficient stamp—Return for payment of full Court-fee fixing time—Further request for time granted—Payment of full Court-fee within time so granted—Effect—Suit—If barred. *See* C. P. CODE, S. 149 AND O. 7, R. 11. 1938 M.W.N. 257.

——S. 4—*Scope and effect.*

All that S. 4 provides is that the suit might be brought on the day when the Court reopened if the Court happened to be closed when the period prescribed expired. The words of S. 4 do not extend limitation. (*Coldstream, Dalip Singh and Din Mohammad, JJ.*) SHANTI PARKASH *v.* HARNAM DAS.

A.I.R. 1938 Lah. 234 (F.B.).

——S. 5—*Extension of time—Duty of Court.*

The period for preferring an appeal cannot be extended simply because the appellant's case is hard and calls for sympathy, nor will the Courts extend the period of limitation merely out of benevolence to the party seeking relief. A Court granting the indulgence must be satisfied that there was diligence on the part of the appellant and that he was not guilty of any negligence whatsoever. (*Bose and Puranik, JJ.*) KRISHNA RAO *v.* TRIMBAK.

173 I.C. 369.

——S 5—*Sufficient cause—Mistake of pleader.*

If the pleader who advises acts without due care and attention, the client who acts on the advice of such a pleader is not entitled to the benefit of S. 5 of the Limitation Act. (*Bose and Puranik, JJ.*) KRISHNA RAO *v.* TRIMBAK. 173 I.C. 369.

——S. 5—*Sufficient cause—Wrong information given by pleader's clerk.*

Where the appellant was misled by the wrong information given by his pleader's clerk as to the date of the re-opening of the Court and presented the appeal after the period of limitation,

Held, that the information given by the pleader's clerk was given recklessly and without due care and attention, and that as he was in the eye of the law an agent of the appellant, his negligence was the negligence of the appellant himself and that, therefore, appellant was not entitled to an extension of time. (*Bose and Puranik, JJ.*) KRISHNA RAO *v.* TRIMBAK. 173 I.C. 369.

——S. 10—*Applicability—Entrustment of money for purpose of investment.*

S. 10 of the Limitation Act applies to a case of entrustment of money for the specific purpose of investment. (*Jack, J.*) KALIPADA BHATTACHARJEE *v.* KALI KUMAR PAL. 42 C.W.N. 381.

——S. 10—Applicability—Executor under will—If express trustee—Suit for arrears of annuity made expressly payable under will and descendible in male line generation after generation—Limitation. *See* LIMITATION ACT, ART. 123. 1938 P.W.N. 186= 19 Pat.L.T. 202.

——S. 10—*Applicability*—Mokhasa *in certain zamindari attached in* 1831 *under Cl.* 6 *of S.* 34, *Madras Regulation* 28 *of* 1802—*Zamindari sold for arrears and purchased by Government—Government resumed* mokhasa *and writing off arrears—Regrant unconditionally to zamindar in* 1860—Mokhasadar *having knowledge of resumption, acquiescing in and abandoning his right in* mokhasa—*Suit for possession in* 1927—*If barred.*

A village in a certain zamidari was a pre-settlement *mokhasa* subject to a kattubadi and thus being an 'alienated land' Government had right of resumption under Cl. 4 of Regulation 25 of 1802. The zamindari was under the management of Court of Wards. In 1831 the *mokhasa* was attached for arrears of rent under Cl. 6, S. 34 of the Regulation 28 of 1802. Zamindari itself was sold for arrears of peshkush in 1851 and came into possession of the Government and remained with them till 1860. In 1856 Government resumed the *mokhasa* and incorporated it with Government land but obligation to pay kattubadi still remained. The Government as owner of the zamindari wrote off the arrears. As they had to pay a large amount of kattubadi to the zamindar they regranted the mokhasa unconditionally to the zamindar with the zamindari in 1860. From that time zamindar was holding the *mokhasa* in his own right free and discharged all claims of the *mokhasadars.* The resumption proceedings were with the knowledge of the *mokhasadars* who acquiesced in the same and abandoned their rights in the *mokhasa* and the conduct of the zamindar was also consonant with that view. An attempt was made in 1884 to recover possession of the *mokhasa* but failed. A suit was brought in 1927 for possession and it was alleged that the original entry on the land by the zamindar was as trustee and the suit therefore was not time-barred.

Held, that relationship created by attachment of *mokhasa* in 1831 was not one of trustee and *cestui que trust.* Assuming that there was a fiduciary relation created, it was put to an end by the resumption of the *mokhasa* by the Government writing off the arrears and regranting it in 1860 to the zamindar who held the *mokhasa* in his own right. Even assuming that by virtue of statutory obligation to account for the management and to deliver possession of land a constructive trust could be raised, there was open disclaimer of the title of the *mokhasadars* and the renunciation of the character of possession set the statute of limitation running from the date of disclaimer or renunciation. The suit therefore was time-barred. (*Venkataramana Rao, J.*) SESHAGIRI RAO *v.* VENKATARAMAYYA APPA RAO BAHADUR. A.I.R. 1938 Mad. 295.

——S. 12—*Computation of time—Different applications for copies of Judgment and decree—Application for copy of decree filed after expiry of period of limitation for appealing—Time taken to get such copy, if can be excluded.*

Where there were two different applications on two different dates for copies of Judgment and decree, the time taken in obtaining the copy of the decree, can be

LIMITATION ACT (1908), S. 14.

excluded for

1938 R.D 270.

——S. 14—*Discretion exercised by lower appellate Court—Interference by High Court.*

The High Court will not interfere with the discretion exercised by the lower appellate Court under S. 14 of the Limitation Act, when such discretion has not been exercised improperly. (*Thomas, C.J, Zia ul-Hasan and Smith, JJ*) JAGDEO PRASAD *v.* PEAREY LAL.

173 I C.648=1938 O.A.

——S. 14—*'Good faith'—M*

'Good faith' as used in S. 14 means 'exercise of due care and attention'. Where the circumstances are such as would justify either view as regards the value of the property, the plaintiff cannot be regarded as having acted dishonestly and without due care and attention, if he has adopted the lower valuation of property and filed his suit in a wrong Court (*Niyogi, J.*) DINKARRAO *v.* RATANSI ASARAM.

1938 N.L J. 107.

——S. 19—*Acknowledgment—Statement admitting liability and providing for arrar satisfaction of liability.*

An admission of liability coupled with a declaration

execution of other document.

Held, that the statement amounted to an admission of subsisting liability on 11-11-1921, as required by law to constitute an acknowledgment, and that the position was not altered by the fact that the contemplated discharge proved ineffective. (*Varadachariar, J.*) RAMASWAMI MESTRIAR *v.* VELAYUTHAM PILLAI.

1938 M.W.N 207=47 L.W. 351=
(1938) 1 M.L.J. 450.

——S. 19—Agent duly authorised — Collector in charge of Court of Wards. *See* U. P COURT OF WARDS ACT. (1938) A.L J. 252 (F.B.).

——S. 19—*Applicability—Acknowledgment after period of limitation but during period by Court of Wards Act—If can extend time.*

S. 19 of the Limitation Act cannot apply to

Singh and Ganga Nath, JJ.)
LAL SINGH.

1938 O.W.N. 318=

——S. 19—*Basis of suit—Ac promise to pay—Consideration, ly taken before Full Bench—If can be allowed.*

(Per *Dalip Singh and Din Mohammad JJ., Coldstream J, dissenting*)—Where acknowledgment implies

LIMITATION ACT (1908), Art. 20.

id if the defendant does not plead lack of , then consideration must be taken to have been proved. As it is an agreement for consideration, whether it is before expiry of limitation or even after it, a suit on its basis cannot be held to be time barred. Even if such point is newly taken before the Full Bench the question before the trial Judge and Single Bench being whether an acknowledgment of a debt made after the period of limitation has expired but during the time in which owing to the provisions of S 4, Limitation Act, the suit might have been instituted, will start a fresh

Din Mohammad, JJ.) SHANTI PARKASH *v.* HARNAM DAS. A.I.R. 1938 Lah. 234 (F.B.).

——S 20—*Payment by debtor not specified—Part payment of principal—Extension of time.*

Where a payment by the debtor is not made towards interest as such and it is not appropriated by the creditor towards interest, the payment is obviously made towards the principal. If the acknowledgment of the nitation is not should specify that the amount was paid in part payment of the principal as such. (*Tek Chand, J.*) JAWAHIR SINGH *v.* GHULAM HASSAN. 40 P.L R. 124.

——S. 20—*Payment towards decree—Application for payment—If*

the principal the Limitation or execution of the date of the HET RAM-

1938 A.L J. 150=
1938 A.W.R. (P.C) 45=1938 O L R. 98=
1938 A.L.R. 129=1938 O W.N. 310=
10 R.P.C. 196=4 B R. 308=
172 I C. 999 (P.C.).

——Art. 23—*Starting point—Acquittal by trial Court—Application in revision against acquittal—Dismissal—Suit for malicious prosecution—Starting point of limitation—Date of order of trial Court or revisional Court.*

Art. 23 of the Limitation Act provides that time shall run when the plaintiff is acquitted or when the prosecu-

taking by M that he would indemnify A after auction sale if it would be proved that longed to A —Suit decreed in favour of

LIMITATION ACT (1908), Art. 36.

M—Suit by A for price of property sold—Article applicable.

Art. 29 must be interpreted to apply only to the seizure and not govern any suit arising out of what happens later at the time of sale. A.I.R. 1924 Lah. 136, foll. One *A* brought a suit against *M* for declaration that certain property attached by *M* in execution of his decree against *H* belonged to him and not to *H*. He also applied for temporary injunction forbidding *M* from getting the property auctioned. But *M* undertook to indemnify *A* after the auction sale if it was proved that the property in dispute belonged to *A*. The suit was subsequently decreed in favour of *A* and it was declared that the property belonged to *A*. Meanwhile the property was auctioned by *M*. *A* thereupon brought a suit for the price of the property sold.

Held, that the suit was not for damages for wrongful seizure. The cause of action for the suit was the undertaking given by *M* and not the wrongful seizure. Art. 83 and not Art. 29 therefore applied. (*Abdul Rashid, J.*) HAJI MAHBUB BAKSH *v.* ABDUL GHAFFAR.

A.I.R. 1938 Lah. 196.

——**Arts. 36 and 120**—*Applicability—Trustee failing to collect monies due to trust—Loss sustained by trust—Suit by succeeding trustee or co-trustee—Limitation—Starting point.*

Art. 36 of the Limitation Act does not include wrongs committed by trustees in respect of trusts. Art. 120 and not Art. 36 of the Limitation Act is the proper article applicable to a suit filed against a trustee or ex-trustee, by a co-trustee or a succeeding trustee of a trust, to make good the loss sustained by the trust by reason of the defendant's omission to collect moneys due to the trust. The starting point of limitation under Art. 120 would depend upon the circumstances of the case. If a sole trustee of a public trust commits a breach of trust, the right to sue arises when a new trustee is appointed. If there are other trustees who are themselves not liable, the limitation would start running immediately the loss is occasioned. But if the co-trustees have also made themselves liable for the breach of trust, the position would be the same as in the case of defaulting sole trustee. In the case of a private trust the *cesti que trust* would ordinarily have the right to sue from the date of the breach of trust. (*Leach, C.J., Varadachariar and King, JJ.*) SUBBIAH THEVAR *v.* SAMIAPPA MUDALIAR. **1938 M.W.N. 229 = 47 L.W. 344 = (1938) 1 M.L.J. 334 (F.B.)**

——**Art. 49**— Applicability — Pronotes left with another either as security or for safe custody—Suit in respect of. *See* LIMITATION ACT, ARTS. 145 AND 49.

1938 A.W.R. 59 (P.C.).

——**Arts. 52 and 96**—Wrong bills sent by mistake by plaintiff's employee for electric current supplied to defendant—Suit by plaintiff for balance not charged—Article applicable. *See* LIMITATION ACT, ARTS. 96 AND 52. **40 P.L.R. 143.**

——**Art. 62**—*Applicability—Assignment of decrees by insolvent prior to adjudication—Annulment of assignment after adjudication—Suit by Official Receiver against assignee to recover collections made by him under assignment—Limitation—Starting point.*

S was adjudicated insolvent on 31—10—1922 on a petition presented by a creditor on 24—4—1922. Previously, on 31—3—1922 the insolvent had assigned several decrees held by him to the appellant who collected money due under some of them. On the application of the Official Receiver the assignment was annulled by Insolvency Court on 22—11—1924. In March, 1930, the Official Receiver sued the appellant for recovery of the money collected by the appellant under the decrees assigned to him both before the annulment of the assignment and after the annulment.

Held, that Art. 62 of the Limitation Act applied to the suit as a whole, both in respect of the moneys realised by the appellant after his assignment but before the annulment of the assignment and also in respect of the moneys collected by him subsequent to the annulment, and consequently any moneys collected by the appellant at any time more than three years prior to the suit could not be recovered, the claim thereto being barred under Art. 62. (*King, J.*) SHANMUGAM CHETTIAR *v.* OFFICIAL RECEIVER, WEST TANJORE.

1938 M.W.N. 290.

——**Arts. 83 and 116**—Applicability—Undertaking by second mortgagee to pay off first mortgage—If contract of indemnity—Suit for damages for breach—Limitation—Starting point. *See* CONTRACT ACT, S. 124. **19 Pat.L.T. 198.**

——**Arts. 83 and 29**—Suit by *A* for declaration that property attached by *M* in execution of his decree against *H* did not belong to *H* but to himself—Undertaking by *M* that he would indemnify *A* after auction-sale if it would be proved that property belonged to *A*—Suit decreed in favour of *A*—Property auctioned by *M*—Suit by *A* for price of property sold—Article applicable. *See* LIMITATION ACT, ARTS. 29 AND 83.

A.I.R. 1938 Lah. 196.

——**Arts. 96 and 52**—*Wrong bills sent by mistake by plaintiff's employee for electric current supplied to defendant—Suit by plaintiff for balance not charged—Article applicable.*

Where by some mistake or negligence on the part of the employees of the plaintiff the actual bills sent to the defendant for the electric current supplied to him were for less than the amount due, a suit by the plaintiff for the balance of the amount not charged for or paid by the defendant is governed by Art. 52 and not Art. 96 of the Limitation Act. Art. 96 cannot apply to a case like the present where the mistake was not the mistake of the parties in contractual relation or any money paid or property handed over because of a mistake but was due to the mistake of the employees in not following the instructions of the plaintiff. (*Dalip Singh, J.*) ATTAR SINGH SANT SINGH *v.* MUNICIPAL COMMITTEE, AMRITSAR. **40 P.L.R. 143.**

——**Art. 118**—*Brahmin dying leaving behind widow and three daughters—Widow adopting son and mutating her husband's land in his name—Suit by daughter for declaration that adoption and gift could not affect her rights—Limitation.*

A Brahmin died leaving behind him a widow and three daughters. The widow who came into possession of the land of her husband executed a deed adopting a son as heir to her husband. The deed was registered and mutation was effected accordingly in adopted son's name. The collaterals of the husband had brought a suit to contest the adoption. Subsequently after six years of this suit one of the daughters brought a suit for declaration that the adoption and gift could not affect her rights as daughter.

Held, that as the starting point of limitation, whether Art. 3, Punjab Limitation (Custom) Act was applicable or Art. 118, Limitation Act, was applicable, was the date of plaintiff's knowledge of the alienation, the suit was barred as it was brought after six years. (*Coldstream and Din Mohammad, JJ.*) MT. MANBHARI *v.* MT. SURTI. **A.I.R. 1938 Lah. 193.**

——**Art. 120**—*Applicability — Resulting trust—Moneys subscribed by large number of people for particular purpose and held by one of them with liability to pay interest—Trust or deposit—Purpose failing-*

LIMITATION ACT (1908), Art. 120.

Effect—Suit by subscriber for recovery of his share—Limitation—Starting point.

Where funds subscribed by a large number of persons are held in trust for a particular purpose, which fails or comes to an end, there arises a resulting trust of such funds as remain, in favour of the contributors or subscribers or, if they are dead, their personal representatives. The unexpended balance belongs to the subscribers rateably in proportion to their subscriptions.

undertakes to pay interest on the funds would not be inconsistent with the transaction being in the nature of a

is a failure of the purpose whereupon the resulting trust arises. (*Venkatasubba Rao and Abdur Rahman, JJ.*) LAKSHMANAN

AR.

——Art.

trustee or co-trustee to collect moneys
by succeeding trustee or co-trustee
Limitation applicable—Starting point
ACT, ARTS. 36 AND 120. (1938) 1 M

——Art. 120—*Declaratory suit—Fresh invasion of right—Fresh start.*

Per *Skemp, J.* Every invasion of right although it

previous invasion is a distinction without a difference. (*Bhide, J. on difference between Dalip Singh and Skemp, JJ.*) RURA *v.* BANTA. A.I.R. 1938 Lah. 227.

——Art. 123— *Applicability — Annuity payable under express terms of will and descendible in male line*

the legatee to recover arrears of such annuity from the executor is governed by Art. 123 of the Limitation Act. S. 10 of the Limitation Act has no application to such a case. An executor as such is not an express trustee. The plaintiff in such a suit can recc
annuity as are not paid within 12
action. (*Manohar Lall and Chatte*
GINI DEVI *v.* ANIL KRISHNA.
19 Pat. L.T. 202

——Art. 132—*Co vendee payin*
avert sale—Right to a charge—Limitation for its enforcement.

Where a payment has been made by one of several vendees of a mortgaged property to save the property from sale under the mortgage which affects the rights of all the vendees, an equitable charge would certainly arise against the whole property on behalf of which payment is made. The right to enforce the charge as against the co-vendees accrues on the date of payment

Onus.

LIMITATION ACT (1908), Art. 142.

Where in a suit on behalf of an idol for a permament injunction restraining the defendant from dispossessing the plaintiff from a certain land the substantial relief claimed by the plaintiff is to set aside a transfer of the land made by a previous mahant in favour of the defendant, the suit falls under Art. 134 A of the Limitation Act and as limitation begins to run from the time when the transfer becomes known to the plaintiff, the initial onus of proving that his suit is within time is on the

subsequent
any date on
the transfer
at account.

(*Abdul Rashid, J.*) THAKARJI MAHARAJ *v.* KHUSHI RAM. 40 P.L.R. 184.

142— *Possession—Proof—Waste land—*
ssession—Absence of specific acts of posses-
Land leased for cultivation—Lessee culti-
area—Small portion remaing waste but trespassed upon and reclaimed by others—Suit by lessee for possession—Limitation—Proof of possession—Chota Nagpur Tenancy Act, S. 64—Applicability.

The plaintiff obtained from the landlord a lease of a

lord, who subsequently leased out portions of one of them to tenants who reclaimed the land. Plaintiffs sued to recover possession of this land from the landlord and

reclamation had acquired special rights by converting the land into *korkar* within the meaning of Ss. 64 and 66 of the Chota Nagpur Tenancy Act. It was found that neither the plaintiffs nor the defendants proved any specific acts of possession over the plots up to the time of the preparation of the record of rights.

h whom an area of
not be required to
every square yard
of the bulk of the

demised area must be treated as enjoyment of possession of the whole for the purposes of Art. 142 of the Limitation Act, in the absence of specific acts of adverse possession done by the defendants, and the latter not

presumption of
o the plaintiff;
uired by a tres-
raiyat, because
dealt with cases
normally be an

act of trespass on the waste land of the village, and laid down that in certain circumstances the landlord must be deemed to have given his consent to the reclamation, whereby the persons who would otherwise have been trespassers became occupancy *raiyats* under the landlord but that S. 64 (1) (*a*) excluded land included in the tenancy of a cultivator and nothing in S. 64 could therefore be treated as applying to acts of trespass of the nature committed by the defendants on land which

and (4) that the plaintiff, having the

IMITATION ACT (1908), Art. 145.

nd under cultivation must be deemed to have acquired right to holo it for the purpose of cultivation, notithstanding that they might not have actually cultivad the whole of it. (*Courtney Terrell, C.J. and James,*.) CHANDRA MOHAN SINGH *v.* BUTU MIAN.

1938 P.W N. 194=19 Pat L.T. 133.

——Arts. 145 and 49—*Applicability—Pro-notes ft with another either as security or for safe custody—uit in respect of.*

Where certain promissory notes remain with defenant, having been left by the plaintiff as security or at ny rate for safe custody, then on either view, not Art. 9 but Art. 145 is the relevant article applicable to a iit in respect of such notes. (*Lord Roche.*) HABIBUL *v.* 'AQ TIKAM CHAND. 173 I.C. 612=1938 O.W.N. 299=1938 A.L.J. 264=1938 A.W.R. 59 (P.C.).

—— Art. 167—Second application under O. 21, R. 5, C. P. Code—Limitation—Starting point. *See* C. P. ODE, O. 21, R. 95. 42 C.W.N. 478.

——Art. 177—*Applicability — Proceedings under ompanies Act—Death of respondent to application for rder for balance of contributions—Failure to implead eirs within 90 days—Effect—Companies Act, S. 160.*

The Limitation Act does not apply to proceedings under e Companies Act; when a member against whom an pplication is made for an order for the balance of conibutions due from him dies pending the application, it s not necessary that his heirs should be substituted ithin 90 days as prescribed by the Limitation Act. The matter of the liability of the legal representatives is overned by S. 160 of the Companies Act and on the eath of the member the liability automatically falls pon the representatives. (*Courtney Terrell, C.J. and Fames, J.*) SUMITRA KUER *v.* SITAMARHI SUGAR WORKS, LTD. 19 Pat L.T. 214.

——Art. 181—*Applicability — Application under S. 144—Tenant ejected by landlord but restored to possession in appeal or revision—Application for mesne profits for period of dispossession—Starting point of imitation.*

An application under S. 144, C. P. Code, is not an pplication in execution, and is governed for purposes of imitation by Art. 181 of the Limitation Act; the right to apply, in the case of a person who is ejected from possession and subsequently restored to possession on appeal or revision, for recovery of mesne profits for the period of his dispossession, accrues only when possession has been restored to him in pursuance of the reversal of the order of ejectment in appeal or revision. The application can therefore be made at any time within three years after the date of restoration of possession. (*Darling, S.M. and Bomford, J.M.*) SURVAPAI SINGH *v.* BIJAI RAM. 1938 A.W.R. (B.R.) 113= 1938 R D. 182.

——Art. 183—"*Revivor*"—*Meaning of—Order of attachment after notice—Notice to minor judgment-debtor not served on proper guardian—Effect—If order of attachment operates as revivor.*

In order to constitute a revivor of a decree there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it. An order of attachment of the properties of the judgment-debtors after notice to them under O. 21, R. 22, C. P. Code, amounts to a revivor of the decree, although the notice to one of the judgment debtors who is a minor is not served on the proper guardian of the minor, but on a wrong guardian (*Fazl Ali and Agarwala, JJ.*) SARJU SINGH *v.* BHAGWAT PRASAD SINGH. 19 Pat.L.T. 193

MADRAS BORSTAL SCHOOLS ACT (V OF 1926), S. 8—*Consecutive sentences under—Legality.*

MADRAS ESTATES LAND ACT (1908), S. 6.

One sentence of detention imposed upon an offender under S. 8 of the Borstal Schools Act should not be ordered to run after the expiry of another sentence imposed upon the same offender. A direction to that effect, *i.e.*, that the sentence of detention in one case should take effect after the expiry of the sentence of detention in another case is not in consonance with law. (*Pandrang Row, J.*) ALLAH BAKSH, *In re.* 47 L.W. 321.

MADRAS CRIMINAL RULES OF PRACTICE, R. 263—*Meaning and scope of*

R. 263 of the Criminal Rules of Practice cannot be read as saying that a District Magistrate shall never refer an acquittal to the High Court. If it be read so, the rule would be *ulra vires* the powers of the Court. (*Leach, C.J, Varadachariar and Mockett, JJ.*) KULASEKARA CHETTY *v.* THOLASINGAM CHETTY. 1938 M.W N. 209=47 L.W. 314= (1938) 1 M.L J. 344 (F.B.).

MADRAS DISTRICT MUNICIPALITIES ACT (V OF 1920), S. 93 and Sch. IV, Rr 18 and 19—*Scope and effect of—Government Officer having headquarters within Municipality going abroad on leave in the middle of half year—Salary received during leave abroad—If to be taken into account in assessing profession tax.*

Though the explanation to R. 19 of Sch. IV of the District Municipalities Act makes it obligatory on a Municipality to accept for the purposes of assessing profession tax the figures accepted by the Income tax authorities for the purpose of assessing income-tax, the fact that a person is not liable to pay income-tax in India in respect of his income will not exempt him from liability for profession tax to a Municipality. Profession tax is surely payable whether income or gain arising from the profession is capable of being assessed to income-tax or not. The fact that an officer of the Government having his headquarters within a Municipality goes abroad on leave during the middle of a particular half-year will not entitle him to withhold payment of profession tax on that part of his income or salary which he receives not in India but abroad. His profession tax has to be calculated on the whole of his half yearly income and not merely on that part of it which is actually received in India. (*Stodart, J.*) HILTON BROWN, *In re.* 47 L.W. 254.

MADRAS ESTATES LAND ACT (I OF 1908), Ss. 6 and 189—*Scope—Private contract between landholder and ryot—Tenant aggreeing to pay enhanced rent in return for occupancy rights—Agreement resulting from* bona fide *settlement of doubtful claim—Enforceability.*

By the Estates Land Act, certain advantages are conferred upon the ryot, and the tenant's fr edom of contract has been in some respects taken away. The Civil Courts are under the Act deprived of jurisdiction in respect of "estates", and this statutory prohibition cannot be abrogated by private contract between the landlord and tenant. The permanent right of occupancy conferred on the tenant is again a statutory right, which cannot be fettered or controlled by any contract impeding or preventing its exercise—such a contract being prohibited both by the language as well as the spirit of the Act. That the contract is the result of a *bona fide* settlement of a disputed claim makes no difference whatsoever. There is no exemption in the Act in favour of such a contract. An arrangement between the land holder and certain of his ryots by which the ryots in return for the conferment of occupancy rights by the landholder agree to pay an enhanced rent, though it may have been the result of a *bona fide* settlement of a

MAD. HER. VILLAGE OFFICES ACT (1895), S. 13.

doubtful claim with regard to the lands being part of an estate, is not such as can be enforced in a Court of law. (*Venkatasubba Rao and Abdur Rahman, JJ.*) ZAMINDAR

MADRAS
ACT (III
and relative scope—Jurisdiction of Civil and Revenue

Court *inter alia* to take into consideration or decide any claim to recover the emoluments of any of the offices specified in S. 3. Unless in a given case jurisdiction is conferred by S. 13 upon the Revenue Courts, it should not be deemed taken away under S. 21 from the

the plaintiff to allege in order to maintain his
that the land in suit is an emolument of a service inam, the jurisdiction will remain with the Revenue Court under S. 13 of the Act. Where the plaintiff sues on the ground of a trespass or the ground that the land is his private property or upon the footing that a lease has expired, there is no need for him to rely upon the fact
inam.
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smith in a ryotwari village alienated to various persons portions of his service inam lands. He was thereupon

which was confirmed, on appeal by the Collector. The defendant applied to the High Court for a writ of *certiorari* alleging that the Revenue Courts had no jurisdiction to try the suit and that the proceedings were liable to be quashed.

Held, that the suit in question was excluded from the

Duty of Court to save—Failure to do so—Revision.

Under S. 9 (5), Madras Hindu Religious Endowments Act, there are two grounds upon which a temple

MAD. IRRIGATION CESS ACT (1865), S. 1.

may be found to be an excepted temple; the first category is temples in which right of succession to the office of trustee is hereditary and the second category consists of temples the succession to the trusteeship been specially provided for and therefore in deciding under this sub section must the provisions, and the omission to do so d ground for revison under S. 115, C. P. n, *J.*) KUMARA ALAGU SAMAYYA NAICKER *v.* MADRAS HINDU RELIGIOUS ENDOW-
A.I.R. 1938 Mad. 321.

and 84—*Provisions of succession to by founder—If must continue to be in petition under S. 84.*

for the succession to the trusteeship of an institution which is made by the founder of it is something which is done once for all at or about the time of the foundation. The words in sub-S. (5) of S. 9 do not imply that the provision made by the founder must continue to be in force at the time of the petition under S. 84 of the Act. (*Burn, J.*) KUMARA ALAGU SAMAYYA NAICKER *v.* MADRAS HINDU RELIGIOUS ENDOWMENTS BOARD.
A.I.R. 1938 Mad 321.

MADRAS IRRIGATION CESS ACT (VII OF 1865), S. 1, first proviso—*Scope—Right to exemption from cess—Conditions of—Absence of proof of engagement—Description of land as "wet"—If imports engagement—Minor inam in ryotwari village adjoining Agraharam—Channel passing through Agraharam and supplying water to Agraharamdar under engagement—Inamdar taking water through Agraharam land—If protected.*

Where the source of irrigation is an artificial channel which is undoubtedly the property of the Government, the right to exemption from liability to water-cess can arise under the first proviso to S. 1 of the Irrigation Cess Act only on proof of an engagement with the Government either express or implied. The mere fact

the Inam Fair Register as "wet" land does not import an engagement to exempt it from water cess. When the inamdar does not prove an engagement with the Government exempting him from cess, and when there is no reference in the inam papers whatever to any source of water supply the inam title deed itself not being produced—the description of the land as wet does not cast a duty on the Government to supply the water free, especially in the absence of evidence to show that at the time of the grant there was in fact any source of irrigation at all. Nor can it be laid down as a broad proposition of law that once Government's liability to supply water is shown—it

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Government. (*Venkatasubba Rao and Abdur Rahman, JJ.*) MANGIAH *v.*

[ADRAS LOCAL BOARDS ACT (XIV OF 1920), . 223—*Applicability—Withdrawal of prosecution—pplication for—Right to make—If confined to officer inctioning prosecution—Complaint filed by section fficer on sanction of President of District Board—Power of section officer to withdraw complaint.*

S. 223 of the Local Boards Act does not refer to ithdrawal of legal proceedings but only to the initiation f legal proceedings. The authority for withdrawal of prosecution is conferred not by the Local Boards Act ut by the Criminal Procedure Code. Where a prose-ution is sanctioned by the president of a District loard and instituted on the complaint of section officer, he latter as the complainant has power to apply for ermission to withdraw the case. It is not correct to old that because the prosecution has been originally uthorised by the president of the District Board only he president can withdraw the complaint. (*Pandrang Row, J.*) PERIASWAMI GOUNDAN, *In re.*

47 L.W. 308.

MADRAS PREVENTION OF ADULTERATION ACT (III OF 1918), Ss. 5 (1) (d) and 14—*Sample upplied by accountant of branch of Co-operative Society o Sanitary Inspector—If sale—Prosecution of ac-ountant and Secretary of Society—Maintainability.*

The supply of sample to a Sanitary Inspector under S. 14 of the Madras Prevention of Adulteration Act is iot a sale, and when a sample is so supplied by the ccountant of a Co-operative Society at one of its branches neither the accountant nor the Secretary of he Society can be said to offer the article for sale so as o render them liable to conviction under S 5 (1) (*d*) ead with the rules. (*Lakshmana Rao, J.*) PUBLIC PROSECUTOR *v.* SRINIVASA RAO.

1938 M.W.N. 317.

MADRAS REGULATION (XXVIII OF 1802), S. 34, Cl 6—*Attachment under—Legal effect of.*

The attachment of property under Cl. (6) of S. 34, does not amount to a transfer of property nor a right to call for transfer of property. The only right conferred is to manage the property until the amount due or to be due s discharged. No right of disposal over the property is given. But for the statutory power, the landlord would have no right to enter in the land. The possession of the tenant is displaced by virtue of the statute and it is not therefore by virtue of any confidence reposed by the defaulting tenant in the zamindar that possession is taken, but in opposition to and in derogation of his rights as owner to remain in possession, and therefore the relationship thus created by attachment can in no sense be one of trustee and *cestui que trust.* (*Venkataramana Rao, J.*) SESHAGIRI RAO *v.* VENKATARAMAYYA APPA RAO BAHADUR.

A.I.R. 1938 Mad. 295.

MAHOMEDAN LAW — Applicability — Cutchi Memons—Execution of will and codicil. *See* CUTCHI MEMONS. (1938) 1 M.L.J. 444.

———Dower—Amount fixed at marriage—Wife below 18 but major under Mahomedan law—Relinquishment of part of dower and alteration of character of part—Validity—Majority Act, S. 2—Operation of. *See* MAJORITY ACT, S. 2. 1938 P.W.N. 144.

———*Will—Form of—Expression of intention of testator—Declaration forming basis of draft—Sufficiency of.*

Granted that the will of a Mahommedan need not be drawn in form and granted that it need only be a declaration of the testamentary intentions of the testator, it would be imperative that there should be evidence which would justify a conclusion that the testator intended that the declaration which he has made of his intentions should be of itself operative and that it should not be merely the basis for making a draft which he would subsequently scrutinise, correct and amplify before signing it. (*Wadsworth, J.*) MAHOMED YOONUS *v.* ABDUR SATTAR ISMAIL. (1938) 1 M.L.J. 444.

———Will—Revocation—Registration of will—Communication by testator to solicitors to draft a codicil as per his instructions—Communications not signed by testator—Codicil not completed — Communications whether operate as codicil and revoke part of his will. *See* WILL—REVOCATION. (1938) 1 M.L.J. 444.

MAJORITY ACT (IX of 1875), S. 2—*Scope and operation of—Dower—Mahomedan wife below 18 years age—Ekrarnama foregoing part of dower and charging character of balance from prompt to deferred—Validity of—If to be judged by Act or by Mahomedan law*

S. 2 of the Majority Act only governs the performance of marriage or effecting of divorce by persons who, though not major according to the Act, are so according to their personal law. But the relinquishment by a Mahommedan wife of the whole or part of her dower fixed at the time of the marriage or changing its character from prompt into deferred does not fall within the exception provided by S. 2 of the Act. Once a marriage is performed, and the dower settled, the dower becomes a property of the wife like any other property belonging to her. It is a debt payable to her and any transfer or relinquishment of the same, whether in whole or part, is not a matter in any way connected with marriage, and such an act must be governed by the ordinary law of the land. The operation of the section cannot be extended beyond what is specified therein. Consequently an ekrarnama executed by a Mohamedan wife who is a minor under Act, but a major under the Mohamedan law, whereby she surrenders a portion of her dower debt and makes the other portion a deferred dower instead of prompt cannot be valid and binding on her, and cannot operate either to reduce the amount of the dower or change its character. (*Courtney Terrell, C. J. and Noor, J.*) NAJMUNNISSA BEGUM *v.* SIRAJUDDIN AHMAD KHAN. 1938 P.W.N. 144.

MALABAR LAW— *Tarwad — Karnavan—Assignment of lands subject to kanom to junior member in lieu of maintenance with power to redeem kanom—Validity,*

If an assignment by a karnavan had been in favour of a stranger by way of a Melcharth possibly it may be open to objection that a karnavan by assigning away the right to redeem long before the period of redemption, would not be acting prudently in the interests of tarwad and would be unnecessarily fettering the exercise of the discretion of succeeding karnavan who at the time of the expiry of the period should take the circumstances then existing as to the desirability of granting a Melcharth; but if by means of a family arrangement, the said property is allotted to a member in lieu of maintenance subject to the burden thereon, there is nothing in law to preclude him from empowering that particular member to discharge that burden and enjoy the land. (*Venkataramana Rao, J.*) MAKKAM AMMA *v.* KUNHI KALAPPA KURUP.

A.I.R. 1938 Mad. 289.

———*Tarwad—Karnavan—Powers of—Maintenance allotment to tharavhi—If binds succeeding karnavan—Power to alter.*

It is open to the karnavan of Malabar tarwad to make grants of land in lieu of maintenance to the junior members of the tarwad and any such maintenance arrangement entered into by the karnavan in favour of a junior member or a group of members constituting a

MALICIOUS PROSECUTION.

tavazhi is binding on the succeeding karnavan and cannot be set aside except for a good cause. It is open to ... regard to the circumstances then existing to

...

tavazhi to seek an enhancement accord... Any arrangement entered into will be ...avan also until ...on If in the ...es provision for ...be assailed by the succeeding karnavan on ... that it may not have been necessary at that time. (*Venkataramana Rao, J.*) MAKKAM AMMA ... KURUP.

MALICIOUS PROSECUTION ... *malice.*

... damages for malicious prosection, ...efendant acted ...g ...) ...BE KHAN. ...(1938) 1 Cal 202.

MARRIED WOMEN'S PROPERTY ACT (III OF 1874), S 6—*Construction and scope—Trust in favour of wife—When arises—Naming of trustee and making of amount payable to Official Trustee—If conditions precedent.*

S. 6 of the Married Women's Property Act does not at ... condition precedent to the creation of a ...

...document b... beneficiary or in favour of a ... truste being nominated. The fact that the insured has not named a trustee, whether such trustee be the Official Trustee or not is no ground for holding that the money made payable to a wife ... (*Rupchand Bilaram Ag. J.C. and* ...) WARIBAI *v.* NIHALCHAND.

MASTER AND SERVANT—*Wrongful dismissal—Railway employee—Dismissal of on report submitted by Traffic Inspector—Suit for damages—Decree against Railway Company—Appeal claiming damages against Traffic Inspector—If barred by decree against Company—Cause of action—If same—Right to damages in appeal—Principles.*

Per *Noor, J.*—Where a Railway employee is dismissed by the Railway Company acting on the report made by an officer of the Railway, *e.g.*, the Traffic Inspector, and the dismissed employee in a suit against the Railway Company and the Traffic Inspector gets a decree for damages against the Railway Company ... appeal by the plaintiff to recover damages as against the Traffic Inspector cannot be held to be barred on the principle that an action against the principal bars an action against the servant. That principle ... because there are no two actions but only one ... in which both the master and the servant are ... and also because the liability of the servant (Traffic Inspector) is for his bringing about the dismissal ... his being responsible for the dismissal. The plaintiff in such a case has two causes of action, one against the Railway for dismissing him without just and lawful cause, and another against the Traffic Inspector for being responsible for the dismissal. It is only in cases in which ...t for which the master ...t tort-feasors and not in ...nd the servant commit ...at the principle of an ...ring an action against the ... same time, where the ...ages on the basis of loss ...led, no separate damage can be awarded against the Traffic Inspector in the absence of any finding that the damage already awarded by the trial Court for loss of service is insufficient. The liability in respect of the libel, if any, contained in the servant's report to the master is mainly that of the former, and the Railway is liable only indirectly as the libel is published by the servant in the course of his ... the Railway Company not itself libelling ... the report of its servants, ...ting a libellous statement to be true is not actionable. (*Courtney Terrell, C. J. and James, J.*) KHIROD RANJAN DAS *v.* MOHAMMAD WASY. 19 P.L.T. 186.

MYSORE C. P. C. REG. (1911), O. 23, R. 3. ... *est exclusio alterius*—If ...(1), C. P. Code. *See* C. P. ...) AND O. 9, R. 9. 1938 N.L.J. 68.

MESNE PROFITS—Interest on—Right to—Partition suit in Hindu joint family—Coparcener kept out of possession and enjoyment—Mesne profits—Interest on—If to be awarded. *See* HINDU LAW—PARTITION. (1938) 1 M L.J. 453.

MORTGAGE — *Mortgage suit — Costs—Appeal by mortgagor from preliminary decree—Costs awarded by appellate Court to mortgagee—Personal liability of ...or.*

...an appeal filed by the mortgagor from the ... against him was dis... ...costs to ... in the appellate Court ... decree against the mortgagor. This is particularly so in a case where the personal remedy for the balance of the money ... on the mortgage is barred and the appeal ... very form ... mortgagor. ... 1938 ... 56.

MORTGAGE SUIT—*Representation ... in mortgage by unauthorised person—... representative of estate sought to be made ... estate, if properly represented.*

Where a mortgage is executed by an unauthorised person and the suit is brought against the same person, to which a wrong legal representative of the estate sought to be made liable was added, it could not be said that the real heir was represented in the suit ... (*Collister and Rafiq, JJ.*) ... PRASAD. 1938 A.W.R. ... 1938

...Substituted security—Rival claimants ...Priority, if arises. *See* T. P. ACT, S. ... 1938 M.W.

... CODE RE ... O. 23, R. 3—"Lawful ... for partition ... interest ... and ef...

A compromise to which some of the parties to the suit alone are parties is not necessarily invalid, though good cause shown by any of the other parties, the Court has a discretion to reject such a compromise. Where such a compromise is prejudicial to the interests of the parties not joining it, it cannot be recognised. Where the interests of the several parties to the suit are inseparable it is not open to some of them alone to compromise the matter. Where a compromise entered into by adults and on behalf of minors, is not for the benefit of the minors, it cannot be recorded so as to bind the minors. The minors have to be treated as not having entered into the compromise or as not being bound by it. And when the suit in which it is entered into is a partition suit filed by majors as well as minors, it cannot also be held binding or enforceable against the majors. The Court will not enforce against the adults a compromise which is not binding on the minors when the adults and minors have together sued for a partition. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) MANICKCHAND *v.* KANYALAL. 16 Mys.L.J. 92.

——**O. 32, R. 7**—*Leave to compromise—Application for—When to be made—If to be before effecting of compromise.*

It is not necessary that leave to compromise under O. 32, R. 7, C. P. Code, should be asked for before the compromise is effected. There is nothing to prohibit the Court from granting leave at any stage. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) MANICKCHAND *v.* KANYALAL. 16 Mys.L.J. 92.

——**O. 32, R. 7**—*Leave to compromise suit on behalf of minor plaintiff—Application for by defendant—Competency.*

An application for compromising a suit on behalf of a minor plaintiff or a minor defendant under O. 32, R. 7, C. P. Code, has to be made by the next friend of the minor plaintiff or the guardian *ad litem* of the minor defendant as the case may be. A defendant is not competent to apply for leave to compromise on behalf of a minor plaintiff. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) MANICKCHAND *v.* KANYALAL. 16 Mys.L.J. 92.

MYSORE COMPANIES REGULATION (VII OF 1917), S. 28 and Sch. I, Table A—*Scope—Shares held in company by joint Hindu family and standing in name of manager—Partition—Allotment of shares to one member—If "transfer"—Non-observance of formalities—Effect—Right to shares allotted.*

There is no provision in the Companies Regulation for cases in which shares belonging to the members of a Hindu joint family are allotted to one member at the time of partition in the family, when the shares stand in the name of the manager or any other member of the family. When a member of a joint family so acquires a right to shares at a family partition, he becomes the exclusive owner thereof, and the non-observance of the formalities for effecting transfers and transmissions of shares ordinarily prescribed by the Regulation or the Articles of Association would not defeat the rights of parties. The other member or members of the family who had a joint interest till the date of partition can have no interest in such shares thereafter; and no creditor has a right to attach such shares allotted to a member in execution of a decree held by the creditor against any other member of members of the family. Nor can the member who gets the shares allotted to him be said to have merely an equitable interest in his favour which could be defeated by the absence of registration in the company's registers; the right acquired under the partition is an exclusive and indefeasible title to the shares. The member is consequently entitled to get registered in his name the shares so allotted to him. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) AKKITHIMMIAH *v.* RANGAPPA. 16 Mys.L.J. 115.

——**S. 91-B**—*Scope—"Contract or arrangement"—Suit by stranger—Defects in contract—If can be pleaded in defence.*

Whatever defects there may be in the passing of a resolution by a company, such defects cannot be set up as a defence against actions brought by strangers who enter into transactions with the company. They are not concerned to see to the internal irregularities or indoor management of the company's proceedings and are entitled to assume that everything has been properly done. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) AKKITHIMMIAH *v.* RANGAPPA. 16 Mys.L.J. 115.

MYSORE CRIMINAL PROCEDURE CODE REGULATION (II OF 1904), S. 199—*"Complaint made by the husband"—Meaning of—Absence of formal complaint, either oral or written—Husband examined as witness for prosecution—Trial and conviction—Legality—Deposition of husband—If sufficient "complaint".*

No person can be convicted on a charge under S. 498, I. P. Code, in the absence of a complaint by the husband as required by S. 199, Cr. P. Code. The fact that the husband appears and gives evidence for the prosecution at the trial cannot take the place of a complaint by the husband which is necessary under S. 199. When there has been no complaint, *i.e.*, an allegation made orally or in writing to a Magistrate with a view to his taking action under the Code, a trial and conviction would be illegal. The deposition of the husband given in his evidence is not in law a sufficient complaint within the meaning of S. 199. (*Nagesvara Iyer and Singaravelu Mudaliar, JJ.*) MALLIAH, *In re.* 16 Mys.L.J. 69.

——**S. 520**—*Discretion—Interference—Grounds—Omission to give reasons* in extenso—*If justifies interference.*

A Court of appeal or revision should not, under S. 520, Cr. P. Code, ordinarily interfere with an order under S. 517, unless it considers that the order of the lower Court regarding the disposal of the property is grossly erroneous or where the interests of justice demand that such an order should not be allowed to stand. The fact that the trial Court has not given its reasons for the order *in extenso*, is not by itself a ground for interfering with its discretion. (*Shankaranarayana Rao, J.*) GOVERNMENT OF MYSORE *v.* SESHAPPA. 16 Mys.L.J. 73.

——**S. 520**—*Jurisdiction under—Conditions for exercise of—Absence of appeal or revision, etc., from main decision—If bar to modification of order of disposal of property.*

S. 520, Cr. P. Code, must be construed in a liberal manner, and must be read as meaning that any superior Court which has powers of appeal, confirmation, reference or revision in respect of the trial Court, that being the Court subordinate thereto referred in the section, can make any substantive order it thinks fit in respect of property dealt with by the trial Court under S. 517, 518 or 519. The fact that there are no proceedings pending by way of appeal, revision or reference, etc., before the superior Court will not deprive the latter of jurisdiction to modify, alter or annul the order of disposal of property passed by the trial Court. (*Shankaranarayana Rao, J.*) GOVERNMENT OF MYSORE *v.* SESHAPPA. 16 Mys.L.J. 73.

MYSORE INSOLVENCY REGULATION (VI OF 1911), S. 51 (3)—*Applicability—Execution sale held after order of adjudication and after vesting order—If*

MYS. LAND REV. CODE REG. (1888), S. 37

void—Title of bona fide *purchaser as against Receiver —"In all cases"—Construction.*

S. 51 (3) of the Insolvency Regulation is not in applicable to sales in execution held after adjudication. A sale held in execution after the order of adjudication and after the property has vested in the Receiver cannot therefore be held to be void as against the Receiver. A person purchasing at such a sale in good faith is protected and gets a good title against the Receiver. The words "in all cases" in S. 51 (3) are comprehensive enough to include sales held even after adjudication. (*Shankaranarayana Rao and Nagesvara Iyer, JJ.*) KHADER ALLI SAB *v.* PROCESS NAZIR MUNSIFF'S COURT HASSAN. 16 Mys.L.J. 111.

MYSORE LAND REVENUE CODE REGULATION (II OF 1888), S. 37—Deputy Commissioner acting under—Injunction to restrain—If can be granted by Civil Court. *See* SPECIFIC RELIEF ACT, S. 56. 16 Mys.L.J. 87.

——**S. 221 (f)**—*Scope—"Respecting the occupation" of—Land belonging to Government—Tank constructed by private party on darkhast land—Interference by Government—Suit to declare to right to maintain bond and for injunction against Government—Maintainability.*

Where a public authority does certain acts under the provisions of an enactment which sec
certain rights and imposes on them cert.
it cannot be said that such rights and
out of any contract between the parties, such rights and duties being the creatures of statute. It is no doubt open to the Government to enter into a contract with a private party, *e.g.*, taking a bond from a party or executing one through one of its officers in favour of a

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may be instituted against the Government, a suit against the Government for a declaration that the plaintiff

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If one arising out of contract. *See* MYS. LAND

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promise to pay and not intended to be negotiable.

A document which acknowledges the receipt of a certain amount by cheque and contains a promise to pay that amount with interest at a certain rate after a certain specified time, is not a promissory note, as it is clearly not intended to be a negotiable instrument. (*Sir George Lowndes.*) KARAM CHAND *v.* MIAN MIR AHMAD AZIZ AHMAD. 1938 A.L.J. 288=1938 O.W.N. 326 (P.C.).

——**S. 13**—*"Pahunch"—Negotiability.*

An instrument, in order to be negotiable must fulfil the following conditions: (1) it must be in a form capable of being sued on by the holder thereof *pro tempore* in his own name; and (2) it must by the custom of trade be transferable like cash by delivery. A 'pahunch' is a writing merely chronicling the fact that a certain amount is received by the person signing it from another person. It is an ordinary receipt. Neither expressly nor impliedly does it create any obligation on the part of any one to pay the amount mentioned therein. It is neither a Bill of Exchange as defined by the Negotiable Instruments Act, nor a hundi, nor any such document entitling or purporting to entitle any person to payment by any other person of any stated sum of money, and is consequently not negotiable. (*Mehta, J.*) JHANGALDAS CHIMANDAS *v.* CHETUMAL BULCHAND. 173 I.C. 591=A.I.R. 1938 Sind 24.

——**Ss. 27, 28 and 32**—*Promissory note by manager of Hindu joint family—Indorsement—Right of indorsee to proceed against other coparceners not parties to the note.*

An indorsee of a promissory note executed by the ... family is limited to ... e indorsement is so ... well and the stamp law is complied with, and, therefore, in the case of an ordinary indorsement the indorsee cannot sue the non-executant coparceners on the ground of their liability under the Hindu Law. It is a fundamental principle of the law relating to negotiable instruments that no one ... on the instrument can be ... , *C.J., Varadachariar and*

[illegible]

... **I OF 1869), S. 2**—*"Heir" and "legatee"—Meaning of.*

The explanation added by the U. P. Act III of 1910

[illegible]

restricted to those who inherit under S. 22: it is used in S. 23 and applies to every estate whose owner was entered in List I whatever the rule of succession. (*Sir George Rankin.*) GAYA BAKHSH SINGH *v.* DEO SINGH. 173 I.C. 625=1938 O.A. 190=1938 O.W.N. 268 (P.C.).

——**S. 14**—*Effect and object of.*

... case of a bequest which is within the ... ls with which S. 14 opens, and which was ... a taluqdar to a person who would have ... according to the provisions of the Act had they been in force at the time when the ...

[illegible]

succession" as the testator. This provision was intended to indicate how the Act was to take effect upon such property and not to ... under the bare terms of the original ... the main provisions of the Act ... the Intention to be ...

OUDH ESTATES ACT (1869), S. 14.

The section is expressly dealing with a case in which the taluqdar has parted with his interest or part thereof prior to the Act. It is difficult to suggest that the statute designedly provided that estates should in some cases within S. 14 run for all time on the bare general principle provided by a sanad, and that the reference to "rights and powers", "conditions" and "rules of succession" should in these cases import none of the elaborate provisions of the Act. No doubt some saving of vested rights may be implied in retrospective legislation, but subject to that the section operates retrospectively as well as prospectively in order to achieve the same result for all estates of the same class. It operates alike whether the transferee is an heir apparent, another taluqdar or a younger son. In giving the other taluqdar the same rights as the transferor the Act may have been unhappy, since the taluqas might not be subject to the same rules of succession. But the purpose of the section was to make the acquisition descend with the old estate. Likewise, the inclusion within the section of persons who would have succeeded under the Act, is intended to preserve in such cases the same character to the estate as it would have continued to bear if the succession had been *ab intestato*. (*Sir George Rankin.*) GAYA BAKHSH SINGH *v.* DEO SINGH 173 I.C. 625 = 1938 O.A. 190 = 1938 O.W.N. 268 (P.C.).

———S. 14—*Scope and effect of—Bequest to a person who would have succeeded under the Act—How affected.*

In the case of a bequest which is in the retrospective words with which S. 14 of the Oudh Estates Act opens, and which was made by a Taluqdar to a person who would have succeeded according to the provisions of the Act (if it had been in force when succession opened) the consequences attached by the section is that such person shall have the same rights and hold it subject to the same conditions and rules of succession as the testator. This is intended to indicate how the Act was to take effect upon such property and not to perpetuate a system of succession under the bare terms of the original sanad and outside the main provisions of the Act. (*Sir George Rankin.*) SURAJ KUNWAR *v.* DEO SINGH. 1938 A.L.J. 301 (P.C.).

———Ss 14 and 22—*'Heir'—'Legatee'—Meaning of—If confined to next immediate heir or legatee.*

The words 'heir', 'legatee' appearing in the sections of the Oudh Estates Act, when used with reference to a taluqdar or grantee is confined to the next immediate heir or legatee of such taluqdar or grantee. (*Sir George Rankin.*) SURAJ KUNWAR *v.* DEO SINGH. 1938 A.L.J. 301 (P.C.).

OUDH RENT ACT (XXII OF 1886), S.33—*Defendant's ancestor declared sir holder in 1869—Status of defendant—Liability of his rent to enhancement.*

Where the defendant's ancestor was declared to be a *sir* holder by an order of the Settlement Court in 1869, the defendant has a right superior to the occupancy right defined in S. 5 of the Rent Act, and in fact he is an under-proprietor. His rent is, therefore, not liable to enhancement under S. 33 of that Act. (*Darling, S. M.*) SALTANAT BAHADUR KHAN *v.* SUBHKARAN SINGH. 1938 R.D. 195 = 1938 A.W.R. (B.R.) 122 = 1938 O.A. 229 = 1938 O.W.N. 165

———S. 67 (1) (b)—*Notice under—Cancellation—Right to apply—Family acquiring under-proprietary rights—Record in the name of one member alone—Member in whose name it is not recorded, if can apply for cancellation of notice against him.*

Where under-proprietary rights acquired by a joint Hindu family are recorded in the name of one of the members alone, another member against whom a notice of ejectment is issued under S. 67 (1) (*b*) of the Oudh Rent Act, cannot get it cancelled on the ground that his name is not recorded. His interest cannot be denied though his name might not have been recorded owing to an error. (*Darling, S. M. and Bomford, J.M.*) BHAWANI SINGH *v.* SHEO SINGH. 1938 R.D. 358.

———Ss. 108 (9) (c) and 108 (10)—*Compensation for forcible dispossession—Suit for—Cause of action—Starting point—Proper procedure.*

Prima facie when a landlord takes forcible possession of a tenant's field, the cause of action for a suit under S. 108 (9) (*c*) of the Rent Act arises on that very date. There is no reason why the dispossessed tenant should not sue at the same time under both Ss 108 (10) and S. 108 (9) (*c*) of the Act (*Darling, S. M. and Bomford, J. M.*) RAM DULAREY *v.* SUCHITLA. 1938 R.D. 375.

———S. 108 (15)—*Suit by co-sharer against lambardar for share of profits—Lambardar, if can be debited with profits of land held by other co-sharers in excess of their share.*

In a suit by a co-sharer against the lambardar for his share of profits, the lambardar cannot be debited with the profits of lands held by other co-sharers in excess of their proper share, because a lambardar as such is not competent to sue his co-sharers for recovery of such excess profits either as profits or as rent. (*Srivastava, C. J. and Smith, J.*) MUNIR AHMAD *v.* AMINA BIBI. 1938 R.D. 263 = 1938 A.W.R. (C.C.) 24 = 1938 O.A. 152 = 1938 O.W.N. 181.

———S. 108 (15)—*Suit for profits against lambardar—Lambardar not assessing rent on ex-proprietary tenancy—If guilty of negligence.*

As it is the duty of all co-sharers and not of the lambardar as such to apply for the fixation of ex-proprietary rent, the lambardar is not guilty of negligence if he does not apply to have rent assessed on an ex-proprietary tenancy. Consequently the failure by him to get this rent assessed does not entitle a co-sharer to obtain a decree for profits against him on gross rental. (*Hamilton, J.*) MUNIR AHMAD *v.* ABDUL KHALIQ. 1938 R.D. 388 = 1938 O.W.N. 306.

———S. 108 (15)—*Suit under—Ex-proprietary rent not assessed—Lambardar, if liable for profits in respect of ex-proprietary land.*

It is not the exclusive duty of the lambardar to apply for the assessment of ex-proprietary rent and if such rent is not assessed, co-sharers are as much to blame as the lambardar. A lambardar cannot, therefore, be charged with negligence for not getting ex-proprietary rent assessed and consequently cannot be made liable to the co-sharer suing under S. 108 (15) of the Oudh Rent Act for any profits in respect of the ex proprietary land. (*Srivastava, C. J. and Smith, J.*) MUNIR AHMAD *v.* AMINA BIBI. 1938 R D. 263 = 1938 O.A. 152 = 1938 A.W.R. (C.C.) 24 = 1938 O.W.N. 181.

———S. 127—*Holding of deceased occupancy tenant in possession of his relation who is not his legal heir—Landlord's right to eject him.*

A person who is related to a deceased occupancy tenant cannot claim possession of the holding when the legal heir is in existence. The landlord can very properly bring a suit under S. 127 of the Oudh Rent Act against him, whether or not the legal heir has actually surrendered the holding in favour of the landlord. (*Ziaul-Hasan, J.*) BISHWA NATH SARAN SINGH *v.* SRI NARAIN SINGH. 173 I.C. 616 = 1938 A.W.R. (C.C.) 25 = 1938 O.L.R. 124 = 1938 O.A. 204 = 1938 O.W.N. 225.

OUDH RENT ACT (1886), S 129.

——S. 129—Applicability—Ex-proprietary rights—Claim to—Enforcement—Limitation—U. P. Land Revenue Act. *See* U P. LAND REVENUE ACT, S. 36. 1938 A.W.R. (B R.) 104 = 1938 R D 168.

PARTITION—*Abadi held jointly by several mahals—Partition of one of such mahals—Procedure—Abadi, if can be divided among co-sharers of the mahal to be partitioned,*

Where an application is made for the partition of a mahal holding abadi area jointly with other mahals, the abadi area of such mahal should be first separated from the joint abadi area, before commencing partition of the mahal. It is doubtful whether this could be done without a separate application for partition. The partition officer is only concerned with the separation of the joint abadi and is not concerned at that stage with the partition of the separated abadi among the co-sharers of the mahal under partition. (*Darling, S. M and Bomford, J. M.*) BRIJ BASI RAI *v.* JHAGROO RAI.
1938 R.D. 327.

——*Parties to—If can challenge entries.*

J. M.) GAYA SINGH *v.* BHAGWAN DAS SINGH.
1938 R.D. 386.

——*Preliminary decree—Execution Decree providing for payment of maintenance to widow—Execution before final decree—Permissibility.*

Decrees may be party preliminary and partly final. If in a partition suit a preliminary decree is passed providing, for payment of a maintenance allowance to a who is a party to the suit, the decree so far as it to the payment of that allowance is quite final a be executed by the widow, although no final dec yet been passed in the suit (*Zia-ul Hasan Hamilton, JJ.*) SRI KRISHEN *v.* JAMNA NARAIN.
1938 O.W N. 348 = 1938 O.A. 240.

——Procedure—Mahal held jointly with other mahals· *See* CO-SHARERS—PARTITION.
1938 R.D. 243

——*Proceedings for—Lease during pendency of—Validity—Duty of lambardar as to fair rent.*

The mere fact that partition was pending at the time when the lease was granted does not invalidate the lease. As partition may take a long time, no lambardar can be expected to leave vacant lands unlet indefinitely. But in such case it is his duty to be particularly careful to see

PARTNERSHIP ACT (IX OF
Applicability—Arbitration—Award in
tered company—Application to file
See C. P. CODE, SCH. II, PARA. 14 (

PENAL CODE (XLV OF 1860), S. 147—*Conviction under—Sustainability—Charge against seven persons—Acquittal of four—Conviction of other three—Legality.*

In the absence of evidence to show that five or more than five persons took part in the attack, no conviction for rioting can be sustained. Where four out of seven persons charged with the offence of rioting are acquitted, the others also must be acquitted. A conv three remaining cannot be upheld. (*Venkata J.*) GOPALAKRISHNA *v.* EMPEROR.
1938 M.W.N. 224 (1) = 4

PENAL CODE (1860), S. 302.

——S. 225 B—*Applicability — Warrant of arrest issued by Civil Court—Order of arrest passed by Judge—Warrant signed by head clerk under authorisation by Court—Order of delegation passed during the time of predecessor-in office of Judge ordering arrest—Warrant—If legal—Escape by arrested person from custody—Offence.*

The accused was arrested by the process-server of the Court of a District Munsif under a warrant of arrest issued by that Court in execution of a decree. The order for arrest was passed by the Munsif and the warrant was signed by the head clerk in pursuance of a general order passed by the predecessor-in-office of the Munsif who ordered the arrest. The respondent signed the warrant of arrest but did not go with the process-server and then absconded.

Held, that the accused was guilty of an offence under S. 225 B, and the fact that the warrant was signed by the head clerk or that there was no order by the succeeding Munsif authorizing the head clerk to sign arrest warrants did not make the warrant illegal. The order in force
UTOR *v.*
N. 316.
—*Proof*

S. 279,

it is not sufficient to show that the person charged must have instigated the driver to drive fast; it must be shown at least that he instigated him to drive at a pace which was in itself, in all the circumstances, so rashly fast as to endanger human life. Looking at the common sense view, it seems unlikely that a passenger in a car would explicitly tell any person to drive in a

——Ss. 299 and 300—*Offence of murder—Intention to kill—If necessary.*

It is not only an intention to kill that constitutes an offence of murder or of culpable homicide. If a person does an act with the knowledge that his act is likely to cause death or such bodily injury as is likely to cause death, he can be guilty of culpable homicide or even of murder in that case also. (*Zia ul-Hasan, J.*) DILDAR KHAN *v.* EMPEROR. 173 I.C. 339 = 1938 O.A. 154 = 1938 A Cr C. 11 = 1938 O.L.R. 108 = 1931 O W.N. 184 = A.I.R. 1938 Oudh 88.

——S. 300, Exception (1)—*Grave and sudden provocation—Provocation given to accused by a poster of which he had knowledge for two days—If amounts to.*

Where the accused stabbed the deceased owing to

40 P.L.R. 119.

——Ss. 302 and 304—*Accused striking deceased one blow with stick on his head under provocation—Offence committed.*

Where the accused struck only one blow with a stick on the head of the deceased in a sudden passion provoked by the deceased who was drunk and was

or S. 304, Part II, I. P. Code. (*Coldstream and Jai Lal, JJ.*) JOGINDAR *v.* EMPEROR. 40 P.L.R. 169.

——S. 302—*Sentence—Murder committed for attack on leader of religious community.*

It would be dangerous in this country to give cause for belief that death would not as a rule result from murders, even when they are committed for attacks on leaders of religious communities, or under their influence, unless they are committed in circumstances which do amount to grave and sudden provocation. (*Young, C.J. and Abdul Rashid, J.*) AZIZ AHMAD *v.* EMPEROR. 40 P.L.R. 119.

——S. 304, Part II—*Offence under—Accused striking deceased with stick on head to pick up quarrel.*

Where the accused himself went to a certain place and in order to pick up a quarrel struck the deceased on the head with a stick in a free fight, which took place over certain building, resulting in the death of the deceased

Held, that the accused had no right of private defence. The accused however did not intend to commit murder, but was guilty under second part of S. 304, as he knew he was striking on a vital part of the body. (*Almond, J.C. and Mir Ahmad, J.*) IBRAHIM *v.* EMPEROR. A.I.R. 1938 Pesh. 10.

——S. 379—*Offence under—Taking of cattle grazing in jungle.*

Cattle turned out to graze in the pasture or jungle are still in the possession of the owner unless the contrary is shown, and the taking of such cattle is theft and not criminal misappropriation, (1892-96) 1 U.B.R. 238, approved. (*Mosely, J.*) PAW DIN *v.* THE KING. 1938 Rang.L.R. 63.

——S. 380—*Sentence of whipping—Accused aged 19 and of good parentage and education.*

Where the accused who was a young man of 19 years of age, of respectable parentage and good education stole a cycle of one of the pupils from his High School and pawned it for a sum of money, was convicted under S. 380, and was sentenced to 20 lashes,

Held, that the sentence of whipping should be upheld even though the accused was a first offender. (*Roberts, C.J.*) MAUNG SEIN HLAING *v.* THE KING. A.I.R. 1938 Rang. 112.

——S. 397—*Applicability—Conviction under—Conditions—Actual infliction of blows or injuries with dangerous weapons—Necessity.*

It is not necessary to justify a conviction under S. 397, I. P. Code, that the accused should actually inflict blows or injuries with the weapons in their possession. If the accused robbers so exhibit dangerous weapons as to intend that by their exhibition of them, the persons robbed or sought to be robbed are likely to be further intimidated, and that the commission of the robbery might be facilitated, they can be punished under S. 397. (*Horwill, J.*) THEVAR SERVAI *v.* EMPEROR. 173 I.C. 450=1938 M.W.N. 215.

——S. 406—*Applicability—Pawnee—Sub-pledge by—Offence.*

The pawnee or pledgee has the right to make a sub-pledge of the goods pawned to him to the extent of his interest; and a sub-pledge of the pledged goods cannot be regarded as amounting to criminal breach of trust under S. 406, I. P. Code. (*Pandrang Row, J.*) NEMICHAND PARAKH *v.* EMPEROR. 1938 M.W.N. 255=47 L.W. 359.

——S. 32—*Violation of conditions of license—Liability if confined to licensees.*

Every processionist who violates the conditions of the licence is liable to be punished under S. 32 of the Police Act, and the liability is not confined only to the licensees. (*Young, C. J. and Monroe, J.*) BILAS RAM *v.* EMPEROR. 40 P.L.R. 148.

POWER-OF ATTORNEY—What is—Deed by Hindu reversioners in favour of stranger—Authority given to latter to file suit for recovery of estate on behalf of all and provisions made for division of estate after recovery by suit—Effect of. *See* CONTRACT ACT, SS. 201 AND 202. (1938) M.W.N. 259.

PRACTICE—Appeal—Discretion of trial Court—Interference—Grounds. *See* C. P. CODE, O. 9, R. 9. 40 Bom.L.R. 238.

——*Evidence—Witness—Legal Practitioner as witness—Desirability.*

A counsel is not incompetent to give evidence whether the facts to which he testifies occurred before or after his retainer. As a general practice it is undesirable that when a matter to which a counsel deposes is other than formal, he should testify either for or against the party whose case he is conducting. (*Coldstream and Din Mohammad, JJ.*) MOOL RAJ *v.* MANOHAR LAL. A.I.R. 1938 Lah. 204.

——New plea—Suit for arrears of rent by one only of several co-sharers—Plea that suit not maintainable—When to be raised. *See* AGRA TENANCY ACT, S. 256. 1938 A.W.R. (B.R.) 105= 1938 R.D. 169.

——*Pleadings—Duty of Court to look to substance rather than form.*

A plaint may be inartistically drawn and seek to rest a justifiable claim upon an unjustifiable basis. But the Court should hesitate to give more importance to form than to substance. The object of pleading is to give fair notice to each party of what his opponent's case is, and if all the documents are from the beginning before the Court there is no question of the defendants being prejudiced by the form of the plaint. (*Sir George Lowndes.*) KARAM CHAND *v.* MIAN MIR AHMAD AZIZ AHMAD. 1938 A.L.J. 288= 1938 O.W.N 326 (P.C.).

——*Relief—Claim made not proved—Right to relief on basis of claim found.*

Where the plaintiffs, representatives of the Brahmin Vadagalai Sri Vaishnavite community of a certain place, instituted a suit against the trustees of a temple in respect of property found to have been dedicated for the use of the whole Brahmin community as such of the place and not for the use of the plaintiffs alone, alleging that the property belonged to the plaintiffs alone and was dedicated for their exclusive use.

Held, that the Court was not precluded from granting the relief which they were entitled to get as members of the Vadagalai community though their title as claimed in the plaint was denied and negatived. (*Venkataramana Rao, J.*) T. P. RENGA IYENGAR *v.* RAMANUJA JEER SWAMIGAL. A.I.R. 1938 Mad. 270.

PRE-EMPTION—*Right of—Benami sale by vendee to person having superior right—Effect of.*

A right of pre-emption cannot be defeated by a sale by the vendee to a person having a superior right of pre-emption, when such sale is found to be a benami one. (*Dalip Singh and Bhide, JJ.*) MAHABIR SINGH *v.* BUDH SINGH. 40 P.L.R. 133.

PRIVY COUNCIL—*Finding of fact—Finding on question of malice.*

A finding on a question of malice is a finding in fact. The state of a man's mind is as much a fact as the state of his digestion. (*Lord Alness.*) SABAPATHI *v.* HUNTLEY. 173 I.C. 19=1938 A.L.J. 179= 10 R.P.C. 180=1938 A.W.R. (P.C.) 79= 47 L.W. 409=A.I.R. 1938 P.C. 91 (P.C.)

PROMISSORY NOTE—*Consideration—Proof—Part only proved as being towards a barred debt—No stipulation as to fresh advance proved—Effect.*

A promissory-note having been given, consideration is to be presumed. The question then is not, whether the plaintiff has formally and sufficiently proved that there was a stipulation for a fresh advance, but whether it is sufficiently shown by the other side th
consideration for the promissory-note
Rankin.) RAJA OF RAMNAD *v.*
CHETTIAR. 1938 A.L.J. 292 (P.C.)

PROVINCIAL INSOLVENCY ACT (V OF 1920). —"*Debtor*" *and* "*insolvent*"—*Meaning—If synonymous.*

The tax use of the word "debtor" throughout the Provincial Insolvency has given rises to difficulties. In many sections it is used as meaning the debtor, while in others it is used as meaning the debtor Strictly speaking, a debtor and an insolvent are different persons. An insolvent under the Act means a person against whom an order of adjudication has been made; a debtor is a person who has made himself amenable to adjudication but who has not yet been adjudicated. (*Burn and Mockett, JJ.*) MALLIKARJUNA RAO *v.* OFFICIAL RECEIVER, KISTNA (1938) M.W.N. 201 = (1938) 1 M.L.J. 471.

——S. 16—*Locus standi to apply—Creditor whose debt is sub*
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creditor.
v. ABDUL

——S. 16—*Order for substitution—When may be made.*

does apply in such a case and an order for substitution should be made. (*Yorke, J.*) SAGARMAL HANOMAN PRASAD *v.* ABDUL RAHMAN. 173 I.C. 631 =

by the

v. SUBRAMANIAN CHETTIAR.
A.I.R. 1938 Mad. 267.

——S. 25 (1)—*Burden of proof—Duty of creditor—Debtor's ability or inability to pay debts—Onus.*

A petitioning creditor need not, under S 25 (1) of the Provincial Insolvency Act, do anything more than prove his right to present the petition and the alleged act of insolvency; on that the adjudication has to follow unless the Court is satisfied by the debtor that he is able to prove his debts. It is not for the creditor-petitioner to prove the debtor's inability to prove his debts. (*Burn and Venkataramana Rao, JJ.*) CHIN-

PROV. INSOL. ACT (1920), S. 31.

NAPPA REDDY *v.* VENKOBAYYA.
(1938) M.W.N. 283.

——S. 26—*Applicability—Conditions—Frivolous or vexatious nature of petition—If to be decided at time of dismissal.*

26 of the
dismissal
sfied that
Court can
consider the matter on a separate application even though it did not do so at the time of the dismissal of the petition under S 25 (1). (*Beasley, C.J.*) RAMASWAMI IYER *v.* SUBRAMANIAN CHETTIAR.
A.I.R. 1938 Mad. 267.

——S. 26—'*Debtor*'—*Meaning of.*

The word "debtor" in S. 26 of the Act means any one against whom an insolvency application has been presented by a creditor. The person applying for compensation under that section need not in truth be a debtor at all. (*Beasley, C.J.*) RAMASWAMI IYER *v.* SUBRAMANIAN CHETTIAR. A.I.R. 1938 Mad. 267.

——S. 26—*Right to compensation—Petition when frivolous or vexatious.*

A creditor in whose favour a Hindu father had executed a promissory note found to be binding on the family

properties and that they had no ready money to pay the debt.

Held that under the circumstances the creditor had
ibly suppose that fraud was
also and therefore it could
of the creditor against the
ious and that therefore no
te. (*Beasley, C.J.*) RAMA-
IAN CHETTIAR.
A.I.R. 1938 Mad. 267.

——S. 28 (2)—*Insolvency of Hindu father—Sale of family property by Receiver—Son's share—If passes.*

difference between the mere existence of the power and the exercise of it. The mere existence of the power is
ny particular case the
Where the sale deed
of an insolvent father's
urchaser showed that
id purchased was the
entire property for a consideration which represented the value of the whole property and not merely the insolvent's own half share after excluding the son's half share, and the Official Receiver had the power on that day to sell the son's share also.

Held, that it must be deemed that the power to sell the son's share was exercised by the Official Receiver and that the sale was of the entire property. (*Pandrang Rao and Horwill, JJ.*) RAMA RAO *v.* POTTISWAMI.
A.I.R. 1938 Mad. 299.

——S. 31—Construction —'Arrest or detention'—Means—If includes order for imprisonment by criminal

or S. 304, Part II, I. P. Code. (*Coldstream and Jai Lal, JJ.*) JOGINDAR *v.* EMPEROR. **40 P.L.R. 159.**

——S. 302 — *Sentence — Murder committed for attack on leader of religious community.*

It would be dangerous in this country to give cause for belief that death would not as a rule result from murders, even when they are committed for attacks on leaders of religious communities, or under their influence, unless they are committed in circumstances which do amount to grave and sudden provocation. (*Young, C.J. and Abdul Rashid, J.*) AZIZ AHMAD *v.* EMPEROR. **40 P.L.R. 119.**

——**S. 304, Part II**—*Offence under—Accused striking deceased with stick on head to pick up quarrel.*

Where the accused himself went to a certain place and in order to pick up a quarrel struck the deceased on the head with a stick in a free fight, which took place over certain building, resulting in the death of the deceased

Held, that the accused had no right of private defence. The accused however did not intend to commit murder, but was guilty under second part of S. 304, as he knew he was striking on a vital part of the body. (*Almond, J.C. and Mir Ahmad, J.*) IBRAHIM *v.* EMPEROR. **A.I.R. 1938 Pesh. 10.**

——**S. 379**—*Offence under—Taking of cattle grazing in jungle.*

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——**S. 380**—*Sentence of whipping—Accused aged 19 and of good parentage and education.*

Where the accused who was a young man of 19 years of age, of respectable parentage and good education stole a cycle of one of the pupils from his High School and pawned it for a sum of money, was convicted under S. 380, and was sentenced to 20 lashes,

Held, that the sentence of whipping should be upheld even though the accused was a first offender. (*Roberts, C.J.*) MAUNG SEIN HLAING *v.* THE KING. **A.I.R. 1938 Rang. 112.**

——**S. 397** — *Applicability — Conviction under — Conditions—Actual infliction of blows or injuries with dangerous weapons—Necessity.*

It is not necessary to justify a conviction under S. 397, I. P. Code, that the accused should actually inflict blows or injuries with the weapons in their possession. If the accused robbers so exhibit dangerous weapons as to intend that by their exhibition of them, the persons robbed or sought to be robbed are likely to be further intimidated, and that the commission of the robbery might be facilitated, they can be punished under S. 397. (*Horwill, J.*) THEVAR SERVAI *v.* EMPEROR. **173 I.C. 450 = 1938 M.W.N. 215.**

——**S. 406**—*Applicability—Pawnee—Sub-pledge by—Offence.*

The pawnee or pledgee has the right to make a sub-pledge of the goods pawned to him to the extent of his interest; and a sub-pledge of the pledged goods cannot be regarded as amounting to criminal breach of trust under S. 406, I. P. Code. (*Pandrang Row, J.*) NEMICHAND PARAKH *v.* EMPEROR. **1938 M.W.N. 255 = 47 L.W. 359.**

——**S. 32**—*Violation of conditions of license—Liability if confined to licensees.*

Every processionist who violates the conditions of the licence is liable to be punished under S. 32 of the Police Act, and the liability is not confined only to the licen-

sees. (*Young, C. J. and Monroe, J.*) BILAS RAM *v.* EMPEROR. **40 P.L.R. 148.**

POWER-OF ATTORNEY—What is—Deed by Hindu reversioners in favour of stranger—Authority given to latter to file suit for recovery of estate on behalf of all and provisions made for division of estate after recovery by suit—Effect of. *See* CONTRACT ACT, SS. 201 AND 202. **(1938) M.W.N. 259.**

PRACTICE—Appeal—Discretion of trial Court—Interference—Grounds. *See* C. P. CODE, O. 9, R. 9. **40 Bom.L.R. 238.**

——*Evidence—Witness—Legal Practitioner as witness—Desirability.*

A counsel is not incompetent to give evidence whether the facts to which he testifies occurred before or after his retainer. As a general practice it is undesirable that when a matter to which a counsel deposes is other than formal, he should testify either for or against the party whose case he is conducting. (*Coldstream and Din Mohammad, JJ.*) MOOL RAJ *v.* MANOHAR LAL. **A.I.R. 1938 Lah. 204.**

——New plea—Suit for arrears of rent by one only of several co-sharers—Plea that suit not maintainable—When to be raised. *See* AGRA TENANCY ACT, S. 256. **1938 A.W.R. (B.R.) 105 = 1938 R.D. 169.**

——*Pleadings—Duty of Court to look to substance rather than form.*

A plaint may be inartistically drawn and seek to rest a justifiable claim upon an unjustifiable basis. But the Court should hesitate to give more importance to form than to substance. The object of pleading is to give fair notice to each party of what his opponent's case is, and if all the documents are from the beginning before the Court there is no question of the defendants being prejudiced by the form of the plaint. (*Sir George Lowndes.*) KARAM CHAND *v.* MIAN MIR AHMAD AZIZ AHMAD. **1938 A.L.J. 288 = 1938 O.W.N 326 (P.C.).**

——*Relief—Claim made not proved—Right to relief on basis of claim found.*

Where the plaintiffs, representatives of the Brahmin Vadagalai Sri Vaishnavite community of a certain place, instituted a suit against the trustees of a temple in respect of property found to have been dedicated for the use of the whole Brahmin community as such of the place and not for the use of the plaintiffs alone, alleging that the property belonged to the plaintiffs alone and was dedicated for their exclusive use.

Held, that the Court was not precluded from granting the relief which they were entitled to get as members of the Vadagalai community though their title as claimed in the plaint was denied and negatived. (*Venkataramana Rao, J.*) T. P. RENGA IYENGAR *v.* RAMANUJA JEER SWAMIGAL. **A.I.R. 1938 Mad. 270.**

PRE-EMPTION—*Right of—Benami sale by vendee to person having superior right—Effect of.*

A right of pre-emption cannot be defeated by a sale by the vendee to a person having a superior right of pre-emption, when such sale is found to be a benami one. (*Dalip Singh and Bhide, JJ.*) MAHABIR SINGH *v.* BUDH SINGH. **40 P.L.R. 133.**

PRIVY COUNCIL—*Finding of fact—Finding on question of malice.*

A finding on a question of malice is a finding in fact. The state of a man's mind is as much a fact as the state of his digestion. (*Lord Alness.*) SABAPATHI *v.* HUNTLEY. **173 I.C. 19 = 1938 A.L.J. 179 = 10 R.P.C. 180 = 1938 A.W.R. (P.C.) 79 = 47 L.W. 409 = A.I.R. 1938 P.C. 91 (P.C)**

PROMISSORY NOTE—*Consideration—Proof—Part only proved as being towards a barred debt—No stipulation as to fresh advance proved—Effect.*

A promissory-note having been given, consideration is to be presumed. The question then is not, whether the plaintiff has formally and sufficiently proved that there was a stipulation for a fresh advance, but whether it is sufficiently shown by the other side th
consideration for the promissory-note
Rankin) RAJA OF RAMNAD *v.*
CHETTIAR. 1938 A.L.J. [illegible] (P.C.)

PROVINCIAL INSOLVENCY ACT (V OF 1920), —*"Debtor" and "insolvent"—Meaning—If synonymous.*

The tax use of the word "debtor" throughout the Provincial Insolvency has given rises to difficulties. In many sections it is used as meaning the debtor, while in others it is used as meaning the debtor. Strictly speaking, [illegible]
sons. Ar
against wl
a debtor
adjudication but who has not yet been adjudicated. (*Burn and Mockett, JJ.*) MALLIKARJUNA RAO *v.* OFFICIAL RECEIVER, KISTNA (1938) M.W.N. 201= (1938) 1 M.L.J. 471.

——S. 16—Locus standi *to apply—Creditor whose debt is subsequent to acts of insolvency alleged by petitioning creditor.*

A creditor whose debt came into existence prior to the petition for adjudication but subsequent to the acts of insolvency alleged by the petitioning creditor, can put in an application under S. 16 of the Provincial Insolvency Act for substitution of his name as petitioning creditor. (*Yorke, J.*) SAGARMAL HANOMAN PRASAD *v.* ABDUL RAHMAN. 173 I.C. 631=1938 O.A. 201= 1938 O.L.R. 125=1938 O.W.N. 230.

——S. 16—*Order for substitution—When may be made.*

[illegible]
still proceeding with due diligence. On the contrary there is a failure to proceed with due diligence in the highest degree. S. 16 of the Provincial Insolvency Act does apply in such a case and an order for substitution should be made. (*Yorke, J.*) SAGARMAL HANOMAN PRASAD *v.* ABDUL RAHMAN. 173 I.C. 631= 1938 O.A. 201=[illegible]

——S. 25 (1)—*Applicability "a* [illegible] *cause"—Dismissal of petition on statement by creditor that debt had been paid—If falls under.*

Where an insolvency petition is dismissed by the Court upon the statement by the creditor that his debt [illegible]

v. SUBRAMANIAN CHETTIAR. A.I.R. 1938 Mad. 267.

——S. 25 (1)—*Burden of proof—Duty of creditor—Debtor's ability or inability to pay debts—Onus.*

[illegible]
petitioner to prove the debtor's inability to prove his debts. (*Burn and Venkataramana Rao, JJ.*) CHIN-

PROV. INSOL. ACT (1920), S. 31.

NAPPA REDDY *v.* VENKOBAYYA. (1938) M.W.N. 283.

——S. 26—*Applicability—Conditions—Frivolous or vexatious nature of petition—If to be decided at time of dismissal.*

[illegible] 26 of the
dismissal
isfied that
Court can consider the matter on a separate application even though it did not do so at the time of the dismissal of the petition under S 25 (1). (*Beasley, C.J.*) RAMASWAMI IYER *v.* SUBRAMANIAN CHETTIAR. A.I.R. 1938 Mad. 267.

——S. 26—*'Debtor'—Meaning of.*

The word "debtor" in S. 26 of the Act means any one against whom an insolvency application has been [illegible]
person applying for com-
[illegible] need not in truth be a
RAMASWAMI IYER *v.*
A.I.R. 1938 Mad. 267.

——S. 26—*Right to compensation—Petition when frivolous or vexatious.*

A creditor in whose favour a Hindu father had executed a promissory note found to be binding on the family presented a petition in insolvency against the father and his two sons to have them declared insolvents. About 4 months later, on the creditor's statement that his claim was satisfied, the insolvency petition was dismissed under S. 25 (1). The sons claimed compensation under S. 26 of the Act. It was found on evidence that the debt was one binding on the family for which the son's share could be made liable and that within ten days immediately after a notice demanding payment of the debt was made by the creditor, the sons together with their father had set about alienating a large portion of the family properties and that they had no ready money to pay the debt.

[illegible] the creditor had
that fraud was
therefore it could
litor against the
sons was frivolous or vexatious and that therefore no compensation was recoverable. (*Beasley, C.J.*) RAMASWAMI IYER *v.* SUBRAMANIAN CHETTIAR. A.I.R. 1938 Mad 267.

——S. 28 (2)—*Insolvency of Hindu father—Sale of family property by Receiver—Son's share—If passes.*

[illegible]
time when the estate vested in him. But there is a difference between the mere existence of the power and the exercise of it. The mere existence of the power is not sufficient to show that in any particular case the [illegible]

entire property for a consideration which represented the value of the whole property and not merely the insolvent's own half share after excluding the son's half share, and the Official Receiver had the power on that [illegible]
power to sell
cial Receiver
(*Pandrang*
TTISWAMI.
A.I.R. 1938 Mad. 299.

——S. 31—Construction —'Arrest, or, detention'—Means—If includes order for imprisonment by criminal.

PROV. INSOL. ACT (1920), S. 43.

Courts. *See* CR. P. CODE, S. 488 (3).

1938 A.L.J. 225.

——Ss. 43 and 37—*Order of annulment—Vesting of property in Court Amin—Effect.*

An order of annulment is not same thing as an order of discharge and where in addition to that, the property was by order made to vest in the Court Amin, there is hardly any justification for the contention that annulment restores the *status quo.* (*Darling, S.M.* and *Bomford, J.M.*) KRISHNA PRASAD *v.* LAL BAHADUR.

1938 A.L.J. (Supp.) 17.

——S. 44 (2)—*Creditor realising his security before order of discharge but not proving balance personally due after valuing security—Order of discharge—Effect of.*

Where a creditor holding a mortgage decree against the insolvent, realises his security before the order of discharge is passed, but does not value his security and prove the balance personally due from the insolvent, the order of discharge releases the insolvent from personal liability under the mortgage as it is a debt provable under the Act and the creditor cannot subsequently claim a personal decree for the balance against the insolvent. (*Addison and Din Mohammad, JJ.*) HAVELI SHAH *v.* MT. HUSSAINA JAN. A.I.R. 1938 Lah. 217.

——S. 50—*Applicability—Annulment of adjudication—Subsequent application to expunge or reduce debt of creditor—Competency—Power of Court to act under S. 50.*

S. 50 of the Provincial Insolvency Act governs the procedure of the Court during the insolvency, *i.e.*, during the course of the administration of the debtor's assets in an insolvency. But, S. 50 can no longer apply after the insolvency has come to an end by annulment of adjudication. After the adjudication has been annulled it is not open to the Court to take action under S. 50 and to expunge or reduce the debt of a creditor. (*Wort and Manohar Lal, JJ.*) KHEMKARANDAS JOKHIRAM *v.* CHOUTHMAL BHAGIRATH.

16 Pat. 754=1938 P.W.N. 222.

——S. 51 (3)—*Construction and scope—"In all cases"—Judgment-debtor, adjudication insolvent—Subsequent sale of his property in execution—Validity—Jurisdiction of executing Court.*

There is no doubt about the all-embracing character of the words in S. 51 (3) of the Provincial Insolvency Act; the sub-section expressly says that a *bona fide* purchaser in execution shall in all cases acquire a good title against the receiver. But S. 51, having regard to the heading under which it comes, can only govern transactions prior to the insolvency, *i.e.*, prior to adjudication. The words "in all cases" in S. 51 (3) can only mean in all cases prior to adjudication; no part of the section can have any bearing upon transactions subsequent to adjudication. Upon adjudication, the property of an insolvent vests immediately in the Official Receiver, and in so far as an insolvent judgment-debtor is concerned, there is no property of his which can be sold in execution by the executing Court. A Court executing a decree has therefore no power to sell a judgment-debtor's property after the judgment-debtor has been adjudicated insolvent and a sale so held in execution is invalid, irregular and inoperative. The fact that the Official Receiver is given a notice in the execution proceedings would not make the sale good or binding on the receiver. (*Burn and Mockett, JJ.*) MALLIKARJUNA RAO *v.* OFFICIAL RECEIVER, KISTNA. (1938) M.W.N. 201=(1938) 1 M.L.J. 471.

——S. 51 (3)—*"Property of a debtor"—Meaning—It includes property of debtor already adjudicated insolvent.*

PROV. INSOL. ACT (1920), S. 54.

The words "the property of a debtor in S. 51 (3) of the Provincial Insolvency Act, read with the heading of the section, must mean only the property of a person which has been sold previous to adjudication, the "transaction" being the sale. All sales both before and after the presentation of a petition but before adjudication by the Court are protected so far as passing a good title to a purchaser is concerned. (*Burn and Mockett, JJ.*) MALLIKARJUNA RAO *v.* OFFICIAL RECEIVER, KISTNA. (1938) M.W.N. 201=(1938) 1 M.L.J. 471.

——Ss. 53 and 54—*"Date of transfer"—Date of execution or date of registration.*

In the case of a mortgage executed by a debtor requiring registration, the date of transfer for purposes of Ss. 53 and 54 is the date of its registration, because without registration the transfer is inoperative. But in the case of document whose registration is refused in the first instance but ordered on appeal, the date of registration is not the date of the appellate order directing registration, but the date on which it was first presented for registration, in view of S. 75 (3) of the Registration Act. (*Madhavan Nair and Stodart, JJ.*) SOMAPPA *v.* OFFICIAL RECEIVER OF BELLARY.

(1938) M.W.N. 291.

——S. 53—*Burden of proof—Good faith—Proof of—Absence of good faith on part of transferee—Onus.*

So far as S. 53 is concerned, it is the absence of good faith on the part of the transferee that has to be proved and not the absence of good faith on the part of the transferor, the insolvent. The fact that there are certain circumstances appearing in the evidence on the side of the alienees which in the absence of an explanation would offer ground for suspicion is not sufficient for coming to the conclusion that the alienations fall under S. 53. The burden of proving want of good faith on the part of alienees is not discharged by mere vague allegations of fraud but only by establishing circumstances from which it can be reasonably inferred that the alienees acted in bad faith and that there was no valuable consideration for the alienations. (*Pandrang Row, J.*) KULLAPPA REDDIAR *v.* VEERAPPA CHETTIAR.

A.I.R. 1938 Mad. 285.

——S. 53—*Procedure—Several applications under—Joint trial with consent of parties—Duty of Court to deal separately with each alienation.*

Where four separate applications under S. 53 are tried together with the consent of parties, it does not follow either that evidence otherwise irrelevant becomes relevant because the applications were heard together, or that because some alienations are found to be fraudulent as being not in good faith the other alienations must necessarily on that account partake of the same character. Therefore in spite of the joint trial of all the applications, the case as regards each alienation must be dealt with separately and the evidence relating to each considered separately. (*Pandrang Row, J.*) KULLAPPA REDDIAR *v.* VEERAPPA CHETTIAR.

A.I.R. 1938 Mad. 285.

——S. 54—*Applicability—Fraudulent preference—Transfer by insolvent in favour of friend after suit by some creditors and attachment—Insolvent having no hope of paying all creditors—Inference—Transfer—If void.*

Where the motive behind the transfer by an insolvent in favour of a friend of his is to give him a preference over the other creditors, it is void under S. 54 of the Provincial Insolvency Act and must be annulled. Where the transfer is effected after a creditor has filed suits and attached some of the properties of the insolvents, and when there are many other creditors whom the insolvent has no hope of paying, it is only reasonable to

PROV. INSOL ACT (1920), S. 66.

infer that the insolvent has the idea of preferring one creditor to the others as his motive. (*Madhavan Nair and Stodart, JJ.*) SOMAPPA v. OFFICIAL RECEIVER OF BELLARY. 1938 M.W.N. 291.

——— ... ... *—Power of*

... nplates ... enance of the insolvent or his family. ... wer the Court to reserve a portion of the immovable property of the insolvent for his maintenance. (*Tek Chand, J.*) LADHA MAL v. TAJA. 40 P L R. 151.

———S. 75 (3)—*Admission of appeal—If tantamounts to grant of leave.*

The absence of an application for leave under S. 75 ...

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), Sch. II, Art. 31—*Suit for mesne profits—Jurisdiction of Small Cause Court.*

A suit for recover ... a sum ascertained ... and is excepted ... S ... S ...

... Cause Courts Act. (*Addison ...* *JJ.*) SIMAR NATH v. OFFICIAL RECEIVER. 40 P.L R. 196 = A.I.R. 1938 Lah. 219.

PUBLIC GAMBLING ACT (III OF 1867), S. 5—*Search warrant—Issue of—Conditions—Inquiry— ... Credible information—Sufficiency.*

... have ... (*Allsop, J.*) RADHEY ...

A warrant for the search of a ... merely because its boundaries are not specified and particularly so where it is described by the name of the owner or occupier and where there is no likelihood of anybody being in doubt as to the identity of the house to be searched. (*Allsop, J.*) RADHEY LAL v. EMPEROR. 1938 A.W.R (H.C.) 147 = 1938 A.L.J. 222.

———S. 6—*Gaming house—Presumption arises—Nature and extent of.*

There is a presumption under S. 6 of the ... Act that a house is a public gaming house if instruments of gaming are found therein in pursuance of a search made in accordance with a warrant under S. 5 of the Act. Where the warrant is quite legal and instruments of gaming in the form of *Satta* slips are found in a house, it has to be presumed that the house is a gaming house, which includes the presumption that it was used for the profit of the owner or occupier. (*Allsop, J.*) RADHEY LAL v EMPEROR. 1938 A W.R. (H.C.) 147 = 1938 A.L J. 222.

———S. 8—*Confiscation of money—Legality.*

S. 8 of the Gambling Act lays down clearly that all money found in a gaming house may be confiscated and hence in such a case there can be no question whether that money is an instrument of gaming or not. (*Allsop, J.*) RAD... ... EMPEROR ...

PUNJAB ...

Finding of ... *record—Interference.*

Where there is no error or defect in the procedure, the ... first appellate Court upon a question of ... evidence proper ... he finding. Such ... n second appeal. ...) MT. GUGNI v. ... 1938 Lah. 191.

———... *n—What amounts to.*

Where the defendants attempted to prove by the evidence led on the particular issue covering the question of ... that there was a sufficient compliance with the ... iswer to a question of the custo- ... the District Judge in their favour ... e custom as proved by them to ... finding could not be im- ... ecessary certifi- ... *nd Din Moham-* ... M. ... 1938 Lah. 191.

... III, Ss. 10-15 ... *to limit.*

... r have no doubt ... to be supplied ... uate justification for the exercise of such exceptional powers. (*Garbett, F. C.*) SUCHET SINGH v. EMPEROR. 17 Lah L T. 2.

PUNJAB LAND REVENUE ACT (XVII OF 1887), S. 117 (1)—*Suit for declaration that land belonged to plaintiff and his co-sharers jointly—No ... partition to revenue authorities—Suit, if ...*

... a suit in which he alleged that the entire estate ... by his ancestor was joint, that no private ... pleas that he was entitled to a decla- ... belonged to ... as entitled to ... ed by the co- ... to sue for the ... he never applied for partition to the revenue authorities, that he was not directed to bring a civil suit, that he was estopped from instituting the suit since he had previously admitted that the land had already been partitioned,

Held, that suit being for a declaration of title was maintainable under S. 117 (1), Land Revenue Act. (*Tek Chand and Abdul Rashid, JJ.*) JAMALA v. ... A I R 1938 Lah. 202.

... OF INDEBTEDNESS ACT ... *—Insolvency Court—If a Civil Court.*

An Insolvency Court is a Civil Court for the purposes of S. 25. Hence on an application made by the debtor to a Debt Conciliation Board, an Insolvency Court is bound to stay proceedings of an insolvency application in respect of the same debt for the settlement of which

PUNJAB RELIEF OF INDEBTEDNESS ACT (1934), S. 34.

an application has been made to the Board. (*Addison and Din Mohammad, JJ.*) BAKHT SINGH *v.* MUNICIPAL COMMITTEE, SARGODHA.

A.I.R. 1938 Lah. 195.

——**S. 34**—*Contumacy of judgment-debtor—Burden of proof.*

Under S. 34, a duty is in the first instance cast upon the decree-holder to bring circumstances on the record from which the Court may be in a position to draw its own inference as to the conditions laid down in the substantive part of the section. This burden may possibly be discharged otherwise as for example by the admission of the judgment-debtor that he owns some money or by other unimpeachable evidence that he owns it, but this will not be conclusive. It will merely shift the onus on to the judgment-debtor to prove his immunity from arrest. Once it is proved that the judgment-debtor had property available for discharging his debts after being called upon to pay them the onus falls back upon him to prove some just cause for not having discharged them, more especially when a Court has granted him time on a promise to use that property for paying his decree-holder, and if he offers no kind of explanation the Court can legally conclude that he has without just cause contumaciously refused to pay the amount of the decree in whole or in part. The mere fact that a judgment-debtor admits that he has certain crops to be harvested and that he will pay the decretal amount out of the money realized from such crop but fails to pay the amount is not enough to prove his capacity to pay, absence of just cause and contumacy. If therefore the Court issues a warrant of arrest without going into the question of contumacy or just cause and without allowing opportunity to the judgment-debtor to give his reasons for not paying amount, the warrant of arrest so issued is illegal. (*Coldstream and Din Mohammad, JJ.*) GHULAM MOHAMMAD KHAN *v.* AMIR MOHAMMAD. **A.I.R. 1938 Lah. 211.**

REGISTRATION ACT (XVI OF 1908), Ss. 17 and 49—"Affecting immovable property"—Deposit of title deeds as security for debt—Collateral security letter in respect of—Admissibility without registration. *See* T.P. ACT, Ss. 58 (*f*) AND 59. **1938 M.W.N. 235.**

——**S. 17 (1) (b)**—*Mortgage by deposit of title deeds—Registration, when necessary.*

Ordinarily a mortgage by deposit of title deeds would be an oral transaction. But, as a matter of practice, it is not unusual for the deposit to be accompanied by a memorandum in writing. If there is such a writing, the question is whether it creates the mortgage or whether the mortgage is complete without the writing, the writing being merely the statement of facts which would evidence the mortgage. If the writtng creates the mortgage, it must be registered. Where the writing embodies the terms of the loan and it is contemporaneous with the transaction and it accompanies the delivery of title deeds and also contains a calculation of the amount of interest, it creates the mortgage and should, therefore, be registered. (*S. K. Ghose and Patterson, J.*) FATIMA BAI *v.* OFFICIAL TRUSTEE OF BENGAL.

I.L.R. (1938) 1 Cal. 187.

——**S. 17 (1) (b) and (2) (v)**—*Partition memoranda evidence agreement to divide—Non-registration—Effect—Admissibility in evidence.*

Partition memoranda which do not constitute the record of a past division, and which contain the terms of an agreement to sever and to divide, without any subsequent formal document being executed, cannot be regarded as recitals of a partition so as to be exempt from registration under S. 17 of the Registration Act. They are compulsorily registrable, and non-registration destroys their utility as proof of the fact of partition. (*Wassoodew and Thakor, JJ.*) RUDRAGOUDA *v.* BASANGOUDA. **40 Bom.L.R. 202.**

——**S. 49**—*Collateral purpose—Partition memoranda not registered—Admissibility to prove fact of partition or severance in status.*

Obiter: Wassoodew, J.—Documents which are compulsorily registrable but which are unregistered can be admitted for a collateral propose. In the case of partition memorandum relating to a joint Hindu family a reference to arbitration for the purpose of division of the family property may be regarded as constituting proof collateral of the fact that the parties intended to sever. The declaration of will to divide can be made even by a unilateral act, and if such declaration was manifested by a joint reference to arbitration by all the adult coparceners calling upon the arbitration to effect a division of the family property and apportion it to the respective sharers, the partition memoranda can be made use of in proof of the change of status or the declaration of will to separate.

Thakoor, J.—Partition memoranda cannot be admitted in evidence to prove the fact of partition. That purpose is not a collateral purpose, nor is the purpose of showing that by these memoranda a severance in interest was created a collateral purpose. Severance in interest, which is only another expression for partition under the Hindu Law, being itself the object of the documents cannot be regarded as a purpose collateral to the main purpose and object of the documents in any sense. (*Wassoodew and Thakor, JJ.*) RUDRAGOUDA *v.* BASANGOUDA.

40 Bom.L.R. 202.

——**S. 49, Proviso**—*Scope—Unregistered mortgage deed—If can support suit for specific performance—If can be regarded as agreement to mortgage.*

An unregistered deed of mortgage is not itself sufficient to support a suit for specific performance of an agreement to transfer. The document being a document of transfer and intended to be such must be registered in order to give it validity as a mortgage. It is not open to a party to ignore the provisions of the law of registration and to treat it as a contract to transfer—which it is not—and to compel the transfer to execute a formal transfer. The unregistered mortgage cannot itself be regarded as the contract for purposes of the new proviso added to S. 49 of the Registration Act, when there is no proof of any separate agreement to mortgage prior to the execution of the mortgage deed. (*Madhavan Nair and Stodart, JJ.*) SOMAPPA *v.* OFFICIAL RECEIVER OF BELLARY.

1938 M.W.N. 291.

REVENUE RECORDS—*Settlement records — Sir entry in—If can be challenged—Defence.*

An entry of *Sir* at a settlement can be challenged and it cannot be defended merely on the ground that it was made in accordance with an interpretation of the law which was later definitely held to be wrong. (*Darling, S.M. and Bomford, J.M.*) RAM ADHAR *v.* SIDDIQ HUSAIN. **1938 R.D. 351.**

SALE OF GOODS—*Right of re-sale on breach of contract—Scope of—Delay in exercise of—Purchaser's action responsible for delay—Effect on damages.*

Where the contract was for the purchase of goods to be taken delivery of in instalments, on the breach by the purchasers of such a contract, the sellers get a right to cancel the sale and to re-sell the goods and recover damages. It is the duty of the sellers to sell the goods relating to each instalment within a reasonable time after the breach to take delivery on the respective dates. But where the delay in the exercise of this right is due entirely to the conduct and action of the purchasers, the

sellers are entitled to claim damages with reference to the rates at which they actually sold the goods. (*Rachhpal Singh and Ismail, JJ.*) SHEO NARAIN GOPI RAM *v.* THE NEW SAVAN SUGAR AND GUR REFINING CO.

1938 A L.J. 227 = 1938 A.W.R. (H.C.) 149.

SALE OF GOODS ACT (III OF 1930), Ss. 20 and 22—*Applicability—Sale of goods by lot to be delivered at place of buyer—Goods to be transhipped by rail and delivered to buyer by weighment—Property in goods—When passes.*

The mere fact that goods are brought by lot after inspection will not make S. 20 of the Sale of Goods Act applicable so as to pass property in the goods to the buyer the very moment the sale is effected. Where the seller has to deliver the goods to the buyer at a place [illegible]

173 I.C. 535 = A.I.R. 1938 Sind 18.

——S. 25 (2)—*Applicability—Goods consigned by seller to buyer by rail—Railway receipt in seller's name sent to banker with instructions not to part with same until payment by buyer—Effect—Goods to be weighed by buyer at destination to ascertain price—Acceptance of hundi by buyer—If passes property in goods to seller.*

Where the seller sends the goods to the buyer by rail [illegible] agent not to part with the railway until payment by the buyer, S. 25 (2) of the Sale of Goods Act applies and there is a *prima facie* presumption that the seller intends to reserve to himself the right of disposal of the goods and that the property in the goods does not [illegible]

1938 A.W.R. (H.C.) 149.

——S. 62—*Scope of—Absence of appropriation—Agreement as to re sale on breach and as to recovery of godown rent—Validity of.*

The Sale of Goods Act does not prevent parties from making any contract they please. There is nothing to prevent the parties from agree[illegible] that in spite of the fact that the [illegible] not passed as there has been no [illegible] of them of the goods towards th[illegible] have the right to re-sell against [illegible] and also to recover godown rent [illegible] S. 62 of the Act expressly recogr[illegible] [illegible]pal Singh and Ismail, JJ.) SHEO NARAIN GOPI RAM *v.* NEW SAVAN SUGAR AND GUR REFINING CO.,

LTD. 1938 A.W.R. (H.C.) 149 = 1938 A.L.J. 227.

SETTLEMENT RECORDS. *See* REVENUE RECORDS.

SONTHAL PARGANAS SETTLEMENT REGULATION (BENGAL ACT III OF 1872), S. 5—*Scope—"Suit"—If includes execution proceedings.*

The term "suit" in S. 5 does not include a proceeding in execution and such a proceeding could be commenced in a Civil Court even when the settlement proceedings might have been going on. (*Fazl Ali and Rowland, JJ.*) BRAJOBALA DEBI *v.* THAKUR MADHUSUDAN SINGH.

A I R. 1938 Pat. 162.

SPECIFIC RELIEF ACT (I OF 1877), S. 18—*Applicability—Court-sale.*

The equitable principle governing S. 18 of the Specific Relief Act does not apply to a Court sale. (*Dalip* [illegible]) NANAK CHAND *v.* GANDU RAM.

40 P.L R. 202.

[illegible] 42—*Declaratory suit — Maintainability—*[illegible]*-sharer with defendant—Mutation obtained* [illegible]

[illegible] he plaintiff is a co-sharer and her possession [illegible] and where prior to the declaratory suit, she [illegible] ame over zamindari as [illegible] ere such possession as [illegible] obtained was obtained [illegible] it offend any provision of law contained in S. 42 of the Specific Relief Act. (*Collister and Bajpai, JJ.*) KOMAL *v.* GUR CHARAN PRASAD. 1938 A.W R. (H.C.) 168 = 1938 A L.J. 235.

——S. 42—*Relief under—Discretion—Imposition of conditions—Principles.*

Though a Court in its discretion can refuse to give a [illegible] decree and can also impose certain condi[illegible] discretion should be guided by judicial [illegible] well-recognized equitable considerations. (*Collister and Bajpai, JJ.*) KOMAL *v.* GUR CHARAN PRASAD. 1938 A.W R. (H C.) 168 = 1938 A.L J. 235.

——S. 42—*Scope—Suit for bare declaration of right to possession of jewels—Maintainability with prayer for* [illegible]*-Permissibility in* [illegible]

[illegible] n jewels which he [illegible] mitted breach of [illegible] defendant Bank, [illegible] as ordered to be [illegible] em. In revision, [illegible] jewels to be re[illegible] the jewels with [illegible] ate and at once [illegible] claration that he [illegible] s. He also at the [illegible] retain the jewels [illegible] and they were so sent.

Held, that the suit for bare declaration was not maintainable and that he was bound to ask also for possession, he having been not in possession of the jewels at the time he instituted the suit. The Court holding the jewels did not hold them as agent of the plaintiff, but [illegible]

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1938 M.W.N. 274 = A.I R. 1938 Mad. 331.

——S. 56—*Grant of injunction—Considerations.*

The Court, in dealing with suits for injunction, has to consider in each case not merely whether the plaintiffs' legal right has been infringed, but also whether under all the circumstances of the case, he ought to be granted an injunction as the proper and appropriate remedy for such infringement. 67 I.C. 299, Foll. (*Din Mohammad, J.*) CHANDI RAM *v.* SECRETARY OF STATE.

40 P.L.R. 160.

——S. 56—*Scope—Act done by public officer in discharge of duty under S. 37, Mysore Land Revenue Code—Suit for injunction to restrain—Bar of.*

It is not open to a Civil Court to prevent a public officer, such as the Deputy Commissioner acting under the Mysore Land Revenue Code from exercising the public duty enjoined on him by S. 37 of that Code. A suit for an injunction to restrain the Government or its officers from doing an act which is done in discharge of such a duty is barred by S. 56 of the Specific Relief Act. (*Shankaranarayana Rao, Offg. C.J. and Singaravelu Mudaliar, J.*) BAKSHI CHABU MIA SAB *v.* THE GOVERNMENT OF MYSORE. **16 Mys.L.J. 87.**

——S. 56 (b)—*Scope—Execution sale by Subordinate Judge's Court—Injunction to restrain—Application in same Court for grant of—Competency.*

An injunction to restrain proceedings in a Court, when issued, is issued against an individual prosecuting his case in a Court, and if an injunction was granted, it is an injunction granted against the litigant and not against the Court. There is no method by which an injunction can be directed to a Court in contradistinction to the persons or parties prosecuting their litigation in that Court. Where execution is being taken out in the Court of the Subordinate Judge, no application can lie in that Court for the grant of an injunction to restrain proceedings in such execution, in view of S. 56 (*b*) of the Specific Relief Act. The proviso added to O. 39, R. 1, C. P. Code, to come into force on 1st January, 1938, adds nothing to the law governed by the Specific Relief Act, and makes no difference in the position which is the same. (*Wort, J.*) RAMKESHWAR DAS *v.* BALDEO SINGH. **1938 P.W.N. 220.**

STAMP ACT (II OF 1899), S. 2 (5)—*Balance struck by debtor in account book—When amounts to bond.*

Ordinarily, a balance struck by the debtor, followed by the words "*baqi rahe*" and signed by the debtor would be a mere "acknowledgment" on which a stamp duty of one anna will be sufficient. In such a case it will be immaterial that the entry is or is not attested by witnesses. If, however, the words used are "*baqi dene*" that would amount to an "agreement" and be liable to be stamped as such. If, further, such an entry is attested by one or more witnesses, it would be a "bond" and must be stamped accordingly. (*Tek Chand and Dalip Singh, JJ.*) TEK CHAND DAULAT RAM *v.* ATA MAHOMED. **40 P.L.R. 193.**

STAY OF PROCEEDINGS—*Commissioner completing enquiry into accounts before issue of Rule for stay—Subsequent submission of report—If without jurisdiction.*

Where before a Rule was issued by the High Court ordering stay of the enquiry into accounts, the Commissioner had completed his enquiry and there was nothing more for him to do than to submit his report, the report by him is not contrary to the Rule issued by the High Court and no question of want of jurisdiction arises. (*S. K. Ghose and Patterson, JJ.*) KESHABJI LALJI *v.* PIRAMALL GAYENKA. **42 C.W.N. 405.**

SUCCESSION ACT (XXXIX OF 1925), S. 214 (1) (b)—*Applicability—Execution proceedings—Decree-holder dying during pendency of—Substitution application by heir—Succession certificate—Necessity.*

Where a decree-holder dies during the pendency of his execution application, and his heir or legal representative applies for substitution of his name for that of the deceased decree-holder, the Court cannot, on that application, proceed with the execution unless a succession certificate is produced, for such an application falls within the words of S. 214 (1) (*b*) of the Succession Act. (*Stone, C.J. and Bose, J.*) TEJRAJ *v.* RAMPYARI.

1938 N.L.J. 99.

——S. 295—*Procedure—Contentious proceedings—Summary disposal—If justified—Duty of Court to make full inquiry as in a regular suit.*

Under S. 295, Succession Act, where there is a contention between the parties, the proceedings should take the form of a suit according to C. P. Code. It is not open to the Court in such a case to proceed to decide the matter in a summary fashion leaving the decision subject to modification in a suit to be filed afterwards. (*Burn and Venkataramana Rao, JJ.*) NOOR MOHAMMAD *v.* MOHAMAD KAREEM. **(1938) 1 M.L.J. 443.**

——S. 353—*Right to interest—Delay in suing—If ground for refusing interest—Interest* pendente lite *and future interest—Discretion—Interference on appeal—If justified.*

There is a statutory right to recover interest under S. 353 of the Succession Act, and the fact that a claimant waits for several years before he comes to Court is no ground for refusing interest, if his claim is within time. But the question of interest *pendente lite* and future interest is entirely within the discretion of the Court, and an appellate Court will not interfere with the discretion exercised by the trial Court, on the mere ground that that Court has not given any reasons for the award of such interest or the refusal to award the same. (*Manohar Lall and Chatterji, JJ.*) HEMANGINI DEVI *v.* ANIL KRISHNA.

1938 P.W.N. 186=19 Pat.L.T. 202.

SURETY—Bond by—Construction— Undertaking to produce judgment-debtor on fixed date—Failure to produce him or to appear himself—Plea of illness of judgment-debtor—Surety, if absolved from liability. *See* C. P. CODE, S. 55 (4). **47 L.W. 408.**

TORT—*Defamation—Privilege—*Bona fide *communications—Slanderous information of conduct of one's relation given to another relation—If privileged.*

A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without this privilege would be slanderous and actionable. Where therefore the defendant gives a near relation information, slanderous in the absence of privilege, of the conduct of the wife of the plaintiff, another relation, the communication is naturally privileged, as it is normally given in confidence, even if it is not expressly stated so in the letter itself. (*Fazl Ali, J.*) SURYANARAYAN *v.* SITARAMAYAH. **A.I.R. 1938 Pat. 164.**

——*Defamation—Privilege—Report submitted by officer of Railway Company about conduct of subordinate servant in response to requisition by higher officer—If privileged—Report false in one particular—Presumption of malice—If arises—Suit for damages—Burden of proof—Failure to prove malice—Effect.*

Noor, J.—A report submitted by an officer of a Railway Company, which he submits not of his own accord but on being asked to do so by the superior officers,—it being submitted to the superior officer without any one

TORT.

made to get damages for
in it unless he proves expres
qualified privilege the de
damages for defamation is
the truth of the accusation
malice, in the absence of such proof no damages can be awarded. (*Courtney-Terrell, C. J. and James, J.*) KHIROD RANJAN DAS *v.* MOHAMMAD WASY. 19 Pat L.T. 186.

——*Malicious house search—Suit for damages—Maintainability—Information given to police by defendants leading to search of plaintiff's house—Remedy of plaintiff—Suit against informants for malicious house-search—Competency.*

As a result of information given by the defendants to the Police regarding the plaintiff's character, the Police searched the plaintiff's house. Plaintiff then brought a suit against the defendants for malicious house search.

were to bring an action for malicious house-search, it would be one against the Police who searched his house, that would not be, however, the same as one for malicious prosecution involving issues as to reasonable and probable cause; (3) that even if brought against the Police it would be an action in trespass, in which the plaintiff would have to prove not the lack of reasonable

BARHI. 19 Pat.L.T. 208.

——*Negligence—Medical man—Failure to advise X-ray examination after motor car accident.*

The fact that the attending physician omitted to advise an immediate X-ray examination of the patient after a motor car accident, does not *per se* constitute

——*Nuisance—Village site—Construction of channel through part of village site—Right of members of village to sue for mandatory injunction—Special damage—If to be proved—Remedy—Absence of sanction of Advocate-General—Effect—C. P. Code, S.* 91.

Where a channel dug by the defendants through a part of the site of a village is only a common nuisance, some of the villagers cannot maintain an action on

damage is to seek the permission
General under S 91, C. P. Code an
But when the objection on the score
is not taken in the trial Court or in
Court and a decree has been passe
plaintiffs, it would not be equitable
dants to raise the objection in second appeal. A mere failure to obtain permission under S. 91, C. P. Code, would not render the suit not maintainable if no objec-

T. P. ACT (1882), S. 35.

——*Trespass—Remedy—Actual encroachment on land—Money damages—If proper remedy—Right to delivery of possession—Rule.*

In cases in which there is an actual encroachment or trespass by one person on the property of another there is no other remedy possible except that of delivery if possible. There is no scope in such cases for the contention that money damages may be given as in the case of an invasion of one man's rights of easement by another. (*Pandrang Row and Abdur Rahman, JJ.*) LADOORAM SOWCAR *v.* JALADURGA PRASADA-RAYUDU. 47 L.W. 255.

——Vicarious liability—Dismissal of servant by Rail-
officer of company—
Railway Company—If
R AND SERVANT—
19 Pat L.T. 186.

——*Wrongful attachment—Damages—Costs of legal proceedings and damages for personal worry—If can be recovered.*

In a suit for damages for wrongful attachment, the costs of the legal proceedings taken to establish the right to the property attached cannot be recovered Nor can damages be recovered for personal worry. Every

TRADE MARK—*Passing off—Action for—Proof required.*

In a case of infringement of trade mark, the Court must exercise its own judgment from the impression which it obtains from looking at the two products in questi
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of stranger authorising latter to file suit on their behalf for recovery of estate—Right given to stranger to conduct suit and to divide the property after recovery in case of success of suit and to take half share—If operative and valid. *See* CONTRACT ACT, SS 201 AND 202. 1938 M W.N. 259.

6 (d)—*Applicability—Mortgage of right to maintenance under trust deed—Validity.*

an owner in full right of certain property
among other things, to
for his maintenance,
the sense of Cl (*d*)

——S. 35—*Election — Mortgage— Construction—Release of security—Avoidance of mortgage—Effect—Right to fall back on prior mortgage.*

T. P. ACT (1882), S. 43.

A debtor executed a settlement conveying his property to a trustee with directions as to payment of debts, maintenance, etc. A suit by a creditor attacking this deed of settlement was compromised and the trustee executed two mortgages to the creditor in respect of his pre-settlement debts and certain other loans. An heir of the settlor brought a suit to set aside these mortgages as being invalid against settled estate. It was decreed. Thereupon the creditor brought the suit on the original bonds and it was held that no question of election could arise as between these securities even on the footing that the later mortgages were valid, as by express agreement, the original hypothecation bonds and the invalid mortgages were to be cumulative and independent securities. Still less can it arise after the mortgages had been set aside. (*Sir George Rankin.*) RAJA OF RAMNAD *v.* CHIDAMBARAM CHETTIAR.

1938 A.L.J. 292 (P.C.).

———S. 43—*Applicability—Court-sale.*

The equitable principle governing S. 43 of the T. P. Act does not apply to a Court-sale. (*Dalip Singh, J.*) NANAK CHAND *v.* GANDU RAM. **40 P.L.R. 202.**

———S. 48—*Applicability — Substituted security—Rival claims—Priority—Rule as to.*

As between two substituted security rights no question of priority can arise; S. 48, T. P. Act, applies only to successive mortgages of the same property. The rights in the substituted security of two rival claimants should be proportionate to the value of the original security as it stood on the date when the property mortgaged ceased to belong to the mortgagor. (*Wadsworth, J.*) KRISHNAVENI AMMAL *v.* SUBRAMANIAM CHETTY.

1938 M.W.N. 235.

———S. 50—*Tenant paying rent to landlord after notice of sale by landlord—Payment relating to period when suit was pending for cancellation of sale-deed—Tenant, if protected.*

The terms of S. 50 of the T. P. Act raise a question of good faith on the part of the payer twice, first with regard to the payment actually made and, secondly, with regard to the title of the person to whom the payment is made. A tenant who pays rent to the landlord who inducted him into the land is entitled to protection under this section although he has notice of the purchase of the land by another person, when the payment relates to the period when a suit was pending between the vendor and the vendee for the cancellation of the sale-deed on the ground that it was a benami transaction. (*S. K. Ghose and Patterson, JJ.*) SATTU LALL JAHAR MULL *v.* KRITANTA KUMAR GUHA.

42 C.W.N. 378

——— S. 51—*Good faith of transferee—Inference from circumstances.*

The question whether or not a transferee believed in good faith that he was absolutely entitled to the property cannot be subject of any hard and fast rules but should be decided on the merits according to the circumstances of each case. (*Zia-ul-Hasan, J.*) NASIB ALI *v.* SAHIB ALI. **1938 R.D. 356=1938 O.W.N. 281.**

——— S. 52—*Applicability—Leases for purposes of cultivation.*

It is wrong to think that leases for purposes of cultivation during the pendency of partition proceedings are bad under S. 52 of the T. P. Act. (*Bomford, J.M.*) RAM GHULAM *v.* THE COLLECTOR OF BANDA.

1938 A.L.J. (Supp.) 20=1938 A.W.R. (B.R.) 144=1938 R.D. 285.

——— S. 52—*Applicability—Maintenance decree in favour of widow creating charge on immovable properties—Transfer of properties by judgment debtors—If affected by* lis pendens—*Agreement by widow with alienee to release property from charge and receipt of part consideration therefor—Effect of—Part performance.*

Where a person such as a Hindu widow has obtained a decree for maintenance, the maintenance being made a charge on immovable properties, the holder of that decree is entitled to proceed against those properties though the properties or some of them have passed into other hands from the persons in whose hands they were at the time of the decree. The transfer of the properties with the charge subsisting thereon is affected by *lis pendens.* The fact that the widow holding the decree agreed with the transferee to release the properties in his hands from the charge for consideration does not prevent the doctrine of *lis pendens* from operating, until there is a release by her valid in law, the properties remain charged. The fact that part of the consideration for the release agreed on has been paid to the widow would not entitle the transferee to a release. The doctrine of part performance has no application to such a case, so as to override the rule of *lis pendens.* (*Leach, C. J., Varadachariar and Mockett, JJ.*) RAMACHANDRA NAIDU *v.* VENGAMMA NAIDU.

1938 M.W.N. 269 (F.B.).

———S. 55 (4) (b)—*Vendor's lien—Enforceability by representative of vendor—Sale of property with direction to vendee to discharge decree debt of vendor—Consideration reserved with vendee—Vendee failing to discharge—Execution sale of property by decree-holder—Purchaser in execution—Right of to sue for unpaid purchase money from vendee—Right to interest.*

Where under a sale-deed the bulk of the consideration is retained with the vendee for being paid to certain holders of decrees against the vendor at the request of the vendee, it cannot be said that the statutory charge in respect of the vendor's lien for unpaid purchase money is given up. The mere fact that the vendor asks the vendee sometime after the sale-deed not to pay the amount due to one of the creditors does not mean that the vendor intends to give up or waive the right given to him by the statute in the shape of a charge on the property for unpaid purchase-money. The charge in favour of the vendor is an interest in property and is saleable. Where the holder of one of the decrees, who is not paid by the vendee brings the property to sale in execution of the decree against the vendor, it is the charge for unpaid purchase-money which the vendor had in the property after the private sale by him that passes to the purchaser of the property at the execution sale, and from him to a subsequent purchaser from him. Such a purchaser is entitled to enforce the charge against the original vendee. The original vendor cannot himself enforce the charge, as the same has passed from him to the execution purchaser by reason of the execution sale. The purchaser has a right to recover the unpaid purchase-money together with interest by enforcing the charge under S. 55 (4) (*b*) of the T. P. Act. (*Pandrang Row and Venkataramana Rao, JJ.*) LAKSHMAYYA NAIDU *v.* PURUSHOTHAMA NAIDU.

1938 M.W.N. 233=(1938) 1 M.L.J. 316.

———Ss. 58 (f) and 59—*Deposit of title deeds—Collateral security letter—Registration—When necessary—Registration Act, Ss. 17 and 49.*

It is settled law that when a deposit of title deeds on collateral security for a loan is evidenced by a writing which is not intended to be itself the embodiment of the contract, but is a mere memorandum of a previously completed transaction, that writing is not an instrument affecting immovable property and need not be registered.

T. P. ACT (1882), S. 81.

In deciding whether the writing is such a memorandum of a completed transaction or the embodiment of the actual contract, the use of the past or present tense in reference to the deposit may be an indication of the intention of the par[illegible] itself be the sole criterion of the nat[illegible] ment. A document described as a '[illegible] letter," began by reciting the names [illegible] the lenders and the name, father's name, religion, occupation and address of the borrower and continued as follows: "On this date I have executed a promissory note in your favour and received Rs. 1,900. I have deposited with you as security the title deeds of premises . . . . belonging to me. At the time when I pay the said promissory note, I shall receive back this letter and also the title deeds. To this effect is the collateral letter given with amy consent. Then followed the signature of the borrower and the attestor and a list of documents. The document did not recite the date of the deposit and did not give the rate of interest. It was found that the title deeds were handed over 5 or 6 days prior to the date of the document and that the terms of the loan were agreed on and the money drawn by the lenders from a fund some days before the title deeds were handed over.

Held, that the document was not a complete record of the contract, that there was a completed mortgage agreement anterior by some days to the writing of the letter, and the latter was therefore admissible in evidence without registration. (*Wadsworth, J*) KRISHHAVENI AMMAL *v.* SUBRAMANIAM CHETTY.
1938 M.W.N. 235.

———S. 81—*Applicability—Marshalling—Right to claim—Conditions—First mortgagee releasing one property from mortgage and then suing for sale of other item—Subsequent mortgagee of latter—Claim by to marshalling—Sustainability.*

Marshalling implies the existence of two sets of properties one of which is subject to both the mortgages and the other is subject only to the earlier mortgage. When there are no two items of properties liable to be sold but only one item, the doctrine of marshalling cannot be invoked. When there are no properties to be marshalled, there being only one or one set of properties liable to be sold being subject to both the mortgages, the doctrine cannot be invoked. The undoubted right of a mortgagee to release any part of his security cannot be lost or be made subject to the right of marshalling given by S. 81 of the T. P. Act. The right given by S. 81 is expressly made subject to the condition that there should be no prejudice to the rights of the first mortgagee. Where the first mortgagee releases one of two properties mortgaged to him and subsequently sues for the amount due to him by sale of the other property included in his morgage, the subsequent mort-[illegible]

———S. 81—*Subsequent mortgagee purchasing property in execution of his decree and also purchasing rights of prior mortgagee—Right to compel in execution of prior mortgage, sale of properties not purchased by him.*

Where a subsequent mortgagee purchases the property mortgaged to him in execution of a decree on his mortgage and subsequently purchases the rights of the prior mortgagee, he is entitled to compel in execution of the first mortgage the sale in the first instance of properties not purchased by him in execution of the second mort-[illegible] [illegible]ortgage [illegible]y which [illegible] BAND-[illegible]
42 C.W.N. 502.

———S. 92—Co-vendee paying off mortgage to avert sale—Right to a charge. *See* LIMITATION ACT, ART. 132. 1938 O.W.N. 290.

———S. 110—*Lease for 7 years from 1318 to 1324 B. S.—If lasts up to midnight of 1st Baisakh*, 1325.

Where from the kabuliyat it appears that the lease is for a term of 7 years from 1318 to 1324 B.S., the intention of the parties evidently is that the lease is to commence from the beginning of 1318 and is to end at the end of 1324. Ordinarily of course the lease will last up to the midnight of the 1st Baisakh, 1325. But the express stipulation in the lease that the time limited by the lease is up to the end of 1324 clearly indicates that there is an express agreement to the contrary within the meaning of S. 110 of the T. P. Act. In view of this express agreement between the parties, the lease lasts only up to the last day of the year 1324 B S., and does not last up to the midnight of the 1st Baisakh of the next year. (*Nasim Ali, J.*) DEB DAS LALA *v.* SK. ABDUL GANI. 42 C.W.N. 443.

———Ss. 130 and 132—*Applicability—"Pahunch"—Transfer of—Form of—Equities.*

A pahunch is an ordinary receipt. At best it evidences acknowledgment of a debt, and is a chose in action or an actionable claim. Under S. 130 of the T. P. Act, it is only transferable by an instrument in writing, such transfer being subject under S. 132, to the equities provided therein. (*Mehta, J.*) JHANGALDAS CHIMANDAS *v.* CHETUMAL BULCHAND. 173 I C. 591 = A.I R. 1938 Sind 24.

———S 136—*Applicability to decrees.*

A decree does not come within the category of actionable claims, but the principle involved is the same. (*Leach, C.J., Varadachariar and Pandrang Row, JJ.*) P. L. PLEADER, RAJAM, *In the matter of.*
1938 M W.N. 220 (F B.).

TREASURE TROVE ACT (VI OF 1878), S. 4—*Offence under—Abetment of—Person not present at finding of treasure but afterwards sharing same with finder—If guilty.*

A person who was not present at the finding of a treasure and who has had no sort of connection with the matter up to the time when the actual finder decides not to report to the Collector about the finding cannot be found guilty of the offence of abetment of an offence under S. 4 of the Treasure Trove Act, though they may [illegible] h the [illegible] [illegible]KER, [illegible] 320. [illegible] sub- [illegible] held [illegible] Nature [illegible] ose—[illegible]esulting trust—Right of contributors. *See* [illegible]ON ACT, ART. 120. 47 L.W. 389.

TRUST.

———*Trustee — Special trustee—Who is—Religious endowment—Gift to temple—Properties conveyed to person described by donor as trustee—Status of.*

It is only in a case where there are other persons in management who can be regarded as general trustees and there are other funds out of which the general upkeep or the trust can be carried on that there will be any sense-

U. P. AGRICULTURISTS' RELIEF ACT (1934), S. 2.

in distinguishing any endowment as a special trust or kattalai intended for a particular purpose. Where in a gift of certain properties to a temple the person to whom the properties are conveyed is described by the donor as a trustee and there are no other persons in management as general trustees and the object of the gift is connected with ordinary worship in the temple, such person cannot be regarded as a special trustee and whether he is a trustee *de facto* or *de jure*, having taken the property under such a gift deed, he cannot claim to have held the properties in any character except that of the trustee of the temple. (*Varadachariar and King, JJ.*) SUBBA REDDI *v.* CHENGALRAYA REDDI.

A.I.R. 1938 Mad. 314.

UNITED PROVINCES AGRICULTURISTS RELIEF ACT (XXVII OF 1934), S. 2 (10) (b) and Sch. III—*Loan purporting to be secured—Security found to be void—Loan, if unsecured.*

A loan that purports to be a secured loan cannot be regarded as such for the purposes of Schedule III of the Agriculturists' Relief Act, if the security given is afterwards found to be void and unenforceable, and such a loan must be regarded as unsecured. (*Zia ul-Hasan and Smith, JJ.*) GOVIND PERSHAD *v.* SURENDRA NATH. 1938 R.D. 293=1938 A.W.R. (C.C.) 11=1938 O.A. 167=1938 O.W.N. 220.

———**S. 3 (2)**—*Action under—Interference in appeal.*

If the Court below has considered the question of taking action under S. 3 (2) of the Agriculturists' Relief Act, and has given satisfactory reasons for not taking such action, the Chief Court would not feel inclined to interfere in appeal, but where there is no indication in the judgment that this point was considered in the Court below, the position is different. (*Zia-ul-Hasan and Smith, JJ.*) GOVIND PERSHAD *v.* SURENDRA NATH. 1938 R.D. 293=1938 O.A. 167=1938 A.W.R. (C.C.) 11=1938 O.W.N. 220.

———**S. 5**—*Applicability—Decree on compromise providing for its satisfaction by judgment-debtor executing sale-deed.*

S. 5 of the Agriculturists' Relief Act is meant to apply only to such decrees as contain a direction for payment of money. Where the terms of a decree based on a compromise provide for satisfaction of the decree by the judgment-debtor executing a sale-deed of a portion of the mortgaged property in favour of the decree-holder and there is no absolutely no provision for payment of any money by the judgment-debtor, the provisions of the section are inapplicable. (*Thomas, C.J. and Zia-ul-Hasan, J.*) RAGHURAJ SINGH *v.* LALA HARI KISHAN LAL. 1938 O.A. 231=1938 A.W.R. (C.C.) 26=1938 O.W.N. 331.

———**S. 5**—*Discretion of Court.*

The Court has discretion in certain cases not to apply the provisions of S. 5 of the Agriculturists' Relief Act to a decree. The section should not be applied to a case where the judgment-debtor agreed to pay off the decretal amount by executing a deed of sale in favour of the decree holder, as it would not be just to allow him to resile from that agreement. (*Thomas, C.J. and Zia-ul-Hasan, J.*) RAGHURAJ SINGH *v.* LALA HARI KISHAN LAL. 1938 O.A. 231=1938 A.W.R. (C C.) 26=1938 O.W.N. 331.

———**S. 5**—*Order amending decree—Revision.*

There is no bar to an application for revision being entertained by the Chief Court against an order of the original Court amending a decree under S. 5 of the Agriculturists' Relief Act. (*Thomas, C.J. and Zia-ul-Hasan, J.*) RAGHURAJ SINGH *v.* LALA HARI KISHAN

U. P. ENCUMBERED ESTATES ACT (1934), S. 4.

LAL. 1938 O.A. 231=1938 A.W.R. (C.C.) 26=1938 O.W.N. 331.

UNITED PROVINCES COURT OF WARDS ACT (IV OF 1912)—*Collector in charge of Court of Wards—If can make an acknowledgment on behalf of a ward.*

The Collector in charge of the Court of Wards is the duly authorised agent of the wards for the purpose of making an acknowledgment under S. 19 of the Limitation Act. (*Bennet, A.C.J., Rachhpal Singh and Ganga Nath, JJ.*) SHANKER LAL *v.* RANA LAL SINGH. 1938 O.W.N. 318=1938 A.W.R. (H.C.) 153=1938 A.L.J. 252 (F.B.).

UNITED PROVINCES ENCUMBERED ESTATES ACT (XXV OF 1934)—*Scope and object of—Persons becoming landlords subsequent to Act coming into force—If can claim benefits.*

The Encumbered Estates Act was not passed for the benefit of those who were not landlords on the date of the Act coming into force. Such persons cannot claim the protection of the Act, by a subsequent acquisition of landed property. (*Darling, S.M. and Bomford, J.M.*) SANT LAL *v.* ALLAHABAD BANK, LTD., JHANSI. 1938 A.W.R. (B.R.) 146=1938 R.D. 288.

———**S. 2 (g)**—Landlord—Person whose name is not in the khewat, if a landlord. *See* U. P. ENCUMBERED ESTATES ACT, SS. 6 AND 4. 1938 A.L.J. (Supp.) 5.

———**S. 2 (g)**—*Landlord—Qualification—Requisites.*

Under the proviso of Cl. (*g*) of S. 2 of the Encumbered Estates Act the requisite qualification for a landlord is that the land held by him is assessed to a local rate which shall not be less than Re. 1 and it is wrong to think that the qualification is the payment of 1 Re. as local rate. (*Darling, S.M. and Bomford, J.M.*) RAM SARUP *v.* SANT BUX SINGH. 1938 R.D. 334.

———**Ss. 4 and 6**—*Applicant only groveholder in district in which the application was filed—Non-disclosure as to zamindari in another district—Transfer to special Judge—Legality.*

Where an applicant under S. 4 of the Encumbered Estates Act was only a groveholder in the district in which he filed his application and where he did not disclose till at a very late stage the fact of his being a zamindar in another district, it was held that the applicant had filed his application in a district in which he had no qualification at all and as he was not entitled to make a second application by reason of S. 5 of the Act and as he failed to disclose in his application the fact of his being a zamindar in another district, he must be held to have forfeited his claim to protection under the Act. The transfer of such an application to the special Judge should be set aside. (*Darling, S.M. and Bomford, J.M.*) BINDESHARI PRASAD *v.* PANCHAITI AKHARA. 1938 A.W.R. (B.R.) 131=1938 R.D. 241.

———**S. 4**—*Application after sale in execution and before confirmation—Competency.*

An application can be made under S. 4 of the Encumbered Estates Act even after a sale in execution of the property of the applicant provided that the sale has not been confirmed. (*Darling, S.M. and Bomford, J.M.*) KAILASH BEHARI LAL *v.* MOBTIDA KHAN. 1938 R.D. 196=1938 A.W.R. (B R.) 123.

———**S. 4**—*Application under—Failure to include all members—Effect.*

The failure to make any mention of the existence of other members of the joint Hindu family renders the application by some only of the members under S. 4 of the Encumbered Estates Act, invalid. (*Darling, S.M. and Bomford, J.M.*) PHOOL SINGH *v.* HARKESH. 1938 A.L.J. (Supp.) 21.

U.P. ENCUMBERED ESTATES ACT (1934), S. 4.

——S. 4—*Application under—Failure of member of joint Hindu family to disclose existence of son's sons—If could be remedied.*

Where the applicants under S. 4 of the Encu Estates Act being members of a Joint Hindu specifically stated in their application, that ther no other members, but it was subsequently found that there were some son's sons, and an application is made to amend the original application by an addition of those grandsons, it cannot be allowed as the defect is a vital one and cannot be remedied. (*Darling, S.M. and Bomford, J.M.*) RATAN SINGH *v.* JAIDEV SINGH.

——S. 4—*Application signature—Vakalatnama a curable by amendment.*

The absence of the signature in an application under S. 4 of the Encumbered Estates Act as also in the

There is no provision in the Encumbered Estates Act

properties on which claim is based—Necessity—Omission—Effect.

be entertained when it is made long after the period of limitation. (*Darling, S.M. and Bomford, J.M.*) JAGAN NATH TEWARI *v.* KALI CHARAN.

1938 A.W.R. (B.R.) 135=1938 R.D. 264.

——S. 4—*Defective application under—Amendment—Stage—Applicant aware of defect—If entitled to ask for amendment after expiry of period of limitation*

Where an applicant under S. 4 of the Estates Act had ample warnings of the application and knew full well that it was within time to allow him for amendment, seeks to apply for amendment after the period of limitation had ex-

Right to apply under.

——S. 4—*Manager of wakf property—Right to apply under—"Landlord".*

The manager of a wakf property whose name is

M. and Bomford, J.M.) SHIV CHARAN JAITLY *v.*

U.P. ENCUMBERED ESTATES ACT (1934), S. 4.

MAHOMED RAZA KHAN. 1938 R.D. 201=1938 A.W.R. (B.R.) 126.

KHAN. 1938 R.D. 196=1938 A.W.R. (B.R.) 123.

——S. 4—*Right to apply under—Applicant selling his property, reserving a right to re-purchase*—Locus standi.

Where a zamindar has sold his property reserving only a right of re-purchase, he cannot on the strength of and entitled ates Act. He ies under the time claim the advantage, as a landlord, given by the Encumbered Estates Act. (*Darling, S.M. and Bomford, J.M.*) ...INGH.

1938 R.D. 354.

Landlord parting agreement for re-

under the Encumbered by one who has landlord by an out

Right to apply under—Undischarged insolvent.

)—Application by Hindu co-parcener ve names and addresses of other co-

Where an applicant under S. 4 of the Encumbered Estates Act is a member of a Hindu joint family, it is incumbent on the applicant to give the names and addresses of the remaining members of his family who do not join him in his application and from whom he wishes to separate. Failure to do so is a fatal defect which cannot be remedied after a long lapse of time. ... AR *v.* ... 171.

Where an applicant is a member of a joint family and where he fails to disclose the existence of a son, he mandatory provisions thereunder and hence (*Darling, S.M. and* SANT BUX SINGH.

1938 R.D. 334.

—Sufficient cause—mutation proceedlication on return ited from applying

Where mutation proceedings were going on after the death of a landlord, and where his widow went on a pilgrimage and on her return finding that mutation had been effected in favour of her son, applied under S. 4 of hat she had 4 (4) of the limitation. RATAN PRAKASH *v.* EMPEROR.

362.

——Ss. 6 and 4—*Application under S. 4—Applicant, if a landlord—Test — Decision—Province of Revenue Court—Duty of Collector to come to definite finding—S. 2 (g).*

The Revenue Courts will not ordinarily look beyond the entry in the khewat for the purpose of deciding whether an applicant under S. 4 of the Encumbered Estates Act is a landlord within the meaning of Cl. (*g*) [o]f S. 2 of the Act. So long as his name is not in the [k]hewat, he is not a landlord within the meaning of the [A]ct. The Collector should come to a definite decision [a]s to whether the applicant is a landlord under the Act, [a]nd should not burke the issue. (*Darling, S.M. and* [B]*omford, J.M.*) HARDEO SINGH *v.* CHHAJJOO MAL. 1938 A.L.J. (Supp.) 5=1938 A.W.R. (B.R.) 95= 1938 R.D. 337.

——S. 6—*Collector's power to review order under.*

Once an order has been made under S. 6 of the En[cu]mbered Estates Act and the application forwarded to [th]e Special Judge, the Collector has no power to cancel [th]e order on the ground of error or mistake. The [B]oard of Revenue alone is entitled to interfere in revi[si]on. (*Darling, S.M. and Bomford, J.M.*) AMJAD [H]USAIN *v.* CHUNNI LAL. 1938 R.D. 202 (1)= 1938 A.W.R. (B.R.) 127.

——S. 6—*Objection by some creditors that applicants [a]re not landlords—Applicant, if can demand addition [o]f all creditors to enquiry—Willingness to pay costs.*

Where on an application under S. 4 of the Encum[b]ered Estates Act some of the creditors raised the [o]bjection that the applicants are not landlords, and [w]here the applicants desire that all the creditors should [b]e made parties to the enquiry so that the order may be [b]inding on all, and are willing to pay their costs, there [i]s no reason why such a wish should not be met. (*Darling, S.M. and Bomford, J.M.*) JAI DAI KUN[W]AR *v.* ROOP SINGH. 1938 R.D 357.

——S. 6—*Objection by some of the creditors to order [u]nder—Debtors if entitled to demand impleading of [o]ther creditors—Condition as to costs.*

Where some of the creditors object to the passing of [a]n order under S. 6 of the Encumbered Estates Act [a]nd the debtor wishes to have impleaded all the other [c]reditors to the hearing of such objection, it may be [d]one so provided he is willing to pay their costs. (*Darl[i]ng, S.M. and Bomford, J.M.*) SAT GUR NATH *v.* [M]ANNO LAL. 1938 R.D. 343.

——S. 6—*Order under—Cancellation—If the Board [o]nly can.*

When once an order under S. 6 of the Encumbered Estates Act is passed, it is only the Board that that could cancel such an order. (*Darling, S M. and Bomford, J.M.*) RAMA SHANKAR *v.* SHYAM LAL. 1938 R.D. 365.

——S. 6—Order under—Effect on proceedings for realisation of compensation in partition case. *See* U. P. ENCUMBERED ESTATES ACT, SS. 7 AND 6. 1938 R.D. 349.

——S. 6—*Order under—Mistake—Duty of Collector.*

If a mistake had been made in passing an order under S. 6 of Encumbered Estates Act, the Collector should refer the case to the Board for revision under S. 46 of the Act and not cancel the order previously passed. (*Darling, S.M. and Bomford, J.M.*) SANT LAL *v.* ALLAHABAD BANK, LTD., JHANSI. 1938 A.W.R. (B.R.) 146=1938 R.D. 288.

——S. 6—*Order under—Mistake in—Objection by creditor subsequently—Refusal to take cognisance by Sub-Divisional Officer—Propriety—Proper course.*

If it is found by a Sub-divisional officer that a mistake has been made in the course of passing an order under S. 6 of the Encumbered Estates Act by his predecessor in office, the proper course for him is to submit the case for orders in revision to the Board of Revenue under S. 46 of the Act, and not to refuse to take cognizance of an objection to that effect made by a creditor. (*Darling, S.M and Bomford, J. M.*) SHIV CHARAN JAITLY *v.* MAHOMED RAZA KHAN. 1938 A.W.R. (B.R.) 126=1938 R.D. 201.

——S. 6—*Right to apply under S. 4—Challenging of—Procedure—Technical point—Strict compliance of rules of procedure—Necessity—Extension of time, if can be granted—Applicability of S. 151, C. P. Code.*

When the point taken by the person who wishes to deprive the debtor of the benefits which the Encumbered Estates Act is intended to confer, is a purely technical one, he must be made to conform strictly to the procedure prescribed—Though the usual procedure is to file a review of the order of transfer under S. 6 of the Act, and it has got to be made within ninety days, there is no reason why in such a case an extension of time should be granted. Nor could the creditor seek relief under S. 151 of the C. P. Code. The wide powers to prevent abuse of the process of Court and to ensure justice, are to be used with discretion. To grant the application of a creditor who has purchased the decree with the knowledge that the judgment-debtor had sought the protection of the Encumbered Estates Act, would itself amount to an abuse of the powers of Court and constitute an injustice by itself. (*Darling, S.M. and Bomford, J.M.*) RAMA SHANKAR *v.* SHYAM LAL. 1938 R.D. 365.

——S. 6—*Sale in execution of decree for arrears of land revenue—Subsequent order under S. 6 in favour of judgment-debtor—Effect—Procedure to be followed.*

Where a sale has been held in execution of a decree for arrears of land revenue and where subsequently the judgment-debtor obtains an order under S. 6 of the Encumbered Estates Act, the sale cannot be upheld, but the execution proceedings should be kept open pending disposal of the application under Act. (*Darling, S.M. and Bomford, J.M.*) ABDUL SHAKOOR *v.* ABDUL KAREEM. 1938 R.D. 348.

——Ss. 7 and 6—*Compensation payable in partition case—Recovery of—If stayed by operation of S. 7.*

The claim in respect of a liability to pay compensation in a partition case, is only in the nature of a private debt. Hence when a co-sharer who has to pay such compensation obtains an order under S. 6 of the Encumbered Estates Act, the proceedings for the realisation of such dues have to be stayed by virtue of S. 7 of the Act and have to remain so stayed so long as that provision remains operative. (*Darling, S.M. and Bomford, J.M.*) CHANAN LAL *v.* AFLATOON. 1938 R.D. 349.

——S. 7—When comes into operation. *See* U. P. REGULATION OF SALES ACT, S. 5. 1938 R.D. 363.

——Ss. 45 and 46—*Order of Collector in proceedings on applications under S. 4—Creditor aggrieved by—Remedy—Appeal or revision.*

As a creditor is not a party to the proceedings before Collector in respect of an application under S. 4 of the Encumbered Estates Act, if he is aggrieved by any order should come to the Board by way of revision under S. 46 and not by way of appeal under S. 45 of the Act. (*Darling, S.M. and Bomford, J.M.*) RATAN SINGH *v.* JAIDEN SINGH. 1938 R.D. 352.

UNITED PROVINCES LAND REVENUE ACT (III OF 1901), Ss. 4 (16) and 39—*Sub-proprietorship—Claim as to—Establishment—Method—Forum.*

A person claiming the status of a sub-proprietor must have his name recorded in the register of proprie-

U.P. LAND REVENUE ACT (1901), S. 23.

... for the correcti ...

1938 A.L.J. (Supp.) ... = 1938 A W.R. (B.R.) 147 = 1938 R D. 289.

—— S. 23 (2) (c)—*Transfer of patwari—Grounds—Mere suggestion of supervisor Qanungo without specific complaint—Sufficiency.*

It is inadvisable to transfer patwaris on the suggestion of the supervisor Qanungo without any specific complaint, there should be strong reasons for ... ferring a patwari appointed with the conse... the zamindars. Transfer is not a punishment, but is actually a much more severe punishment than any authorised by the Land Revenue Act or the rules under the Act, barring dismissal and remov... *S.M. and Bomford, J.M.)* SHYAM ... EMPEROR. 1938 A.W R ...

——Ss. 33 and 39—*Entry of lo* ...

... can only be established by a ... Tenancy Act. Before an application under S. 39 of the Land Revenue Act is admitted, the real points to consider are whether there is an error to correct or change to record (*Darling, S.M. and Bomford, J M*) PI... v. PARTAP SINGH. 1938 A L.J. (Supp ...

—— S. 33—Rejection of mutation—Subsequent ... cation for correction, if justified. *See* U. P. REVENUE ACT, Ss. 34 AND 33. 1938 R D. 239.

——S. 33 (2)—*Applicability—Refusal of mutation—Fresh application—Ordering of mutation—If an 'error'* ...

... has been rejected ...

——S. 33 (2)—*Correction—Scope of—Application on* ... *—If can be* ... *—Neces-* ...

... r on the ... years, it ... his title ...

U.P. LAND REVENUE ACT (1901), S. 39.

... —*Thekka lease* ... *zamindar for* ... *to fine under* ...

... a village for a ... sfer within the ... venue Act when ... n. But there is no transfer under the section on the expiry of the lease. An application by the zamindar after the expiry of the thekka lease for removal of the name of the thekkadar is a proceeding under S. 39 of the Act, and consequently no fine is leviable from the zamindar in respect of the same under S. 38. (*Darling, S.M and Bomford, J.M.*) ADITYA NARAIN SINGH ...

... '8 R.D. 172.

— ... *of application of alleged vendee—Vendee if can apply for correction or oppose application for mutation by heirs of* ...

... or mutation by an alleged ... t is not open to him later on, ... application for correction of ... application for mutation by the ... dor. The unsuccessful party should not be allowed to evade the duty cast on them by ... of going to the Civil ... he Revenue Courts once ... applying for correction ... mutation. (*Darling,* ... RJA DAYAL v. TORKEY ...) 130 = 1938 R.D 239.

... *laim to ex-proprietary* ... *Act, S.* 129.

A claim to ex proprietary rights must be made within one year of their accrual, limitation being governed by S. 129 of the Oudh Rent Act, and not by the Land ... Act merely prescribes the pro- ...

——S. 36—*Claim to ex-proprietary rights in khudkasht—Refusal of prior claim in execution by sales officer—If a bar.*

A claim to ex proprietary rights, regularly made under S 36 of the U. P. Land Revenue Act, is not barred by ... that a claim thereto in *khudkasht* land ... execution for sale ... for valuation pur- ... Act. The refusal ... bar the establish- ... (*Darling, S.M.*) ...

... 5 = 1938 R.D. 199.

—— S. 36—*Proprietor executing mortgage and waiving rights under S.* 15 (5) *of the Tenancy Act—Entries how to be made.*

Where a mortgagor of *sir* executes a mortgage and states that he has handed over possession to the mortgagees, he waives his ex proprietary rights but he is under S. 15 (5) of the Tenancy Act entitled to redeem the mortgage within 12 years. This right must remain recognised in the papers. (*Darling, S.M and Bomford, J.M.*) GHURAN PANDEY v. HIRA LAL. 1938 R.D. 391.

... establishing claim ... method. *See* U. P. ...

band's share to her nearest reversioners and has no power to transfer it to anybody else, it does not prohibit alienation for legal necessity. Though a widow can make an alienation in case of legal necessity, she can do so only to one of the nearest reversioners of her husband and not to any one else. Consequently an alienation by her in favour of one who is not such a reversioner is invalid, whether or not it is made for legal necessity. (*Zia ul-Hasan, J*). AYUB KHAN *v.* IMDAD KHAN. 1938 R.D. 393=1938 O.W.N. 296.

WILL—*Revocation — Mahomedan testator—Registration of original will—Communications to solicitors, to draft a codicil as per his instructions—Codicil not completed—Whether communications operate as codicil and revoke part of his will.*

A Mohamedan testator made a will in due form, attested and registered. After making this will, he communicated with a firm of European Solicitors and got a properly drafted but incomplete codicil. After receiving that draft codicil, he sent two communications, a letter and a telegram, which he did not sign to his solicitors, instructing them to make certain alterations in that draft. But he died before further action could be taken upon the draft.

Held, that it is quite possible that a letter by a Mahomedan to his solicitor may operate to revoke a will. But in the circumstances of the case, it was not the intention of the testator to revoke any part of his will,

by the letter or the telegram. What he intended was that the letter and the telegram were to serve only the purpose of providing materials for the preparation of a draft, that the solicitors should draw a proper draft codicil embodying the modifications communicated and that he should execute that codicil formally. (*Wadsworth, J.*) MAHOMED YOONUS *v.* ABDUR SATTAR ISMAIL. (1938) 1 M.L.J. 444.

——*Revocation—Requirement.*

A mere expression of an intention to revoke a will at some future date cannot amount to a revocation of the will under any system of law. (*Wadsworth, J.*) MAHOMED YOONUS *v.* ABDUR SATTAR ISMAIL. (1938) 1 M.L.J. 444.

WORDS AND PHRASES—Mookassa and Vrittee—Meaning of. *See* LAND TENURES MOOKASSA AND VRITTEE TENURES. 1938 N.L.J. 112.

ZAILDAR—*Appointment of—Non-lamlardar appointed by commissioner after sanctioning candidature—Non-lamlardar not an approved candidate before*

appointing him is valid, although he was not an approved candidate before the Collector who made the first appointment. (*Garbett, F.C.*) RUR SINGH *v.* GURBAKHSH SINGH. 17 Lah L.T. 1

II—TRAVANCORE CASES.

ABATEMENT—*Appeal—Joint appellants—Death of one—Decree passed without impleading heirs—Whether a nullity—Executing Court—Power to refuse execution.*

Plaintiffs 1 and 2 who were joint foremen of a Chitty, instituted a suit for the recovery of arrears of Chitty subscriptions. The Court of first instance dismissed the suit with costs to defendants 15 and 16. On appeal to the lower appellate Court, the trial Court's decree was reversed and the suit was decreed with costs. Defendants 15 and 16 then preferred a special appeal before the High Court with the result that the special appeal was allowed dismissing the suit with costs to defendants 15 and 16. The 1st plaintiff died while the special appeal was pending hearing and it was heard and disposed of without bringing the legal representatives of the 1st plaintiff on the array of parties.

Held, that since there was nothing to show that the interests of the two plaintiffs were separable, and under the provisions of the Chitty Regulation, the legal heirs of a deceased foreman succeeded to his rights and the liability of joint foremen was joint and several, the special appeal abated in its entirety as the legal heirs of the deceased 1st plaintiff were not brought on the record. The decree in special appeal was therefore a nullity and of no effect as against the 1st plaintiff or his legal representative. The executing Court was competent to refuse execution on the ground that the decree was passed without jurisdiction. (*Verghese, C. J. and Kumaran, J.*) PARAMESWARAN PILLAI *v.* THANUVAN.

12 T.L.T. 689.

APPEAL—Competency—*Pro forma* defendant—Right of appeal—Test—*Res judicata. See* RES JUDICATA—CO-DEFENDANTS. **12 T.L.T. 587.**

ARBITRATION—*Arbitrator — "Misconduct"— Refusal to hear material evidence—Acting on own information received in the absence of parties—Effect of.*

The law is well established that the arbitrator should hear all the evidence material to the question which the arbitrators are called upon to decide. No doubt the arbitrators are competent to exercise some amount of discretion as to the quantity of evidence they hear. The enquiry before an arbitrator is generally assimilated as near as may be to the proceedings on a trial in the Court and arbitrators are bound by the same rules of evidence as the Courts of Law. The refusal to receive proof where proof is needed is fatal to the award. The rule that the arbitrator is bound to take the evidence only when tendered, only means that the parties must have made a request to the arbitrators for taking evidence. It does not mean that in all cases it is incumbent upon them to produce the witnesses for examination before the arbitrator. In some instances the witness may not be willing to appear for giving evidence at the mere beck and call of the party without a requisition made on this behalf by the arbitrator. To hold that in such cases the arbitrator can invariably insist upon the examination of only such witnesses as can be produced before him

C.P. CODE REGN. S. 115.

will entail serious hardship and inconvenience to parties. It is well-established that where an arbitrator has refused opportunity to a party to let in evidence it amounts to 'misconduct'. It is improper on the part of an arbitrator to act on information received by them in the absence of parties. Both sides must be heard each in the presence of the other. However immaterial the arbitrator may deem a point to be, he should be very careful not to examine a party or a witness upon it, except in the presence of an opponent. If he errs in this respect he exposes himself to the gravest censure, and the smallest irregularity is often fatal to the award. (*K. P. Gopal Menon and Sankarasubba Iyer, JJ.*) VARKI *v.* GEEVARGHESE. **12 T.L.T. 460 = 28 T.L.J. 220.**

CHITTY REGULATION (as amended in 1108). S. 3—*Scope—If retrospective—Money paid towards chitties started before enactment of S. 53—Whether recoverable.*

It is open to a party to recover money paid in respect of a chitty which, though void under S. 4 of the Chitty Regulation, was before the enactment of Section 53 of the amended Chitty Regulation of 1108. Until Section 53 of the amended Regulation was passed in Dhanu 1108, chitties void under S. 4 were not held to be unlawful. Where the plaintiff entered into the transaction long before the date of the amended Regulation, the penal provisions introduced in 1108 having no retrospective effect. Court will allow subscribers to recover the paid up subscriptions. Even assuming that the transaction may be treated as a lottery, the plaintiff will nevertheless be entitled, in the circumstances of the case, to recover the amount claimed by him on the principle of the decision in 26 T.L.J. 458. (*Verghese, C. J. and Parameswaran Pillai, J.*) PAPPUKUTTI *v.* VASAVAN. **28 T.L.J. 69.**

CIVIL PROCEDURE CODE REGULATION S 31—*Interest—Compromise decree—Provision to pay 12 per cent interest after decree—Legality.*

A Court has no jurisdiction to accept a compromise which awards more than 9 per cent interest from the date of decree and to give it the sanction of the Court in the form of a decree. (*Verghese, C. J. and Parameswaran Pillai, J.*) JOSEPH *v.* EASWARA PAKKY NADAR. **12 T.L.T. 321.**

——S. 115—*Inherent powers—Exercise of—Other remedies open—If a bar.*

The fact that there are other remedies open to an aggrieved party is no justification for a Court to decline to exercise its inherent jurisdiction if such interference is needed for the ends of justice. The existence of any remedy under the Civil Procedure Code should not be taken to preclude the Court from passing appropriate orders where in its opinion the same is considered necessary in the interests of justice. (*Kumaran, J.*) **12 T.L.T. 663.**

C.P. CODE REGN. O. 21, R. 14.

——O. 21, R. 14—*Joint decree-holders—Death of one—Legal representatives filling character of defendants—Effect—Executability of decree—Extinguishment—Extent of.*

Plaintiffs 1 to 3 and their mother, the 4th plaintiff, instituted a suit against the karnavan and senior

costs. The 1st defendant resisted execution by the assignee.

Held, that the decree setting aside the alienation of the tarward property enured to the benefit of the tarwad, but not the costs personally decreed to the four plaintiffs jointly. On 4th plaintiff's death, her interests in the costs jointly awarded descended to plaintiffs 1 to 3 and defendants 4, 6 and 7 who were her legal representatives. Her interests in the decree could not be executed against the other judgment-debtors as directed in O. 21, R. 14, C. P. Code, inasmuch as there was a merger of her interests. To the extent that one or more judgment debtors inherited the interest of one of the joint decree-holders, the decree was extinguished *pro tanto*. The decree was therefore extinguished only to the extent of the fourth plaintiff's interest in the joint decree and was executable to the extent of the interests of plaintiffs 1 to 3. In the absence of any direction in the decree as to the extent of the interests of each of the four plaintiffs in the joint decree for costs, equity must prevail and it must be held that each of the four plaintiffs was equally interested in the joint decree. (*Verghese, C.J. and Gopal Menon, J.*) JOHN *v.* CHANDY. 12 T.L.T. 522.

——O. 21, R. 16—*Applicability—Conditions—Mortgage decree for sale of mortgaged property only—Set-off against a simple money decree obtained by mortgagor—Permissibility.*

A mortgage decree for sale of the mortgaged property, where there is no remedy except against the property and where there is no obligation on the part of the mortgagor personally to pay any sum of money, is not a decree for the payment of money within the meaning of O. 21, R.
mortgagee a
against him b
that where *A* holds a decree against *B* personally, and *B* files a suit on a mortgage executed by *C* impleading *A* as purchaser of a portion of the equity of redemption and obtains a decree, the parties cannot be held to fill the same character in the two suits and that the two decrees cannot be set-off one against the other. The parties cannot be deemed to fill the same character when in one suit they figure in their individual capacity while in the other, they come in as a trustee, manager or on behalf of their tarwads. (*Narayana Iyer and Gopala Menon, JJ.*) ABRAHAM *v.* OUSEPH.
12 T.L.T. 478=28 T.L.J. 182.

——O. 21, Rr. 17 and 18—*Applicability.*

In order that R. 17 of O. 21, C. P. Code, may apply, the decree must be one under which two parties are entitled to recover sums of money from each other. The effect of R. 18 of O. 21, is to apply the provisions of R. 16 and R. 17 to cases of mortgage or charge when a personal liability has been created. R. 17 can become applicable only if two parties are entitled to recover sums of money under the decree. That means that each party must have been granted a personal relief against the other. O. 21, R. 18 has to be read subject to this condition. (*Gopal Menon and Sankarasubba Iyer, JJ.*) KRISHNA PILLAI *v.* PADMANABHA PILLAI. 12 T.L.T. 336=28 T.L.J. 200.

C.P. CODE REGN. O. 36, R. 5.

——O. 22, R. 9—*Compliance—Application to implead legal representatives of deceased party—If an application to set aside abatement.*

An application to bring on record the legal representatives of a deceased party can be treated as in substance an application to set aside the abatement under O. 22, R. 9 of the C. P. Code. (*Narayana Iyer and Gopala Menon, JJ.*) VIJENDRA RAO *v.* NARAYANA PILLAI. 28 T.L.J. 114.

——O. 23, R. 1—*Scope—Withdrawal of suit with permission—Binding nature of order permitting—Right of parties to challenge in collateral proceeding—Subsequent suit—Form and frame of—Withdrawal permitted without notice to defendants—Effect of*—Res judicata.

When in the exercise of its jurisdiction the Court passes an order under O. 23, R. 1, C. P. Code, allowing the plaintiff to withdraw the suit with permission to bring a fresh suit, the order is binding upon the parties to the former suit until it is set aside by appropriate proceedings in that suit. Such order cannot be questioned in a collateral proceeding. In the absence of any special directions in this behalf made by the Court allowing withdrawal of the suit, there is no legal obligation cast upon the plaintiff to shape the suit in any particular manner provided the second suit is in respect of the same subject matter and is based on the same cause of action. No permission is necessary to enable a plaintiff to withdraw the suit. The withdrawal of a suit without permission to institute a fresh suit will however operate as *res judicata* when a separate suit is instituted with respect to the same subject-matter and on the same cause of action. The fact that no specific notice was given to the defendant of the plaintiff's application to withdraw the suit will amount, if at all, only to a material irregularity in the exercise of jurisdiction and cannot be deemed to have been passed without jurisdiction at all. (*Parameswaran Pillai and Kumaran, JJ.*) MUHAMMED MYDEEN *v.* SHAHOOLHAMEETHU.
12 T.L.T. 819=28 T.L.J. 141.

——O. 25, R. 1—*Security under—When to be ordered.*

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ess grounds are shown tend-
is true. (*Parameswaran Pillai, J.*) NARAYANA IYER *v.* KRISHNA IYER.
12 T.L.T. 687=28 T.L.J. 87.

——O. 36, R. 5 (1) (a), (b) and (c)—*Attachment before judgment—When may be granted—Duty of Court.*

A condition precedent to the making of any order for attachment before judgment is that the Court must be satisfied that the defendant, with a specified intent, is about to do or has done one of the acts specified in O. 36, R. 5 (1) (*a*), (*b*) and (*c*). No Court should grant an attachment before judgment on light grounds or unless it is perfectly satisfied by trustworthy evidence that the defendant is about to dispose of property or to remove it from the jurisdiction of the Court. In all applications for attachment before judgment, there must be *uberrima fides* on the part of the plaintiff, and where the utmost good faith is wanting, the application should be rejected. The issue of an *interim* attachment is a very extraordinary remedy to be sparingly used in exceptional cases. It is an unwholesome practice to grant *interim* ly for the

asking, without seriously considering the question whether the circumstances of the case do justify the granting of such an extraordinary remedy as an order of *interim* attachment. Unless the Court is satisfied that the defendant is about to dispose of his property with a view to obstruct or delay the execution of the decree which may be passed eventually, it will have no jurisdiction to pass an order for attachment before judgment on the mere ground that such attachment will facilitate the plaintiff in his realising the fruits of his decree. (*Parameswaran Pillai and Narayana Iyer, JJ.*) CHERIAN *v.* PERUMAL. 28 T.L.J. 122.

——**O. 40, R. 10**—*Security for costs—Grounds for—Poverty of appellant.*

The poverty of the appellant and the fact that therefore the petitioner may lose her costs are not sufficient grounds for demanding security. The discretion vested in the appellate Court under O. 40, R. 10 of the C. P. Code, should be exercised judicially and very special grounds must be shown in support of such an application. Some particular circumstances must be shown such as that the appellant has been acting in a vexatious or improper manner or some like grounds. There must be some evidence at least of facts which cast doubts on the honesty and *bona fides* of the appellant such as obstruction to the execution of the decree in the lower Court or the fact that the appellant is not the real litigant or if in any way it can be shown that the appeal is vexatious. (*Nilakanta Iyer, J.*) KUNCHUKUTTI AMMA *v.* KRISHNAN ASARI. 28 T.L.J. 140.

——**O. 45**—*Application under* in forma pauperis—*Appeal* in forma pauperis—*Dismissal for default—Restoration application—Court-fee—If may be dispensed with.*

The remedies which are open to an appellant whose appeal filed *in forma pauperis* has been dismissed for default are (1) an application for restoration on payment of a court-fee of Rs. 2 within 30 days from the date of decree or from knowledge of decree dismissing the appeal, or (2) a review up to 90 days from the date of the decree on payment of half the court-fee on appeal or (3) a review from the 90th day onwards on payment of full court-fee on appeal. In the provisions of O. 45 relating to review, there is no special provision exonerating payment of court-fee in the case of reviews by *paupers*. (*Verghese, C.J. and Gopal Menon, J.*) 12 T.L.T. 552.

CONTEMPT OF COURT—*Inherent jurisdiction of High Court.*

The High Court as the Highest Court in the State has inherent jurisdiction to deal with contempts of Courts committed *ex facie* of the High Court and in Courts subordinate to it, in a summary manner. (*Verghese, C. J. and Sankarasubba Iyer, J.*) KUNJU KOYA NURDIN, *In re.* 28 T.L.J. 155.

CONTRACT—*Part-performance—Doctrine of—Conditions for application of.*

The jurisdiction to carry into execution transactions clothed imperfectly in legal forms being purely equitable, Courts of Equity have imposed on themselves certain limits for the exercise of the jurisdiction. Those limits must be clearly recognised and carefully guarded. The first essential condition for the exercise of the jurisdiction is that there must be a final engagement between the parties. If the circumstances in the case suggest that the matter still rested in negotiation, there is no room to charge a person on the equities resulting from the acts done in execution of the contract. The second essential condition is that there are such actings of the parties as must be unequivocally and in their own nature referable to the agreement alleged. If the alleged part-performance cannot be connected with the alleged agreement, then there is nothing which the Court has to undo and consequently nothing which has been left undone and which ought to be carried into further execution. (*Narayana Iyer and Gopala Menon, JJ.*) ATCHUTHAN PILLAI *v.* VARIATHU. 12 T.L.T. 471.

——Third party—Right of suit. *See* MORTGAGE—INTEREST. 12 T.L.T. 541.

——*Third party—Right of suit.*

A stranger to a contract cannot enforce the terms of a contract entered into between other persons even though under the contract a benefit is reserved to him, unless the contract can be brought within one of the recognised exceptions. (*Narayana Iyer and Gopala Menon, JJ.*) KALIAN *v.* KOCHUNNI. 12 T.L.T. 514.

CONTRACT ACT, S. 235—*Applicability—Agent's personal liability on contract—Contract signed by agent in own name.*

Whether an agent is to be taken to have contracted personally, or merely on behalf of the principal, depends on what appears to have been the intention of the parties, to be deduced from the nature and terms of the particular contract and the surrounding circumstances. If the contract is in writing, the presumed intention is that which appears from the terms of the written agreement as a whole. An agent who signs a contract in his own name without qualification, though known to be an agent, is understood to contract personally, unless a contrary intention plainly appears from the body of the instrument, and the mere description of him as an agent, whether as part of the signature or in the body of the contract, is not sufficient indication of a contrary intention to discharge him from the liability incurred by reason of the unqualified signature. There is no distinction in principle between the case of a man who represents that he has authority from another when he has no authority whatever, and the case of a man who represents that he has certain authority from another when his authority is of another description. In neither case can the man who makes the representation be said to be the authorised agent of the other with reference to the matter of which he has no authority. S. 235 of the Indian Contract Act is intended to apply to both classes of cases. (*Verghese, C.J. and Narayana Iyer, J.*) MAHAMMATHAPPA ROWTHER *v.* RAGHAVAN PILLAI. 12 T.L.T. 284.

——**S. 239**—"*Partnership*"—*Nature and legal incidents of.*

A partnership under S. 239 of the Indian Contract Act is a relationship which subsists between persons. In the eye of the law, a firm has no existence apart from the members constituting the firm. A firm is not a juristic person which the law takes cognizance of, as in the case of an idol or corporation. A partnership firm is merely a collective or compendious name of the individuals who are members of the partnership. When a suit is instituted by or against a firm it is only a suit by or against a group of individuals. (*Kumaran and Sankarasubba Iyer, JJ.*) VENKITACHALAM IYEN *v.* KOLAPPAN PANICKAR. 12 T.L.T. 466 = 28 T.L.J. 128.

CRIMINAL PROCEDURE CODE REGULATION S. 161—'*Consequence*'—*Meaning of.*

The word 'consequence' in S. 161 of the Cr. P. Code means a consequence which forms part and parcel of the offence and does not amount to a consequence which is not such a direct result of the act of the offender as to form any part of the offence, so that a loss finally resulting from a criminal breach of trust is no part of the offence. (*Verghese, C.J. and Gopal Menon, J.*) CHUDALAYANDI PILLAI *v.* REGHUNATHA KAMMATHI. 12 T.L.T. 644 = 28 T.L.J. 12.

CRIM. P. CODE REG., S. 256.

——S. 256—*Compounding of offence—Meaning of—Agreement between complainant and one of several accused for composition of offence within 3 days—Effect of.*

The compounding of offence contemplated in S. 256, Cr. P. Code, is more than a mere promise to the withdrawal of the prosecution. It denotes an arrangement arrived at between the parties, whereby all their differences have been settled and all further proceedings in the case agreed to be dropped. Compounding an offence supposes an arrangement by which the parties have settled their differences, and in the mere usual acceptation of the
some consid
prosecution.
the parties have settled their differences and not a mere arrangement to settle the disputes in future as the result of some action either by themselves or third parties. Complainant's composition of the offence with one of the accused persons has not the effect of entitling the other co-accused charged with or under trial for the same offence to an acquittal. (*K. P. Gopal Menon and R. Gopala Menon, JJ.*) HARIHARA IYER *v.* ANANTHASUBRAMONIA IYER. 28 T.L.J. 109.

——S. 367—*Power of Magistrate to alter rate of maintenance.*

Under S. 367 of the Criminal Procedure Code, the Magistrate is empowered to make such alteration in the

stances which could form the basis of a new order under the section, the Magistrate has no power to review the previous order. (*Narayana Iyer and Kumaran, JJ.*) LEKSHMI PILLAI *v.* RAMAKRISHNA PILLAI. 28 T.L.J. 93.

——S. 392—*Applicability—Moonnamsthanakaran if can be committed to civil jail for default.*

Even in regard to Kychit taken from Moonnamsthanakaran, S. 392, Cr. P. Code, is applicable. If the movables belonging to Moonnamsthanakaran who defaulted to pay the amount ordered to be recovered from him (for failure to produce the thondi log entrusted to him) had already been proceeded against, by attachment and sale, as is contemplated in the section, it is clear that the Court has power to commit the person, concerned to civil jail. (*K. P. Gopal Menon and Gopala Menon, JJ.*) 12 T.L.T. 54

CRIMINAL TRIAL—*Conviction—Basis of—Prosecution evidence disbelieved in essential particulars Remaining evidence—Conviction on basis—Sustainability.*

Where the prosecution case is disbelieved in essential particulars, it is unsafe to convict the accused on the basis of the remaining part of prosecution evidence which may appear reliable. Where the prosecution case is materially and substantially false and particularly where the defence version of the occurre
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illegal to convict the accused upon the r
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EXECUTION.

Where the summons issued to the defendant in the suit is served by affixture, in the absence of evidence to the contrary, such service has to be presumed to be proper service of summons. Assuming that there was not proper service of summons in that suit, improper service alone would not be sufficient to set aside an *ex parte* decree which obtained in that suit. Proof of mere non-service of summons would not be sufficient ground for cancellation of an *ex parte* decree, and the plaintiff can succeed only on proving fraudulent suppression of summons "as the result of deliberate design". Where a
cancellation of the *ex parte*
raud, he can succeed only on
mediated and intentional contrivance to keep the parties and the Court in ignorance of the real facts and obtaining a decree by that contrivance." (*Verghese, C.J. and Gopala Menon, J.*) GEEVARGHESE *v.* ABRAHAM. 12 T.L.T. 488.

——*Validity—Personal decree against defendant without notice and behind his back—If nullity—Execution Court—Power to refuse execution.*

A personal judgment rendered against a defendant without notice to him and behind his back is without jurisdiction and is entirely void and the executing Court is competent to refuse execution of a personal decree passed without jurisdiction. (*Verghese, C.J. and Parameswaran Pillai, J.*) CHIDAMBARA IYEN *v.* SUBRA-
T.L.J. 85.
aintenance
of *udam*
allotment
ARUMAK
T.L.J. 72.
—*Entries*

Entries in School Admission Registers are not admissible in evidence to prove the age of a pupil, unless the person who made such entries and the person who supplied the information are examined to prove the correctness of the entries. (*Parameswaran Pillai and Narayana Iyer, JJ.*) NARAYANAN *v.* VARKEY. 12 T.L.T. 339 = 28 T.L.J. 57.

——*Books of account—Evidentiary value of—If per se proof of transactions.*

Account books by themselves cannot prove transactions as they are merely corroborative evidence. It is hardly proper to stigmatise the books of a respectable firm as books which it is not difficult to fabricate without coming to a specific finding that the books produced were as a matter of fact fabricated. Errors and omissions
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12 T.L.T. 498 = 28 T.L.J. 126.

EXECUTION—*Abatement—Death of judgment-debtor—One legal representative on record—Application to implead another legal representative—Limitation.*

If one of the legal representatives of the deceased defendant is already on record, that circumstance alone is sufficient to keep the execution application alive. If
the decree holder, to
taken to obtain the
Iyer and Kumaran,
...UNJAN.
12 T.L.T. 485.
— Decree without
on of. *See* DECREE
28 T.L.J. 85.
go behind decree—
...n—Power to refuse-

execution. *See* ABATEMENT—APPEAL.
12 T.L.T. 689.

——*Revivor—Conditions—Application in accordance with law—What amounts to.*

In order that an application for execution of a decree may be a continuation or revival of a prior application which has been dismissed, two conditions must co-exist. These conditions are that the default should not have been of the decree-holder which brought about the dismissal and that the scope and character of the second application must be similar to that of the provious one of which it is claimed to be a continuation. O. 21, R. 15, C. P. Code, directs the Court to see, when an application is filed under O. 21, R. 11, whether it is in form, and if it is not in form by not adding the list of properties to be attached, the application has to be ordered to be amended and if not complied with, the application has to be rejected; and when the defect is remedied within the prescribed time, it should be deemed to be an application in accordane with law and presented on the date when it was first presented. The omission of the officers of the Court in not directing the amendment of the execution application by adding a list of properties to be attached should not be visited on the decree-holder, and the omission to attach the list of properties being only a matter of amendment the latter application cannot for that reason be regarded as an application not in accordance with law. (*Verghese, C.J. and Kumaran, J.*) APPAVU *v.* KOCHUMMINI.
12 T.L.T. 582.

FRAUD—*Pleading and proof—Rule as to vague allegations—Sufficiency of.*

It is clear law that a pleading charging fraud must definitely set forth the particulars; and general allegations, however strong the words may be, cannot be noticed by Courts. In cases where fraud of one kind is alleged and of another kind is proved, relief cannot be given on the latter ground not alleged. (*Verghese, C.J. and Gopala Menon, J.*) OOMMEN *v.* TAMPI.
12 T.L.T. 681.

HIGH COURT REGULATION (Second Amendment Regulation II of 1113)—*Appeals filed prior to jurisdiction of a single Judge.*

A single Judge of the High Court has power to hear appeals, as prescribed in the Amended Regulation II of 1113, filed prior to the day when the amendment came into force. (*Joseph Thaliath and Parameswaran Pillai, JJ.*) NAKSHATRAM *v*, SUBROMONIAN CHETTIAR.
12 T.L.T. 826=28 T.L.J. 99.

——**(Second Amendment Regulation III of 1113)**—*Criminal Revision petition—Competency of single Judge to hear and decide.*

A single Judge of the High Court is competent to hear and decide a Criminal Revision Petition as prescribed in Regulation III of 1113. (*Joseph Thaliath and Parameswaran Pillai, JJ.*) PARAMESWARAN PILLAI *v.* KRISHNAN NAIR. 12 T.L.T. 833=28 T.L.J. 106.

HINDU LAW—*Debts—Widow—Debt incurred for improving the estate or for pilgrimages—If binding on the reversionary estate.*

A widow cannot charge a reversionary estate with debts for improving it. So long as a widow's pilgrimages are intended to be for the benefit of herself or her own soul, the expenses incurred therefor are not binding on the reversionary estate, though it may be a different matter if the pilgrimages are undertaken for the benefit of the soul of the last owner. (*Verghese, C.J. and Joseph Thaliath, J.*) NILACANTAN *v.* PADMANABHAN.
12 T.L.T. 601.

INCOME-TAX REGULATION, S. 2 (ii)—*Previous "year"—Meaning—Alteration of year once adopted—Power of Income-tax Officer.*

S. 2 (*ii*) of the Income-tax Regulation gives the option to the assessee to determine the previous year in respect of submitting his income-tax return. When the assessee has exercised that option, provided it is as prescribed by the Regulation, he has to submit his subsequent returns for periods of 12 months thereafter to which he must adhere. If, however, he discards that option, the period of 12 months contemplated by the Regulation is on a date ending with the 31st Karkadagom. The Regulation does not authorise an Income-tax Officer to depart from the Official year mensioned in the Regulation. The Regulation does not empower the Chief Revenue Authority to substitute any other year in its place other than the one ending with 31st Karkadagom. Where to avoid re-assessment of the assessee for a portion of the amount twice over it was necessary to effect a wholesale adjustment of the assessments for several years back.

Held, that the Chief Revenue Authority was not forbidden by the Regulation to effect a wholesale adjustment so as to be in conformity with natural justice. (*Verghese, C.J. Joseph Thaliath and Kumaran, JJ.*) COMMISSIONER OF INCOME-TAX TRAVANCORE *v.* RAJARATNAM PILLAI. 12 T.L.T. 801= 28 T.L.J. 148 (F.B.).

——**S. 8 (2) and (3)**—*Loans advanced by partners and interest paid thereon—Claim for deduction—Maintainability—Conditions.*

The question whether loans advanced by partners are real borrowings, and interest paid thereon should be deducted when assessing income-tax on the earnings of the firm, are questions of fact in each case. It has to be clearly made out that these borrowings are not designed to evade payment of income-tax due to the Governor. (*Verghese, C.J., Joseph Thaliath and Kumaran, JJ.*) COMMISSIONER OF INCOME-TAX TRAVANCORE, *v.* RATANSEE ASSARIA & CO. 12 T.L.T. 648= 28 T.L.J. 15 (F.B.).

——**S. 8 (ii)**—*Partnership—Personal expenses of partner—If can be deducted.*

The allowances to be made before computing income from business are provided in S. 8 (*ii*) of the Regulation. The personal expenses incurred by a partner for meals and for rent are not deductions allowed by the above section. Only such expenditure can be deducted if it is incurred solely for the purpose of earning profits of the business. (*Verghese, C.J., Joseph Thaliath and Kumaran, JJ.*) COMMISSIONEK OF INCOME-TAX, TRAVANCORE *v.* RAJARATNAM PILLAI.
12 T.L.T. 801=28 T.L.J. 148 (F.B.).

——**Ss. 23 and 27**—*Review—Chief Revenue Authority—Power to review own order.*

S. 27 of the Income-tax Regulation lays down that for the purpose of any enquiry under Chapter II relating to the assessment of income-tax, the Income tax Officer shall have the same powers as are vested in a Court under the Code of Civil Procedure, and that proceedings in which evidence is taken by such officer shall be deemed to be judicial proceeding within the meaning of Ss. 187 and 226 of the T. P. C. . . . . . . All the remedies available to Courts in judicial proceedings are available to Income-tax Officers also in judicial proceedings. The Chief Revenue Authority has the power to review his own order. (*Verghese, C.J. Joseph Thaliath and Kumaran, JJ.*) COMMISSIONER OF INCOME-TAX, TRAVANCORE *v.* RAJARATNAM PILLAI.
12 T.L.T. 801=28 T.L.J. 148 (F.B.).

——S. 50—*Stay order—Power of Court to pass under.*

The High Court exercises merely a consultative function when it proceeds to act under S. 50, sub-Sec. (5),

a stay order the collection of tax pending proceedings before it under S. 50, Income-tax Regulation. (*Sankarasubba Iyer and Kumaran, JJ.*) 12 T.L.T. 324.

——S 50 (1)—*Scope—Reference under—When to be made—Duty of Division-Peishkar Commissioner.*

The provision in sub-Section (1) of S. 50 of the Income tax Regulation cannot be construed as having created an obligation on the Division Peishkar-Commissioner to refer questions of law on which he feels no doubt and which could be decided in accordance with the provisions of the Regulation and precedents furnished by the decisions of the High Court. It is clear that the Division Peishkar is bound to make a reference only in cases where he entertains a doubt as to the principles that have to be applied in the disposal of such cases. If he makes a wrong decision, the Regulation provides the necessary remedy for the aggrieved party. It is however necessary to impress upon the Division Peishkars-Commissioners that, as far as possible, they would do well to have all important questions of law arising for decision referred to the High Court under S. 50 of the Regulation. (*Verghese, C.J. Joseph Thaliath and Kumaran, JJ.*) COMMISSIONER OF INCOME-TAXT, RAVANCORE *v.* RATANSEE ASSARIA & CO. 12 T.L.T. 648 = 28 T.L.J. 15 (F.B.).

——S. 50 (2)—*'Passing' of order—Publication or communication of the order to the assessee—If essential R. 21.*

The 'passing' of an order under S. 50, sub-Sec. ... of the Income-tax Regulation means publication or communication of the order to assessee as provided by R. 21 of the Income tax Rules ... *Joseph Thaliath and Kumaran,* ... ASSARIA & CO. *v.* SIRKAR. 28 ...

——S. 50 (ii)—*"Passing" of orde... cation to assessee—If essential.*

Held, the "passing" of an order under S. 50 (*ii*) of the Income tax Regulation means publication or communication of the order to the assessee as provided by rule 21 of the Income tax rules. (*Verghese, C.J. and Joseph Thaliath, J.*) 12 T.L.T 548.

——Ss. 16 (2) and 33 (3)—*Relative scope and effect of—Insolvent—Suit against without leave of Court—Whether liable to be dismissed—Validity of decree and execution proceedings in such suit.*

On 15-7-1108 a subscriber in a ... defendant had also joined, filed a ... 1098 against the foremen and all paid-up subscriptions. The foremen were declared insolvents on 20 7-1095 and a vesting order was passed on 23-4-1098. The suit was decreed, and in execution of the decree the foreman's rights under the chitty security bond executed by the defendant were attached and sold, and purchased by the decree. The present suit filed on the said chitty security bond was contested on the ground that the prior suit should not have been instituted without the leave of the Insolvency Court and without impleading the Official Receiver as a party thereto.

Held, the prior suit was not dismissed, it was never stayed, a decree was duly passed in the presence of all the creditors concerned, the decree was duly executed and the present rights were sold, and the sale was not

characterised as a fraud on creditors or otherwise bad. The Insolvency Law did not make a purchase *ipso facto* void. A purchaser of an insolvent's property at a sale in execution of a decree, even with notice of the insolvency, who purchased the property in good faith acquired a good title to it against the Receiver in whom the Insolvent's property had vested under S. 16, subsection (2) of the Insolvency Regulation. The provision contained in S. 16, sub section 2 was controlled by the later provision in S. 33, sub section (3), and effectively secured the title of the purchaser of an insolvent's property at a sale in execution in case of good faith being established on the part of the purchaser. There was no basis for the position that omission to obtain the required leave to commence a suit must result in dismissal of the suit, even where the infringement of the enactment was innocent and was incurred in ignorance of the existence of such insolvency proceedings. (*Narayana Iyer and Gopala Menon, JJ.*) CHACKO *v.* RAMASWAMY IYEN. 12 T.L.T. 269 = 28 T.L.J. 158.

——S. 53—*Transfer—Avoidance of—Grounds.*

The most important consideration which has to be borne in mind in determining whether a transfer can be avoided under S. 53 of the Insolvency Regulation, must be to find out what the dominant intention underlying the document has been. The mere fact that valuable consideration has passed for the transfer by the debtor cannot necessarily lead to an inference of good faith also. This is the reason why S. 53 states that the transfer to be protected must be supported by valuable consideration and good faith. Where there has been valuable consideration for the transfer adequate to the occasion, that cir... e that there was ... is consideration ... interest on the part of the transferor can be inferred, and the evidence does not show that the transfer is a mere cloak for re... vendor, the transfer has to be ... ie creditors. Where the consi... may be evidence of want of ... tself be sufficient ground for ... (*Parameswaran Pillai and* ...) GOPALA PILLAI *v.* RAJANKOM IYER. 12 T.L.T. 667.

INTEREST—*Rate—Claim by way of damages—Proper rate—Amount reserved in sale deed out of consideration.*

In a suit for sale price reserved in the sale deed, interest on the reserved amount alone can be allowed as compensation and when interest is claimed as damages no more than 6 per cent. can be awarded. (*Kumaran and Sankarasubba Iyer, JJ.*) NARAYANAN UNNITHAN *v.* KALYANI AMMA. 12 T.L.T. 527.

... PROCLAMATION

... *confined to jenmom* ... *can be created by a jenmi in respect of non-jenmom lands—Kanom deed—Covenant for renewal—Construction.*

Held, Cl. 8 of the Royal Proclamation of 1042 applies only to what are strictly known as jenmom lands as distinguished from Pandarapattom and other non-jenmom lands. There is little doubt that a jenmi as any other person owning lands may confer by contract permanent rights of occupancy and create an irredeemable tenure in respect of land demised by him. It is well-established that in such cases the covenant for renewal, if any, will not be construed as a covenant for perpetual renewal unless the intention in that behalf is clearly shown, for instance, when the covenant expressly states that the lease is to be renewed for ever, otherwise the agreement is satisfied and exhausted by a single

JENMI AND KUDIYAN REGULATION, S. 3.

renewal. A covenant to receive the construction of perpetual renewal, must be plain and distinct and such as to bear no other construction without force or violence done to the words or the context. (*Parameswaran Pillai and Narayana Iyer, JJ.*) CHACKO v. KRISHNAN NAMBOORI. 12 T.L.T. 677=28 T.L.J. 173.

JENMI AND KUDIYAN REGULATION S. 3—"*Jenmi*"—*Meaning of*—*Thettom, meaning of.*

The ordinary meaning of the word "thettom" is "acquisition". Where a property is described as kudi jenmom in the pattah, it does not cease to be jenmom property. A person who has succeeded to the rights of a jenmi over jenmom properties is himself a jenmi within the meaning of the term in S. 3 of the Jenmi and Kudiyan Regulation. (*Verghese, C.J. and Sankarasubba Iyer, J.*) SREEDHARAN MOOSAD v. NARAYANA IYEN. 12 T.L.T. 555.

——(Old) **S. 4**—*Kanom*—*Transfer of jenmom right by jenmi*—*Tenant's right to deduct tax or enhanced tax paid by him from the michavarom payable*—*Right to collect michavarom lost to the original jenmi*—*Effect.*

S. 4 of the Jenmi and Kudiyan Regulation (before it was amended by the Amending Regulation XII of 1108) throws the liability for payment of tax or the enhanced tax on the transferee of the jenmom holding, in ambiguous terms. A kanom tenant who had paid the tax or the enhanced tax imposed by the Sircar on account of the transfer of the jenmom right of the original jenmi is entitled to deduct such payment from the michavaram payable under the lease. The above right will not be affected by the fact that the right to collect michavarom has been lost to the original jenmi before he effected a transfer of the jenom right. (*Gopal Menon, Parameswaran Pillai and Sankarasubba Iyer, JJ.*) MATHEVAN PILLAI v. PARAMESWARAN PILLAI. 12 T.L.T. 634=28 T.L.J. 177 (F.B.).

KANOM—*Deed creating relationship*—*Subsequent registry from Sirkar*—*Acceptance of by tenant*—*Whether has the effect of terminating tenancy created by kanom deed.*

Where the plaintiff sued on Exhibit A, kanom ethir deed, for arrears of michavarom due from the defendant and where the latter contended that the plaint property was Sirkar Pandarapattom land in respect of which he had obtained registry in patta.

Held, so far as the plaintiff and defendant were concerned, the relation created under Exhibit A could not be deemed to have been terminated by the acceptance of registry by the defendent from the Sirkar. Unless the defendant had also intended at the same time to repudiate the plaintiff's title to the knowledge of the plaintiff and to hold the property under independent title hostile to the plaintiff, the possession of the defendant could not be treated as adverse to the plaintiff. On the other hand, so long as the tenancy created under Exhibit A lasted and the registry had not been set up by defendant in the past as the only title under which he was in possession, his possession must be treated in the eye of law as possession under the plaintiff. (*Parameswaran Pillai and Kumaran, JJ.*) THRATHARU NAMPOORIPAD v. CHUMMARU. 12 T.L.T. 535=28 T.L.J. 164.

LAND ACQUISITION REGULATION, S. 6 (3)—"*Public purpose*"—*Acquisition for the benefit of a section of the public*—*Declaration under S. 6 (3)*—*Effect of.*

Lands acquired for the benefit of a section of the public is acquisition for a public purpose. It will be seen from Cl. (3) of S. 6 of the Land Acquisition Regulation that when a declaration as prescribed by Cl. (2) of the section is published in the Government Gazette, such declaration shall be conclusive evidence that the

MALICIOUS PROSECUTION.

land was needed for a public purpose. After such a declaration, it is not open to the owner to contend in any Court that the land was not needed for a public purpose. (*K.P. Gopal Menon and R. Gopala Menon, JJ.*) IYPE v. THE DEWAN OF TRVANCORE. 12 T.L.T. 672.

LIMITATION—*Chitty*—*Joint foremen*—*If partners*—*Dissolution of partnership*—*Termination of Chitty*—*Effect of suit for dissolution of partnership and accounts*—*Limitation*—*Right to claim share of the unrealised assets.*

Joint foremen of a chitty should be deemed to be partners in the eye of law. Where it is clear from the allegations in the plaint that the partnership which is the basis of the suit was constituted for the sole purpose of the conduct of the chitty, the partnership must be deemed to have dissolved with the termination of the chitty. A suit for the dissolution of partnership and accounts is clearly barred if it is brought after three years from the date of the dissolution. If the suit for accounts is unsustainable owing to the bar of limitation, plaintiff cannot of course lay any claim to assets that have yet to be realised. (*K. P. Gopal Menon and R. Gopala Menon, JJ.*) PARAMESWARAN PILLAI v. NARAYANA PANICKAR. 12 T.L.T. 500=28 T.L.J. 169.

——*Suit for recovery of balance of sale consideration*—"*On demand*"—*Meaning of.*

The term "on demand" has been interpreted to mean "forthwith" or "immediately" when used in negotiable instruments which derive their peculiar characteristic from the law merchant. Such a construction cannot properly be applied to instruments falling outside the law merchant. Except in transactions connected with law merchant, the word "on demand" has a meaning and there should be a demand before cause of action can arise. (*Kumaran and Sankarasubba Iyer, JJ.*) NARAYANA UNNITHAN v. KALYANI AMMA. 12 T.L.T. 527.

LIMITATION REGULATION, S. 19—*Applicability*—*Admission of a mortgage by the mortgagee in pokkuvaravu application if an acknowledgment of liability.*

The admission of a mortgage by the mortgagee in a pokkuvaravu application in respect of the suit property, is a sufficient and valid acknowledgment under S. 19 of the Limitation Regulation. (*Verghese, C. J. and Parameswaran Pillai, J.*) PARUKUTTI AMMA v. SAMUEL. 12 T.L.T. 558=28 T.L.J. 80.

——**Arts. 86 and 119**—*Applicability*—*Suit for contribution claiming charge.*

Where, in a suit for contribution, the plaintiff by virtue of the payment acquires a charge upon immovable property, Art. 119 of the Limitation Regulation applies. Art. 86 applies only to a suit for a personal decree for contribution and not to a suit to enforce a charge. (*Narayana Iyer and Sankarasubba Iyer, JJ.*) VERGHESE v. OUSEPH. 12 T.L.T. 593.

MALICIOUS PROSECUTION—*Action for*—*Essentials to be proved*—*Reasonable and probable cause*—*Burden of proof.*

The plaintiff in a suit for malicious prosecution has to prove that he was prosecuted by the defendant, that the defendant acted without reasonable and probable cause, that the defendant acted maliciously and that prosecution ended in plaintiff's favour. The term "reasonable and probable cause" means a genuine belief based on reasonable grounds that the proceedings are justified. When a person has been acquitted, there would be presumption of want of reasonable and probable cause in an occurrence when there was no scope for surmise and the evidence was given by the defen-

MALICIOUS PROSECUTION

dant of what he actually said. To throw the burden of proof on the plaintiff to prove that the charge brought by the defendant against him was false, is tantamount to putting him to the proof of his innocence without giving him the benefit of acquittal obtained by him in the criminal Court. The burden of proof shifts to the defendant that the charge disbelieved by the Criminal Court was true. (*Narayana Iyer and Kumaran, JJ.*) RAMASWAMI IYEN *v.* SUBULEKSHMI AMMAL. 12 T.L.T. 276.

——*Damages—Proof of.*

There are three sorts of damages, any one of which is sufficient to support an action for malicious prosecution. Damages to a man's fame or reputation; damages to his person and damages to property. (*Narayana Iyer and Kumaran, JJ.*) RAMASWAMY IYEN *v.* SUBULEKSHMI AMMAL. 12 T.L.T. 276.

——*Prosecution—Malice—Proof of.*

A prosecution need not be malicious from the very commencement of it. It may have been commenced under a *bona fide* belief in the guilt of the accused. But it may subsequently become malicious in any of the stages through which it has to pass, if the prosecutor, having known subsequently of the innocence of the accused perseveres *mala animo* in the prosecution with the intention of procuring a conviction of the accused. Where in a suit for malicious prosecution, the defendant gets up false evidence in support of the charge, it shows not merely that he had not sufficient and reasonable cause but also that he was actuate

yana Iyer and Kumaran, JJ.)

SUBULEKSHMI AMMAL.

——*Suit for—Essentials to be proved—Absence of reasonable and probable cause—Malice — Proof of—Necessity.*

Before the plaintiff can succeed in his claim for damages for malicious prosecution, he must prove *malice* on the part of the defendant. He must also prove that the defendant had no probable and reasonable cause for making the complaint. (*Parameswaran Pillai and Sankarasubba Iyer, JJ.*) ABDALKADIR *v.* KUNJI AMMA. 28 T.L.J. 137.

MARUMAKKATHAYAM LAW — *Alienation—Karnavan—Powers of—Partnership business started by karnavan with stranger—Tarwad—If bound—Consent of all adult members—Effect of.*

It is well-recognised law that in the case of alienation by the karnavan of a marumakkathayam tarwad

ledgments made by the karnavan or other executants of the document do not by themselves constitute proof of consideration. The presumption of tarwad necessity can relate only to acts falling within the scope of the ordinary duties of a karnavan. A karnavan is incompetent to enter into any speculative transaction beyor

cularl

with

in fact enter into a contractual relation with the stranger. Consent on the part of the adult members of the tarwad, however valuable it may be to lead to a reasonable presumption of tarwad necessity, does not by itself constitute tarwad necessity. In other words, "consent" and "tarwad necessity" are not synonymous terms, nor are

Nair Regulation o

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made with the written consent of all the major members of the tarwad irrespective of any tarwad necessity for the same. The consent of all the adult members of the tarwad raises a reasonable presumption as to valid tarwad necessity, and in the absence of fraud or other invalidating circumstances, the alienation will be upheld as one for tarwad necessity. But this rule will not apply to cases where the alienation has the consent of all the adult members but is demonstrably void of tarwad necessity. Similarly family arrangements entered into with the written consent of all the major members of the tarwad will be binding in the absence of fraud or manifest prejudice. The broad observation which suggests that in the case of alienations of whatever character, effected with the consent of the adult members of a tarwad, the minors would be incompetent to question them except on the ground of fraud is not sanctioned either by the well established rules of Marumakkathayam Law or by any specific provisions of the NairRegulation. The consent of the adult members can only lead to a responsible presumption of tarwad necessity, which if unrebutted will favour the creditor. But the strength of such presumption will vary with the nature and character of the admission made, the occasion when it was made and other attendant circumstances. The principle that,

amily has no authority to

the risk and liability of

, is applicable with greater force to Nair tarwads than to joint Hindu families, especially after the enactment of the Nair Regulation under which no alienation unless it is supported by consideration and tarwad necessity will be binding on the tarwad. (*Verghese, C.J., Parameswaran Pillai and Narayana Iyer, JJ.*) SWAMINATHA SASTRIAL *v.* SANKARAN NAINARU. 12 T.L.T. 606 (F.B.).

——*Junior members—Self-acquisitions—Devolution of—Right of common Tarwad and of his branch—Adverse possession.*

Where the Karnavan of the common Tarwad released the self acquisition of a junior member outstanding on mortgage after his death, and obtained possession of the property, and where a suit was instituted by the plaintiff, Karnavan of the branch of the deceased junior member, to recover possession on payment of the mortgage amount,

Held, the common Tarawad has admittedly been in possession of the plaint properties since the date of the release and the possession of the common Tarawad after the date of the release was obviously adverse to the plaintiff's branch, as under the law which prevailed at the time the common Tarwad alone was entitled to the acquisitions of the deceased junior member. The decision in 24 T.L.R. 102 brought about a change in the

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.L.R. 278. But,

ed opinion as to

the law had not, however, the effect of divesting vested rights or disturbing transactions entered into honestly and in good faith on the faith of the law as generally understood. It was not open to the plaintiff now to set up claims to the plaint prop

tion of the law made in 24 T.L.R. 102. (*K. P. Gopal Menon and R. Gopala Menon, JJ.*) KRISHNA PILLAI *v.* ATCHUTHAN PILLAI. 12 T.L.T. 342.

———*Partition—Separation — Evidence of—Separate enjoyment of property by different branches of Tarwad —Presumption of severance of interests—If arises.*

Separate enjoyment of property or separate payment of tax by different branches of a Marumakkathayam Tarwad is not *per se* sufficient to lead to the conclusion that the branches intended to remain separate in interest from each other. There should be some definite act or transaction on the part of the representatives of the different branches which would indicate beyond doubt their settled intention to conduct themselves as members of divided branches. It is unnecessary that such conduct should cover a prescribed period before the status of division can be presumed. It is, however, essential that the facts and circumstances proved in the case should be such as are inconsistent with joint ownership and the corporate character of a Tarwad. (*Parameswaran Pillai and Sankarasubba Iyer, JJ.*) KAVARIAL D'COSTA *v.* KOCHU PILLAI. 12 T.L.T. 492= 28 T.L.J. 59.

———*Partition—What amounts to—Document styled* Bhagapatrom *entered into between members of the Tarwad—If to be construed as a partition deed or as a mere allotment for maintenance—Interpretation of documents.*

Whether an instrument is described as *Bhagapatrom* or as *Nischayapatrom* or as *Udampadi*, if it is definitely clear from the terms of the document that the arrangement contemplated under the document is of a permanent character and the allotment of properties under the Udampady is not capable of any readjustment at a future date, it is reasonable to conclude that the document evidences a deed of partition. There are expressions which clearly or by necessary implication indicate that the parties intended the arrangement to continue for ever, it would not be reasonable to conclude that the right to readjust the allotment was extinguished. It will not be sufficient if the deed is silent aboutthe contingency of readjustment. It is not inconceivable that in a Marumakkathayam Tarwad the members may enter into an agreement regulating the enjoyment and management of Tarwad properties by different branches without at the same time intending to effect a complete severance of interest- There are various stages through which a family may pass in its progress from a state of union to one of disintegration. The arrangements may probably come up to the very verge of the divided status without actually falling within it. But so long as they fall short of what is required to establish a divided status, the joint status of the family must be upheld with all the incidents that may flow therefrom. Unless there be decisive provisions pointing to division, the indivisibility of the Tarwad will be maintained wherever it is possible. No invariable rule can be laid down in this connection and what constitutes a permanent arrangement or otherwise must depend almost entirely on the terms of a document read as a whole. This aspect assumes importance especially in construing the effect of provisions regarding restraint on alienation embodied in agreements of the nature in question. Where independently of the provision relating to restraint on alienation, it is clear beyond doubt from the terms of the document that the parties intended to effect complete severance of interest, a restraint on alienation may be treated as void and ineffective; but where such terms of the document themselves raise a doubt as to whether the document should be treated as one creating severance of interest or otherwise, the clause relating to restraint on alienation should not be dismissed as of no effect whatever, but should be adjudged on its own merits. Without intending complete severance of interest,the members of a Marumakkathayam Tarwad might allot properties for the maintenance of particular branches of Tavazhies with qualified or limited powers of alienation for temporary needs, and in other respects, the powers of alienation might be restrained absolutely. In such circumstances the restraint on alienation cannot be treated as altogether ineffective; to hold otherwise would virtually be to cancel the arrangement which may have been lawfully and deliberately entered into between members of the Tarwad for regulating the management of Tarwad properties without terminating the corporate capacity of the Tarwad. (*Parameswaran Pillai and Gopala Menon, JJ.*) KUNCHI AMMA *v.* NARAYANAN. 12 T.L.T. 569=28 T.L.J. 72.

MORTGAGE—*Interest—Charge for—Third party—Right to sue.*

It is undoubted law that the mortgagee, in the absence of any contract to the contrary, is entitled to treat the interest due under the mortgage as a charge on the estate. Where the liability is a charge on immovable property or where it is due to a third party under a partition or family arrangement or where the contract creates a trust in favour of a third party, such third party can sue, to enforce it, even though that party be not a party to the contract. (*Narayana Iyer and Sankarasubba Iyer, JJ.*) KRISHNASAMI IYER *v.* KRISHNA IYER. 12 T.L.T. 541= 28 T.L J. 132.

———*Redemption—Suit for—Accounts between mortgagor and mortgagee—Right to demand.*

Held, in suits for redemption or for recovery of the mortgage amount, the whole of the accounts between the mortgagor and the mortgagee should be taken and determined; and in the taking of such accounts, the mortgagor is entitled to be given credit against the mortgage amount for all items due to him under the mortgage transaction. It is therefore well-settled that the mortgagee in possession is liable to account to his mortgagor and to those who may become entitled to redeem him. The mortgagor is entitled to a settlement of accounts with the mortgagee and to recover from him the excess profits appropriated by him. (*K. P. Gopal Menon and R. Gopala Menon, JJ.*) SIVATHANU POKANTHAR *v.* SIVATHANU PILLAI. 12 T.L.T. 564.

MORTGAGOR AND MORTGAGEE—*Relationship—Kanom—Mortgagee enjoying property under a Kanom from Jenmi—Registry by Sirkar of property subsequently in the name of mortgagee—Whether extinguishes rights and obligations under the Kanom tenancy.*

Where the relationship of mortgagor and mortgagee created under a Kanom deed subsits, and the mortgagee does not repudiate the mortgagor's title in open contest and to the knowledge of the plaintiff but has even supported the plaintiff-mortgagor's title against the Sirkar, the subsequent acceptance of rights to the disputed property from the Sirkar and the submission of the title of the Sirkar cannot by itself have the effect of terminating the tenancy created by the Kanom and prevent the Jenmi from enforcing his rights. So long as the Kanom subsists and the registry has not been set up by the defendant as the only title under which he is in possession his possession must be treated in law as possession under the plaintiff. The Jenmi is not bound to set aside the settlement decisions, the property was Government Puduval, in the absence of any admission on his part to the contrary and such a decision would not operate as a bar to the enforcement of his rights. (*Parameswaran Pillai and Kumaran, JJ.*) THRATHARU NAM.

NAIR REGULATION (1100). S. 4.

BURIPAD *v.* CHUMMARU. 12 T.L.T. 535= 28 T.L.J. 164.

NAIR REGULATION (II OF 1100). Ss. 4, 7, sub S. (vi) and (viii) and R. 18—*Divorce*—Ex parte *order granting* . . .
to set asia . . .
R. 13—*A* . . .
be restored to file

A, the wife of *B*, applied for divorce and compensation under S. 4 of the Nair Regulation. *B* was then in Colombo, and notice of the petition, being returned unserved, was published in the Travancore Government Gazette; on 4—10—1109, the Munsiff passed an order *ex parte*, dissolving the marriage and awarding Rs. 200 as compensation. Within 30 days of the order *B* applied to set aside the order, under O 9, R. 13, C. P. Code. In the meanwhile, *A* had married a second time and had a child by the second husband during the pendency of *B's* petition.

Held, the restoration of the original petition could be allowed only in respect of the award for money against *B*.

Per *Chief* . . . rules framec . . . the Code oi . . . dings under . . . may be incor . . .

. . . bastardized by setting aside a marriage. Under the circumsta . . . the Code of Civil Procedure in . . . must be regarded as coming w. . . . templated in R. 18.

Per *Joseph Thaliath, J.*—Opinion at present on the larger question involved in this case, because the question did not actually arise for decision . . . case. (*Verghese, C.J., Joseph Thaliath* . . . *JJ.*) NARAYANA PILLAI *v.* GOURIKU . . . 28 T.L.J. 1.

———**S. 7 (5)**—*Scope*—*If mandatory*—*Decree-holder* . . . *id later*—*Applica-* . . .

. . . Nair Regulation is . . . shall "become executable" only on payment of court-fee. . . . mean that the condition relating to paymen . . . applies even to the making of an applicatı . . . tion. It can relate only to actual execu . . . payment by Court of the decree amc . . . decree-holder. There is no provision in th . . . lation or in the order sought to be executed which prevents the decree holder from applying for execution on one day and paying the court-fee on a subsequent date. Again where the application for execution has been acted upon by the Court, and the judgment debtor has been arrested in execution, . . . court fee cannot be treated as a . . . execution application invalid; it is . . . capable of being cured in the course of the execution proceedings. (*Verghese, C. J. and Parameswaran Pillai, J.*) NARAYANA PILLAI *v.* PARVATHI PILLAI. 28 T.L J. 62.

———**S. 19**—Scope—Karnavan—Alienation by—If binds minor members—Consent of adult members—Effect—Karnavan's power to start new business in partnership with stranger. *See* MARUMAKKATHAYAM LAW—ALIENATION. 12 T.L.T. 606.

PRACTICE.

———**Ss. 35 and 36**—*Tarwad*—*Partition*—*Share allotted jointly to mother and minor children*—*Nature of interest*—*Estate taken*—*Share of mother*—*Attachability.*

When it is prescribed under S. 36 of the Nair Regu- . . .

. . . takes such properties jointly on her own behalf as well as of the minor children, and the principle of S. 35 must apply equally to such newly constituted Tarwads. Thus the mother and the minor children form a sub-Tarwad among themselves in respect of property obtained by them on partition of the main Tarawad, and until a partition is effected in accordance with law, the mother does not derive any separate interest which is capable of attachment. (*Verghese, C. J. and Parameswaran Pillai, J.*) 12 T.L.T. 329.

NEGOTIABLE INSTRUMENT—*Promissory note*—*Allegation of benami*—*Suit to declare attachability in execution of decree against person not named as payee*—*Maintainability.*

. . . for there is a rule which precludes the . . . evidence showing that the payee was . . . for another. (*Verghese, C. J. and* . . . *J.*) KESAVAN *v.* KRISHNA IYER. 28 T L J. 116.

PARTNERSHIP— Dissolution — Chitty conducted jointly by two foremen—If partnership—Termin- . . .

. . . CHITTY. 12 T.L T. 500.

POSSESSION—*Presumption that possession follows title*—*When may be relied on.*

Held, there is abundant authority for the view that where the evidence as regards possession is so conflicting as to make it difficult for the Court to make up its mind . . . , it is open to . . . hat possession . . . ersons having . . . *JJ.*) SHEIK . . . 2 T.L.T. 577.

. . . *the onus not cast undertaking to prove*—*Failure to discharge*—*Effect of*—*Estoppel.*

It has been consistently held by this Court that when a party on whom the onus is not laid, undertakes to prove a fact, he must abide by the result of such under- . . . to discharge the burden he . . . from contending that the . . . him. (*Parameswaran Pillai and Narayana Iyer, JJ.*) NARAYANA IYER *v.* SANKARARU. 12 T L.T. 665=28 T.L.J. 55.

———*Pleadings*—*Amendment*—*Power of Court.*

All rules of Court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve, and be subordinate to, that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised only no distinct cause of action can

was appearance by a party or his agent and not a Vakil and it could not be contended that the Village

Regulation by the President alone was illegal. This

VAKILS' REGULATION, S. 10.

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Menon, R. Gopala Menon and Sankara- *J.*) PARAMESWARAN PILLAI *v.* SIRKAR. 12 T.L.T. 315 = 28 T.L.J. 7 (F.B.).

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INDIAN AND SELECT ENGLISH CASES.

I—INDIAN DECISIONS.

ACCOUNTS—*Suit for—Assignment of definite sum due from principal—Right of assignee to sue for account.*

Where, what is assigned to the plaintiff by the Official Receiver of an ex-broker's assets in insolvency is a definite sum of money due from the
and not a right to sue for account, if
dition of account for the recovery o
assigned is incompetent. (*Addison a
JJ.*) JAINI BROTHERS & CO. *v.* SE

A.I.R. 1938 Lah. 270.

ADVERSE POSSESSION—Acquisition of title—Khoti land—Wrong transfer by occupancy tenant—Posses
See B

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settler

—*Landlord and tenant—Essentials—Adverse possession against tenant—Effect as against landlord.*

To establish adverse possession against a landlord it is not sufficient to show that the person claiming adverse possession has established by adverse possession a title against a tenant of the landlord, because that might be treated as an incumbrance which can be annulled after a rent sale under S. 167, Bengal Tenancy Act. (*Courtney-Terrell, C.J. and James, J.*) GOPI RAM RAMCHANDRA *v.* NITAI LAL DUTT.

A.I.R. 1938 Pat. 220.

——*Landlord and tenant—Sub-lessee from tenant under unauthorised transfer—Possession of—When adverse to landlord.*

A tenant of surface land transferred his holding without the consent of the landlord to a sub lessee of underground mining rights. The sub-lessee in the place of growing crops substituted the headworks of a colliery and was in possession of this land for more than twelve years before a rent suit was brought by the landlo against the tenant. In the rent suit, the holding was p to sale and the purchaser instituted a suit for ejectment

RAM RAMCHANDRA *v.* NITAI LAL DUTT.

A.I.R. 1938 Pat. 220.

AGRA TENANCY ACT (1926), S. 26.

1938 R D. 416.

——S. 20, (2) Prov. (1) (b)—*'Proceedings' meaning of.*

'Proceedings' in S. 20 (2), proviso 1 (*b*) must be taken to mean effective proceedings. (*Darling, S.M. and Bomford, J.M.*) KALKA PRASAD *v.* RAHUA.

1938 A.W.R. (B R.) 167.

——S. 26—*Inheritance—Competition between separated brother and nephew.*

Under the tenancy law as amended by S. 26 of the Agra Tenancy Act when one of the separated brothers die, the other must be regarded as the heir of the deceased brother and he would take the occupancy holding of the dead brother, in preference to the nephew. But in the case of fixed rate holding it would devolve according to Hindu Law. (*Darling, S.M. and Bomford, J.M.*) UDIT NARAIN AHIR *v.* RAM HARAKH AHIR.

1938 R.D. 429 = 1938 A.L J. (Supp.) 46.

——S. 44—*Ejectment—Cause of action—Sale of occupancy holding—Starting point—Damages—Measure of.*

The mere execution of a deed of sale of an occupancy holding does not give rise to a cause of action to eject the vendee; it only arises on the actual transfer to the vendee. A claim to be in possession from a date prior to that mentioned in the papers, has to be proved by the vendee. As regards damages it must be remembered that a trespasser is not entitled to any remission. (*Darling, S.M. and Bomford, J.M.*) NARAINI PRASAD SINGH *v.* MAKUND. 1938 R.D. 455.

——S. 44—*Scope of—Trespasser in possession—Remedy of owner—Option as to.*

It is open to the proprietor of agricultural land either to sue a trespasser for ejectment in the Civil Court or to avail himself of the speedier remedy provided by S. 44 of the new Tenancy Act and to file a suit for ejectment and for damages in the Revenue Court. (*Iqbal Ahmad and Verma, JJ.*) LACHHMINA KUNWARI *v.* MAKFULA KUNWARI. 1938 A.W.R. (H.C.) 199= 1938 A.L.J. 333.

——S. 72—*Covenant overriding provisions of—Validity.*

It is not the intention of the Legislature to allow any covenant in a lease to override the provisions of S. 72 of the Tenancy Act. Hence any covenant against remission of rent in the kabuliyat is void. (*Ganga Nath, J.*) MAHARAJAH OF BENARES *v.* RAM NARAIN. 1938 A.W.R. (H.C.) 293.

——S. 80—*Ejectment—Payment of decree amount alone—Costs of ejectment, not paid—Liability to ejectment.*

A tenant is not liable to ejectment if he pays the decree amount alone without the costs of the ejectment proceedings. (*Bomford, J.M.*) NEWAL DUBE *v.* BHOLANATH. 1938 R.D. 395 (2).

——Ss. 97 and 98—*Ejectment—Sowing done prior to—Ejected tenant, if entitled to value of crop at harvest.*

An ejected tenant is not *prima facie* entitled to be paid the value at harvest of a crop which he has sown just before ejectment, leaving it to the landlord to take all the risks of damage between sowing and harvest. In such a case he would at best be entitled only to the value of the seed, and labour charges for ploughing and sowing. (*Darling, S.M. and Bomford, J. M.*) CHIRANJIVA NARAIN *v.* MUSTA. 1938 R.D. 395 (1)= 1938 A.L.J. (Supp.) 44.

——Ss. 99 and 82—*Ejectment—Remedy—Suit by ected tenant under S. 99, after rejection of review of rder of ejectment—If maintainable.*

Whether or not a tenant who has been ejected under S. 82 of the Agra Tenancy Act has a right in certain special circumstances to bring a suit under S. 99, he cannot certainly be allowed to do so where he has tried one remedy after another. An order rejecting an application for review of the order of ejectment when not appealed against should be treated as final. (*Darling, S. M. and Bomford, J. M.*) VIVEK SINGH MAJITHIA *v.* RAM LAL. 1938 R.D. 436.

——S. 197—*Groveholder—Right to transfer his interest—Law as to—Custom to the contrary—Onus.*

S. 197 of the Agra Tenancy Act has introduced a change in the law from what had been ruled in various rulings, and the general law is that a groveholder has a right of transfer and the burden of proof of a custom to the contrary lies on any one who denies the rights of transfer to a groveholder. (*Bennet, Iqbal Ahmad, Yorke and Varma, JJ.*) MUBARAK HASAIN *v.* SAGAR MAL. 1938 A.L.J. 400= 1938 A.W.R. (H.C.) 251 (S.B.).

——S. 226—*Rate of profits—Decision as to, if can operate as* res judicata.

It cannot be held that a decision as to the rate of profits operates as a *res judicata*, for circumstances governing the rate of profits differ from year to year. (*Darling, S. M. and Bomford, J. M.*) SHIVA BANS PANDEY *v.* RAJMAN PANDEY. 1938 R.D. 441.

——S. 227—*Suit for profits—Maintainability—Purchaser from co-sharer obtaining decree for proportionate share of ex-proprietary rent only—If can sue for profits.*

Where a purchaser from a co-sharer obtains a decree, only for the proportionate share of the ex proprietary rent, in his suit, he is entitled to sue for profits. (*Darling S.M. and Bomford, J.M.*) GANGA RATHI *v.* RAM AUTAR. 1938 R.D. 398.

——S. 266—*Scope of—Creation of tenancy—Power of one of several co-sharers.*

The granting of a lease of agricultural plots is permitted by the Tenancy Act and every owner of an agricultural plot of land is, therefore, competent to grant a lease of the same. But if the plot is owned by two or more co sharers the right to grant a lease can be exercised jointly by them all or not at all. Each co-sharer has the right to enjoy possession of joint agricultural plots in conjunction with his other co-sharers, but has not the right, without the concurrence of the other co-sharers, to introduce a tenant on the joint plots. It is this principle that has been given legislative sanction by S. 194 of the former and by S. 266 of the present Tenancy Act. (*Iqbal Ahmad and Verma, JJ.*) LACHHMINA KUNWARI *v.* MAKFULA KUNWARI. 1938 A.W R. (H.C.) 199=1938 A.L.J. 333.

——S. 271—*Dispute as to shares in suit for profits—Prior decision of Civil Court—Reference to Civil Court—Necessity.*

In a suit for profits though there is a dispute as to the exact shares of the parties, it is unnecessary to refer the case to a Civil Court, where the parties have already resorted to it and the decision of that Court was before the Revenue Court on a prior occasion in connection with a previous profits case. The decision in the earlier profits case will operate as *res judicata*, at least as regards the shares of parties. (*Darling, S.M. and Bomford, J.M.*) SHIVA BANS PANDEY *v.* RAJMAN PANDEY. 1938 R.D. 441.

——S. 271—*Jurisdiction—Civil and Revenue Courts—Dispute as to whether defendant is a mortgagee of* sir *or not.*

Where there is a dispute as to whether a defendant is a mortgagee of *sir* or not, it is for the Civil Courts to decide that question. (*Darling, S. M. and Bomford, J. M.*) RAMAKANT SINGH *v.* BENI MADHO SINGH. 1938 R.D. 397.

ARBITRATION—*Award—Validity—Failure of one of the arbitrators to sign award—Defect of procedure—Award when not to be set aside.*

Where an award is arrived at under the 'joint consultation' of all the arbitrators and represents their decision, the mere failure of one of the arbitrators to sign the award does not render it invalid. An award made on proper reference ought not to be set aside on the ground of an alleged defect in procedure not affecting the merits, where substantial justice has been done. (*Thomas, C. J. and Zia-ul Hassan, J.*) BENI DATT *v.* BAIJ NATH. 1938 O.A. 341.

BANKER'S BOOKS EVIDENCE ACT (XVIII OF 1891), S. 5—*"Order of Court for special cause"—Order for production of books under S. 94, Cr. P. Code—S. 94, Cr. P. Code, if conflicts with S. 5 of former*

BENG. AGRI. DEBTORS' ACT (1936), S. 34.

Act—Prosecution of auditors of Bank for false statements in balance sheet certified as correct—Order for production of Bank's books—Legality—Right of prosecution to inspection—Duty of Court.

There is really no conflict between S. 94 of the Cr. P. Code, and the Banker's Books Evidence Act. S. 5 of the latter Act is the only section which can be relied upon as containing anything inconsistent with S. 94, Cr. P. Code. But all that S. 5 of that Act enacts is that no officer of the Bank shall in any legal proceeding to which the Bank is not a party be compellable to produce any banker's book the contents of which can be proved under the Act or to appear as a witness to prove the matters, transactions and accounts, etc., unless by order of the Court or Judge made for special cause. "Court" includes a Magistrate trying a criminal case, so that a Bank cannot be compelled to produce its books without an order of the Court "for special cause." But there is no reason at all why an order made under S. 94, Cr. P. Code, should not be regarded as a sufficient order for the purpose of S. 5 of the Banker's Books Evidence Act. There is nothing in that Act which prevents an order being made under S. 94, Cr. P. Code, in the proper case. In a prosecution against the auditors of a Bank for offences in respect of false statements in the balance sheet of the Bank certified by them as correct, an order for production can lawfully be made under S. 94, Cr. P. Code, but it should be made, in the case of banker's books, very cautiously and carefully drafted. A routine order *ex parte* is generally undesirable. The prosecutor who applies for an order and for inspection of the books produced should be required to state before the issue of the order not only what books he requires to be produced but also why their production is necessary with specific reference to the allegations in his complaint. Anything in the nature of a roving or fishing inspection of the books of a Bank should be prevented. But the prosecution cannot be denied the right of inspection of documents the production of which has been held to be necessary or desirable for the purpose of the trial and which have been held to be relevant after considering the objections of the party producing. (*Broomfield and Wadia, JJ.*) P. D. SHAMDASANI *v.* SIR HUGH GOLDING COOKE.

I.L.R. (1938) Bom. 31.

BENGAL AGRICULTURAL DEBTORS' ACT (VII OF 1936), S. 34—*Notice for stay—Question if applicant before Board is debtor—Jurisdiction of Civil Court to decide.*

S. 20 of the Bengal Agricultural Debtors Act provides that if any question arises in connection with proceedings before a Board under this Act, whether a person is a debtor or not, the Board shall decide the matter. This section was, of course, enacted in relation [illegible] tion of 'debtor' under S. 2 of the Act. A [illegible] receiving notice for stay under S. 34 has, [illegible] jurisdiction to decide such a question. (*He* [illegible]) BASIRUDDIN AHMED CHOWDHURY *v.* NOAKHALI SWADESHI STORE. 66 C.L.J. 539.

——S. 34—*Notice for stay in respect of joint debt—Power of Court to enquire if application to Bo*[illegible] *valid.*

A Civil Court, on receipt of a notice under [illegible] the Bengal Agricultural Debtors Act in respect o[illegible] for which several persons are jointly liable, has no power to enquire whether the application made [illegible] Board was a valid application having regard [illegible] provisions of S. 9 (1) (*b*) of the Act. If the Civil [illegible] is satisfied that an application for the settleme[illegible] debts has in fact been made to the Board and that such [illegible]

BENG. N.-W.P. AND ASSAM CIV. CTS. ACT, S. 22.

[illegible]

ALI BEPARI. 42 C.W.N. 529.

——S. 34—*Sale of entire mortgaged property in execution of decree—Decree-holder purchaser allowed set-off against portion of decretal debt—Notice received by Court before confirmation of sale—Proceedings, if should be stayed.*

In execution of a mortgage decree the entire mortgaged property was sold for less than the decretal amount and was purchased by the decree holder. His prayer for set-off was allowed and the decretal debt to the extent of the amount realised by the sale was wiped out. After the sale had taken place and before it was confirmed the Court received notice under S. 34 of the Bengal Agricultural Debtors Act for stay of further proceedings. This the Court refused to do.

Held, that the debt to the extent to which it was satisfied by the aforesaid sale had ceased to exist, and that as the entire mortgaged property had been sold and there was no application for a personal decree under O. 34, R. 6, C. P. Code, there was nothing else for the Court to do, and that, therefore, the Court acted rightly in refusing the stay. (*S. K. Ghose and Nasim Ali, JJ.*) JATINDRA MOHAN MANDAL *v.* ELAHI BUX.

42 C.W.N. 530.

BENGAL ESTATES PARTITION ACT (V OF 1897), S. 99—*Applicability—Lessee admitted by one co-sharer—Possession for over 12 years continuously—Effect of—Right of other co-sharers to eject.*

In applying the provisions of S. 99 of the Bengal Estates Partition Act, a distinction must be made between occupancy rights which are the creation of statute, and the rights of a lessee or a tenure-holder which are the result of a contract between a co-sharer and the person in possession. It is doubtful if after occupancy rights have accrued by 12 years continuous possession, any other co-sharer would be entitled to eject the raiyat or lessee under the provisions of S. 99. (*Courtney-Terrell, C. J. and James, J.*) RAJA RAM RAI *v.* NIRANJAN RAI. 17 Pat. 143.

BENGAL LAND REVENUE SALES ACT (XI OF 1859), S. 8—*Revenue received by Collector by money order on last date—Money not credited to intended taluk owing to mistake in description of taluk—Sale of taluk—If void.*

A Collector received the revenue by money order on the last date for payment of revenue. This money could not be credited to the account of the intended taluk on account of mistake in the description of the taluk. The [illegible]

footing that there was an arrear of revenue due.

Held, that as the description of the taluk was not correctly given, it could not be reasonably said that the money was undoubtedly placed in the hands of the [illegible]

A.I.R. 1938 Cal. 275.

[illegible]

Judge.

An order of a Munsiff refusing to file a complaint under S. 476, Cr. P. Code, does amount to an order within the meaning of S. 22 of the Civil Courts Act. A District Judge has, therefore, jurisdiction to transfer an appeal against that order made to him to a Subordinate Judge under his administrative control for hearing. (*Jack and Henderson, JJ.*) CHANDRA KUMAR *v.* GOPI NATH KAR. **42 C.W.N. 686.**

BENGAL TENANCY ACT (VIII OF 1885), S. 26 E (1)—*Sale of tenure and occupancy holding together—Landlord's fees so far as tenure deposited—Sale of tenure confirmed and that of occupancy field set aside—Validity.*

In execution of a mortgage decree, *A* purchased and obtained possession of a tenure and an occupancy field in one lot. He deposited landlord's fees so far as the tenure only was concerned. While confirming the sale, the executing Court confirmed the sale of the tenure and set it aside so far as the occupancy holding was concerned. Later on, landlord sold the tenure in execution of rent decree without making *A* as party and purchased it himself and took symbolical possession. Therefore *A* brought a suit against the landlord for declaration of his title to the tenure. Landlord contended that the order of confirmation of the tenure only was illegal as the tenure and occupancy field were sold in one lot and the entire sale should have been set aside. He further contended that the Court should ignore the order of confirmation of the tenure.

Held that there was no violation of the provision of S. 26-E.

Held further that the non-compliance with S. 26-E (1) did not oust the jurisdiction of the Court and any order made by it cannot be treated as nullity and be ignored unless it has been properly set aside. (*B. K. Mukherjea, J.*) BASIRUDDIN MAHOMED *v.* PRASANNA DEB RAI KAT. **A.I.R. 1938 Cal. 282.**

——**S. 303-b and 52**—*Decree against recorded tenant—Unrecognised transferee of occupancy holding—If can sue to set aside decree.*

The unrecognized transferee of a portion of an occupancy holding has undoubtedly a right to get a decree obtained against the recorded tenant set aside on the ground that it was vitiated by fraud or collusion; but it is not open to him to attack the decree simply on the ground that the decree is wrong in law and should not have been passed having regard to the evidence that was adduced in the case of the provisions of law which were applicable to the facts. (*B. K. Mukherjea, J.*) BARKATULLA SHEIKH *v.* JNANENDRA CHANDRA GHOSH. **A.I.R. 1938 Cal. 281.**

——**S. 74**—*Scope—Rent payable—What is—Customary rent and actual rent—Claim to sum in excess of actual rent—Maintainability.*

The rent of a holding is that which is paid by a tenant for the use and occupation of the land. Actual rent is the rent actually agreed upon between the parties. A tenant may be inducted on land on an agreement to pay the customary rent; that is perfectly a good contract, and on proof of what has been customary, such rent is leviable. What must not be levied is something in excess of the actual rent agreed upon. It is not the concern of the tenant how the landlord actually devotes the money which the tenant pays him by way of agreement for the use of the land. If the amount has been definitely agreed upon that is the actual rent payable. (*Courtney-Terrell, C. J. and Fazl Ali, J.*) SURJO MOHAN *v.* CHHOTE SINGH. **1938 P.W.N. 286.**

——**S. 76 (2) (f) (as amended)**—*Effect—Right of tenant to erect building.*

The only effect of the amendment of S. 76 (2) (*f*) is that the description of dwelling-house is made more specific in the present Act. But it is certainly not correct to say that the tenant is entitled to build without reference to area even though the effect might be to render the land unfit for the purposes of the tenancy. (*S. K. Ghose, J.*) BHUPENDRA NATH *v.* ELOKESHI DASSI. **A.I.R. 1938 Cal. 318.**

——**Ss. 105 and 107**—*Scope—Settlement proceedings—Rent fixed at definite lump sum—Effect of—Rent suit by landlord—Claim to sum in excess of and over and above the settlement rent—Maintainability.*

When the rent has definitely been fixed in settlement proceedings under S. 105 of the Bengal Tenancy Act, it cannot, by reason of S. 107 of the Act, be made the subject of further litigation. A suit by the landlord against the tenant claiming a certain amount as *patwari* rent over and above the jama entered in the record-of-rights in respect of the holding is not maintainable. When the Settlement Officer has decided upon a definite sum and fixed the rent at a lump sum in respect of the holding, it is not open to the landlord in a suit to attempt to establish that the rent ever in a limited class of suits is other than the rent which the Settlement Officer has in fact found to be payable. (*Courtney-Terrell, C. J. and Fazl Ali, J.*) SURJO MOHAN *v.* CHHOTE SINGH. **1938 P.W.N. 286.**

——**S. 148-A (9)**—*Scope—Suit for rent by co-sharer landlord impleading others as defendants—If prevents latter from further prosecuting certificate proceedings previously started—Latter withdrawing from certificate proceedings and joining as co-plaintiffs in suit—Right to exclude time taken by such proceedings—Limitation Act, S. 14.*

Sub. S. (9) of S. 148-A of the Bengal Tenancy Act bars the recovery by *suit only* of the co-sharer landlord's dues, when he had not joined as co-plaintiff in his co-sharer's suit for rent. It does not bar recovery of such dues by certificate proceedings. A suit by a co-sharer landlord under S. 148-A of the Act for recovery of rent due to his share impleading the other co-sharer landlords as defendants does not prevent the latter from proceeding further with the certificate proceedings previously started by them for recovery of their share of rent for the same period. If, therefore, the latter withdraw from the certificate proceedings and join as co-plaintiffs in the suit, they cannot invoke S. 14 of the Limitation Act to extend the period of limitation for their claim by excluding the period during which they prosecuted those proceedings (*M. C. Ghose and R. C. Mitter, JJ.*) HRISHI KESH MITRA *v.* BARADA PRASAD RAY CHAUDHURI.

I.L.R. (1938) 1 Cal. 262.

——**S. 174 (5)**—*Order dismissing for default application to set aside sale—Appeal.*

An appeal lies against an order of Court dismissing for default an application under S. 174 of the B. T. Act to set aside a sale. (*Edgley, J.*) MOHAMMAD KAZIBULLA *v.* HUMAYUN REZA CHOUDHURY.

42 C.W.N. 612.

——**S. 174 (5)**—*Order under S. 173 (3)—Right of appeal.*

S. 174 (5) of the B. T. Act applies to applications falling under S. 174 and does not apply to applications coming under S. 173 (3). Consequently, there is no right of appeal against an order under S. 173 (3). (*S. K. Ghose and Nasim Ali, JJ.*) ASHUTOSH MANDAL *v.* GATIKRISHNA. **42 C.W.N. 585.**

——**Sch. III, Art. 3**—*Applicability—Dispossession by landlord as auction-purchaser.*

B. T. ACT (1885), Sch. III. Art. 3.

Dispossession by the landlords as auction-purchasers does come under the provisions of the special law of limitation under Art. 3 of Sch. III. A.I.R. 1927 Cal. 488, Rel. on. (*Jack, J.*) AMIRUDDIN SARKAR *v.* NISARUDDIN SARKAR. **A.I.R. 1938 Cal. 276.**

——**Sch. III, Art. 3**—*Applicability—Landlord dispossessing tenant from possession obtained in execution of mortgage decree against co-sharer tenants.*

Where a tenant in execution of a mortgage decree against his co-sharer tenants obtains their rights in the land, he represents the tenancy and when he is dispossessed by the landlord the rule of special limitation would apply. A.I.R. 1936 Cal. 299, Rel. on. (*Jack, J.*) AMIRUDDIN SARKAR *v.* NISARUDDIN SARKAR. **A.I.R. 1938 Cal. 276.**

——**Sch. III, Art. 3**—*Applicability — Landlord setting up servant as tenant and dispossessing raiyat through him—Suit by raiyat to recover possession—Limitation.*

Mere allegations or suggestions in the pleadings are insufficient material on which to base a conclusion that dispossession was dispossession by the landlord. Where the landlord does not directly dispossess the raiyat, but sets up his servant as a tenant who dispossesses the raiyat, the dispossession is by landlord and a suit by the raiyat to recover possession is governed by Art. 3. (*Agarwala, J.*) BINDESHWARI RAI *v.* RAM PALAK SINGH. **A.I.R. 1938 Pat. 181.**

BENGAL WAKF ACT (XIII OF 1934), Ss. 70 and 72—*Petitions by mutwalli under O. 21, R. 58, C. P. Code, dismissed for default—Right of commissioner to present similar petition on notice from Court.*

Although petitions under O. 21, R. 58, C. P. Code, previously filed by successive mutwallis were dismissed for default, the commissioner of wakf is entitled to file a similar petition of claim on receipt of notice under S. 70 of the Bengal Wakf Act, and he is entitled to have his petition heard on the merits. (*S. K. Ghose and Nasim Ali, J.*) COMMISSIONER OF WAKFS, BENGAL *v.* GAGAN CHANDRA DAS. **42 C.W.N. 616.**

——**S. 71**—*Property not admitted to be wakf—Right of Commissioner to intervene.*

Per *Nasim Ali, J.*:—S. 71 of the Bengal Wakfs Act enables the commissioner of Wakfs to intervene and to defend a suit or a proceeding although it is in respect of property which is not admitted by all the parties to the suit or proceeding to be wakf. If, therefore, a person attaches certain wakf property in execution of a decree for money obtained against the mutwalli personally on the allegation that it is not wakf, the commissioner can intervene and oppose the attachment and sale of the property on behalf of and in the interests of the wakf. (*S. K. Ghose and Nasim Ali, JJ.*) COMMISSIONER OF WAKFS, BENGAL *v.* GAGAN CHANDRA DAS. **42 C.W.N. 616.**

BERAR ALIENATED VILLAGES TENANCY LAW, S. 22—*Right of hypothecation—Limits.*

The right of hypothecation contemplated by S. 22 of the Berar Alienated Villages Tenancy Law, could only be exercised against those crops which had been reaped or gathered and were deposited or stored, and only on account of an arrear which has not been due for more than one year. (*Pollock, J.*) RAMCHANDRA GOVIND *v.* MISHRIMAL CHANDANMAL. 173 I.C. 800= **A.I.R. 1938 Nag. 202.**

——**S. 76 (3)**—*Suit for arrears of rent due by ante alienation tenant—Limitation.*

According to S. 76 (3) of the Berar Alienated Villages Tenancy Law, the period of limitation for a suit by a landlord for an arrear of rent due by an ante alienation

BOM. CITY MUNICIPAL ACT (1888), S. 394.

tenant is three years and this is so notwithstanding anything contained in Arts. 120 and 132 of the Limitation Act (*Pollock, J.*) RAMCHANDRA GOVIND *v.* MISHRIMAL CHANDANMAL. 173 I C 800= **A.I.R. 1938 Nag. 202.**

BERAR INAM RULES—R. VI, Cl (4)—*Interpretation—Grant in return for services—Services ceasing to be rendered—Continuing of service grant by Inam commissioner—Nature of estate granted to inamdar.*

Where the original grant of lands was in return for certain services which had now ceased to be rendered and the service grant was continued in perpetuity on the recommendation of the Inam commissioner on payment of 'one half rates of assessment,' it was *held* on an interpretation of Cl. 4 of R. 6 of the Berar Inam Rules which governed the case that the grantee obtained a free hold estate, (*Pollock, J.*) DIGAMBAR *v.* KISHANDAS GOVERDHANDAS. 174 I. C. 84= **A.I.R. 1938 Nag. 220.**

BERAR LAND REVENUE CODE (1928), S. 155—*Absence of Jurisdiction to sell—Question, if can be raised after sale but before confirmation.*

An objection as to Jurisdiction of a Court to sell can be raised between the sale and its confirmation for, if there is no Jurisdiction, the sale would be void and there could be no confirmation. (*N. J Roughton, F.C.*) KILACHAND DEVCHAND & CO, LTD. *v.* DHUNDIRAJ GANESH SAHASRABUDHE. **1938 N L.J. 128.**

BIHAR AND ORISSA MUNICIPAL ACT (VII OF 1912), Ss. 180 and 362—Limitation—Municipal Licence fee—Suit for—Limitation applicable. *See* LIMITATION ACT ARTS. 115 AND 120. **A.I.R. 1938 Pat. 192.**

BIHAR TENANCY ACT (VIII OF 1934), Ss. 105 and 109—*Scope—Application for settlement of fair rent withdrawn — Subsequent suit on same matter—Bar of.*

The withdrawal of an application under S. 105 for settlement of fair rent of kabil-lagan land debars the Civil Court from entertaining a subsequent suit on the same matter. S. 109 is a bar to such a suit. Such a suit is also barred by limitation when the defendants having denied in the case under S. 105 the plaintiff's right to get any rent from them, the plaintiff brings the suit more than 12 years after the assertion of the hostile right to hold the land rent free. (*Mohamed Noor, J.*) RAM RANVIJAYA PRASAD SAHA *v.* MUNI PANDEY. **A.I.R. 1938 Pat. 215.**

BOMBAY CITY MUNICIPAL ACT (III OF 1888), S. 231—*Powers of Commissioner under—Notice—Requisites of validity—Notice requiring owner within 15 days to connect unconnected waste water to municipal storm water drain—Validity.*

The notice authorised by S. 231 of the Bombay City Municipal Act is one requiring the owner or occupier of a house to make a drain of the character therein specified, that is to say, of such material, size and description and so forth as may appear to the Commissioner necessary. A notice served by the Commissioner on the owner or occupier of a house requiring him within 15 days to connect the unconnected waste water of the nahanies and washing places in the municipal storm water drain at a particular place after obtaining necessary permit of the owners of the drain is not a sufficient notice to comply with S. 231. (*Beaumont, C.J. and Wassoodew, J.*) EMPEROR *v.* EUGENE MIRANDA. **40 Bom. L.R. 320.**

——**S. 394 (1) (b) and Sch. M, part III**—*"Timber"—Plywood—If timber.*

[B]OMBAY KHOTI SETTLEMENT ACT (1880), S. 6.

The object of requiring a license for the keeping of [a]rticles mentioned in Part III of Sch. M of the City of [B]ombay Municipal Act, is to safeguard the public [a]gainst nuisance or danger. Timber is not used in Part [I]II of Sch. M, in any technical sense; it only means [w]ood used for building or carpentry. "Timber" in Part [I]II of Sch. M. does not include plywood. Keeping [p]lywood for sale without license is not an offence under [S]. 394 (1) (*b*), for which the person keeping it can be [c]onvicted. (*Beaumont, C.J. and Wassoodew, J.*) EMPEROR *v.* AHMEDALLI ESUFFALLI.

40 Bom. L.R. 322.

[B]OMBAY KHOTI SETTLEMENT ACT (I OF [1]880), Ss. 6 and 8—*Scope of—Unauthorised transfer [o]f Khoti land by occupancy tenant—Effect—Rights and [s]tatus of transferee—Possession for over 12 years—[E]ffect of—If becomes occupancy tenant—Right of Khot [t]o eject—Notice to quit.*

The respondents were the Khots of a village, *H. D.* [w]ho was an occupancy tenant of the lands sold the same [o]n 13—5—1896, to the appellants. After *D*, 1. death, [h]is nephew sold the same lands to the respondents on [2]1—10—1927, and in December. 1928, passed a raji[n]ama in their favour. The respondents, the admitted [K]hots of the occupancy holding of *D*, gave notice to the [a]ppellants to quit on 27—12—1929 under S. 84 of the Bombay Land Revenue Code, and on 7—2—1930, sued [f]or ejectment of the appellants and for possession. The [a]ppellants pleaded that they had become occupancy [t]enants of the respondents by reason of their having held [t]he occupancy holding adversely to the respondents for [o]ver 12 years.

Held, (1) that under S. 6 of the Khoti Settlement Act, the appellants became the tenants of the respondents by virtue of the sale in their favour by *D*, in 1896; (2) that in the absence of any special agreement set up by the appellants, the latter become yearly or annual tenants of the respondents under S. 8 of the Act; (3) that the appellants, as transferees under a wrong transfer, could not claim to be occupancy tenants merely because they had been in possession for over 12 years and set up adverse possession; and (4) that the respondants, having determined the tenancy by a notice to quit under S. 84 of the Land Revenue Act, were entitled to evict the appellants. (*Rangnekar and Sen, JJ.*) RAMKRISHNA *v.* BAPURAO.

40 Bom. L.R. 390.

———(I OF 1880, as amended in 1912), S. 9—*Scope —If retrospective.*

The amendment to S. 9 of the Khoti Settlement Act made in 1912 has no retrospective effect and does not apply to the case of a transfer made by the tenant prior to 1912. (*Rangnekar and Sen, JJ.*) RAMKRISHNA *v.* BAPU RAO. 40 Bom.L.R. 390.

BOMBAY LAND REVENUE CODE (V OF 1829), S. 83—*Applicability — Watan lands— Permanent [t]enancy—Acquisition by adverse possession—Conditions of.*

S. 83 of the Land Revenue Code would apply in the case of watan lands if the tenancy is shown to have commenced before the watan lands were sendered inalienable by the operation of Regulation No. 16 of 1827. Tenants of watan lands whose tenancy has commenced subsequently cannot acquire title to a permanent tenancy of the lands by adverse possession as against the watan lands from whom they hold. When the tenancy has been ascertained with reasonable definiteness, S. 83 cannot in terms assist the tenant. The section has no application to a case where the commencement of the tenancy has been traced either to particular year or to a reasonably short and definite period of time on satisfac-

BOM PREVENTION OF ADULTERATION ACT (1925), S. 4.

tory evidence. (*Broomfield and Sen, JJ.*) KRISHNA BHIMA *v.* LAXMIBAI. 40 Bom.L.R. 439.

BOMBAY MUNICIPAL BOROUGHS ACT(XVIII OF 1925), S. 129—*Construction and Scope—Notice under—Requisites of validity—Powers of chief officer—Notice require plan for laying out drain, etc.—Legality.*

S. 129 of the Bombay Municipal Boroughs Act gives power to the chief officer to require something to be done, and it is for him to say what he requires to be done and not for the owner of the house or buildings to submit proposals. A notice calling upon the owners of houses or buildings to submit a plan for laying out a six inches drain in their property and to get it passed by the engineering department and after laying out a 6" "drainage line according to the passed plan and getting a connection only through the Municipality to join it therewith within thirty days of the receipt of the notice is not a proper or valid notice under S. 129, and a failure to comply with such a notice is not a breach of S. 129 which would render the owners liable to conviction. The chief officer is bound in his notice to specify the size, materials, level and fall which he requires in respect of the drain which he is ordering. A notice which does not comply with these requirements is not a good notice under S. 129. The house-holder is entitled to know in the first instance what he is required to do. (*Beaumont, C. J. and Wassoodew, J.*) EMPEROR *v.* TRIKAMLAL KESHAVLAL. 40 Bom.L.R. 314.

BOMBAY PREVENTION OF ADULTERATION ACT (V OF 1925), Ss. 3 (a), 4 (4)(a) 13—*Plea of warranty—Duty of accused—Right to adjournment.*

In a trial for an offence under the Bombay Prevention of Adulteration Act, if the accused rely on the defence of warranty, they must prove it and must have the witnesses ready on the date of hearing. They are not entitled to an adjournment as of right for the purpose of proving warranty. Where however neither the summons served on the accused nor the evidence for the prosecution makes it clear what the case is that the accused have to meet, the accused may be pardoned if they do not state clearly the defence of warranty before the case for the prosecution is closed. (*Davis, J.C. and Lobo, J.*) CHOITHRAM *v.* EMPEROR.

A.I.R. 1938 Sind 70.

———S. 4 (1)—*Conviction—Validity.*

S. 4 (1) contemplates three distinct offences, under Cls. (*a*), (*b*) and (*c*) respectively and a conviction under S. 4 (1) generally is bad in law. (*Davis, J.C. and Lobo, J.*) CHOITHRAM *v.* EMPEROR.

A.I.R. 1938 Sind 70.

———S. 4 (4) (b)—*Commissionto warant or—Powers of Court.*

The words in the 'exception' contained in S. 4 (4) (*b*) are wide enough to cover the power of a Magistrate to ask for the issue of a commission under S. 506, Cr. P. Code, in case where he thinks that it is only just and proper that that power should be exercised. The cases in which the Court would grant a request for the issue of a commission to a warrantor would be rare, but there is nothing in S. 4 (4) (*b*) to prevent the Court asking the District Magistrate to issue a commission for the examination of the warrantor. It is not, however, necessary for the Magistrate rejecting the application for the issue of commission to give his reasons for doing so in writing. (*Davis, C.J. and Lobo, J.*) GIRDHARILAL *v.* EMPEROR. A.I.R. 1938 Sind 72.

———Ss. 4 (4) (b) and 5—*Warranty—Proof of—Personal attendance of warrantor—Necessity for.*

Under S. 4 (4) (*b*), it is the rule that a warranty must be proved by the personal attendance in Court, of the

BOM. SURVEY AND SETTLEMENT ACT (1865), S. 38.

person by whom or on whose behalf it was given and it may well be that this provision of S. 4 (4)(*b*) is to be read with S. 5 whereby provision is made for the punishment of the warrantor in case a false warranty is given. It is the rule that the warrantor must personally attend in Court, and it is only in exceptional circumstances that he should not do so. (*Davis, J.C. and Lobo, J.*) GIRDHARILAL *v.* EMPEROR. A.I.R. 1938 Sind 72.

BOMBAY SURVEY AND SETTLEMENT ACT (I OF 1865), S. 38—*Kabulayat taken by Government from managing khot—Effect—Right of khot to take faida in kind.*

Once Government have taken a kabulayat in a particular form from the managing khot, he becomes entitled to recover the faida in accordance with the terms of the kabulayat. If any occupant is dissatisfied with the terms of the kabulayat, it is for him to take such steps as he may be advised against Government, or approach Government to get the kabulayat charg is done, the managing khot cannot go of the kabulayat so long as it stands. entitles the khot to recover faida in kind, he can take it in kind, and the tenant cannot resist the demand and insist on payment in cash. (*Rangnekar, J.*) PANDU NARAYAN *v.* AMIRUDDIN SHEKK. 40 Bom.L.R. 407.

BUDDHIST LAW (BURMESE)—*Marriage—Proof of.*

Among Burman Buddhists marriage is a contract entered into by mutual consent of the parties and no ceremony is necessary. In the absence of direct proof, consent may be inferred from the conduct of the parties or established by reputation. Generally in such circumstances, some open recognition of the wedded state is to be expected. Relatives and neighbours are usually asked to some form of entertainment in order to signify the occasion, and where this is dispensed with, evidence of the intention to enter into married life must be clear. Clandestine acts of sexual intercourse do not by themselves establish marital relationship and where there is no regular cohabitation under the same roof and the couple who resort to each other for purposes of intimacy are thought by some to be engaged, and by others to be cousins or mere friends, proof of marriage has not been established by reputation. Moreover, as it takes two persons to make a contract, in order to prove marriage there must be evidence not merely of desire by one per-

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Offence under—Villager not paying thathameda tax—Order to him by headman to appear at Township office—Disobedience of order.

[illegible]

fixed by Registrar under Ch. 8, R. 4.

The time fixed by the Registrar in any particula acting under Chap. 8, R. 4, is "time appointed rules" within the meaning of Chap. 38, R. 33. *ckridge, J.*) MONI SETHANI *v.* RADHA KISSEN 42 C.W.N.

C. P. DEBT CONCILIATION ACT (1933), S. 7-A.

——Ch. 38, R. 33—*Time for filing written statement—Power of Court to extend—Defendant not asking for extension within period fixed by summons.*

R. 33 of Chap. 38 of the Original Side Rules gives the Court power to extend the time for filing a written statement in cases where the Defendant has neglected to take out any summons asking for extension within the period fixed by the writ of summons for filing the written statement. R. 2 of Chap. 9 as amended was not intended to exclude Chap. 9 from the purview of Chap. 38, R. 33. (*Panckridge, J.*) MONI SETHANI *v.* RADHA KISSEN. 42 C.W.N. 601.

CALCUTTA MUNICIPAL ACT (III OF 1923), S. 133 (i)—*Applicability.*

X died leaving a will whereby he dedicated absolutely to certain deities the outer portion of the premises in suit, and bequeathed the remaining portion to his sons in equal shares absolutely. The two portions of the [illegible] and independent enjoyment. The [illegible] as divided under S. 133, Cl. (*i*) of the Calcutta Municipal Act.

Held, that the assessment was properly dealt with as coming under the provisions of S. 133, Cl. (*i*) of the Act and that no such division of the assessment was possible except under its provisions. (*Lort Williams, J.*) CORPORATION OF CALCUTTA *v.* BON BEHARY SHAW. 42 C.W.N. 582.

——S. 205—*Division of assessment of premises under S. 133 (i)—Whole of premises, if subject to statutory charge.*

If the division of assessment of the premises is made under the provisions of S 133, Cl. (*i*) of the Calcutta Municipal Act, the whole of the premises so affected remain subject to the statutory charge. (*Lort Williams, J.*) CORPORATION OF CALCUTTA *v.* BON BEHARY SHAW. 42 C.W.N. 582.

CALCUTTA POLICE ACT (IV OF 1866), Ss. 44 and 47—*Accused not present at search—Betting materials found in room—If sufficient for his conviction.*

Where a person charged with keeping a common gaming house and permitting a room to be used as a gaming house is not present in the room at the time of the search, the provisions of S. 47 do not apply to him personally and the mere fact that betting material is found in the room is not sufficient to warrant his con-

[illegible]

CENTRAL PROVINCES DEBT CONCILIATION ACT (II OF 1933 as amended by Act XV of 1936),

appeared on behalf of the minor. The Board refused to accept the other two major members of the family as representatives of the minor and without appointing a guardian for the minor under O. 32, C. P. Code, passed an order under S. 8 (2) discharging the minor's share of the debt. On a suit being instituted by an assignee of the debt for its recovery, the lower Court dismissed the suit with respect to the minor's share in the debt holding that it had no jurisdiction to question the procedure of the Board.

Held, that the action of the Board was without jurisdiction and was not a mere irregularity in procedure. The minor was not represented by a properly appointed guardian under O. 32, C. P. Code, and had been prejudiced by reason of his non-representation. The Civil Court had jurisdiction to consider validity of the procedure followed by the Board and it could proceed in respect of the minor's share. (*Bose, J.*) KANHAIYALAL *v.* GOVINDA TUKARAM. **A.I.R. 1938 Nag. 203.**

——**S. 8 (1)**—*Notice under—Creditors who are omitted in the application under S. 4—Position of—Right to a decree.*

The notice contemplated in S. 8 (1) of the C. P. Debt Conciliation Act, presupposes that the debtor has disclosed the names of all his creditors. To consture that such a publication affects unknown creditors as well would result in grave injustice to creditors whose names were not disclosed in the application under S. 4. The case of such creditors must be treated as being lying outside the sphere of the Debt Conciliation Act. They are therefore entitled to a full decree. (*Nirogi, J.*) HAJI MOHAMAD *v.* HARBAJI. **1938 N.L.J. 141.**

——**S. 21**—*Applicability—Insolvency proceedings, if could be stayed—'Other proceedings' in S. 21, meaning of.*

Proceedings in insolvency cannot be suspended under S. 21 of the C. P. Debt conciliation Act. An insolvent after adjudication, though he might continue to be debtor for the purposes of those proceedings, cannot be a debtor for the purposes of the Debt Conciliation Act, as his property is vested in the insolvency Court which strips him of the essential ingredient of his status as a debtor. The expression 'other proceedings' in S. 21 of the Act must be taken to be those contemplated in S. 16 (*i.e.*) execution proceedings. (*Niyogi, J.*) SHRIDHAR *v.* GANESH. **1938 N.L.J. 133.**

——**S. 21**—*Certificate produced after confirmation of sale in execution—Effect of.*

By virtue of S. 21 of the C. P. Debt Conciliation Act any suit or proceeding in respect of any debt for the settlement of which an application under S. 4 has been made to the Board, shall be stayed till the disposal of such application. The date of the presentation of the certificate issued under R. 11 of the rules framed under the Act is immaterial. The certificate is a stay order and is imperative and hence the confirmation of sale should be stayed. (*Grille, J.*) THAKUR PRASAD *v.* RAGHURAJSINGH. **1938 N.L.J. 150.**

CENTRAL PROVINCES LAND ALIENATION ACT (II OF 1916), S. 16—*Money decree against member of an aboriginal tribe—Prohibition against sale of his property—If applies to attachment also.*

Attachment is not an end in itself, but is only an adjunct to sale. So it follows that where the Court is for any reason prohibited from selling the property or dealing with it otherwise in lieu of sale, the attachment must be raised. In the case of an aboriginal, the prohibition against interference with his property is complete; not only can there be no sale but even a receiver cannot be appointed to manage his property. Any attachment of his property must be raised. (*Bose and Puranik, JJ.*) DAULAT SHAH BAPU *v.* SARASWATI BAI. **173 I.C. 877.**

CENTRAL PROVINCES LAND REVENUE ACT (II OF 1917)—*Revision—Time—Long delay—Charge in law and ignorance as to forum of revision—If grounds of for excusing.*

A delay in filing a revision cannot be excused on the ground of either a change in the law or ignorance on the part of the party as to the proper forum for the presentation of the revision in Collector's cases. (*N. J. Roughton, F.C.*) KISAN *v.* ADKU. **1938 N.L.J. 127.**

——**S. 203**—*Obtaining of site for building house to live in—Right of transfer—Presumption.*

Where a man obtains land in order to build a residential house in a growing town, the ordinary presumption would be that the land was acquired with a right of transfer. If a landlord contends that the tenant has no right to transfer his building, it is for him to show that the right of the tenant was so expressly limited. (*Pollock, J.*) GANPATRAO *v.* MOTILAL. **1938 N.L.J. 144.**

CENTRAL PROVINCES LOCAL SELF-GOVERNMENT ACT (IV OF 1920), S. 23 (1)—*Applicability to any market.*

S. 23 (1), C. P. Local Self-Government Act, applies to any market which corresponds to the definition of market given in S. 2 (2) of the Act whatever it may happen to be called. (*Bose, J.*) KRISHNARAO GOPALRAO *v.* SECRETARY OF STATE. **A.I.R. 1938 Nag. 188.**

——**S. 23 (1) and (3)**—*Rights of owner of market—Notification under S. 23 (1) of C. P. Local Self Government Act—Rights of owner, if affected—Test—Remedy.*

In general, the owner of a market has a right to levy fees and tolls which are usually known as stallage, piccage, pennage and rent and no one can erect a stall on any portion of the land or otherwise claim exclusive occupation of it without a license from the owner. But these rights can be curtailed in various ways one of which is custom. The word 'control' as used in connotation with market means to manage or to regulate, but, in the case of markets these rights are very considerably curtailed. The only right which the owner has is to levy fees and tolls and if that is taken away by custom or statute or other means his right of control in this sense vanishes. A suit was brought by the owner of a market to cancel the Notification by Government issued under S. 23 (1), C. P. Local Self-Government Act on the ground that his rights were affected by levy of fees and toll and that his rights to levy fees for nistar were infringed by the Notification. According to the wazib-ul-arz of the village no person had right to make collections from the bazaar; the jungle tank and wells lay outside the boundaries of the market.

Held, that the rights of the owner were not affected by the Notification and the suit did not lie under S. 23 (3). (*Bose, J.*) KRISHNARAO GOPALRAO *v.* SECRETARY OF STATE. **A.I.R. 1938 Nag. 188.**

——**S. 23 (3)**—*Who can sue under—Notification when to be cancelled.*

Any person, whose rights are prejudicially affected in some way by the notification under S. 23 (1) of the C. P. Local Self-Government Act, is entitled to sue under S. 23 (3) and the Notification must be cancelled if the prejudice is established. (*Bose, J.*) KRISHNARAO GOPALRAO *v.* SECRETARY OF STATE. **A.I.R. 1938 Nag. 188.**

CENTRAL PROVINCES TENANCY ACT (I OF 1920), S. 2 (5) (d)—*Improvement—House built in* abadi—*If amounts to—House built in holding when amounts to.*

Where an occupancy tenant builds a house in the *abadi* though with a view to live near the holding and protect it, is not an improvement. Though built on the holding itself, it cannot be an improvement unless it is 'required' by the holding. (*G. P. Burton, R.M.*) MT. BUDHANBAI *v.* THENGU. 1938 N.L.J. 136

——S. 6—*Transfer of absolute*
No notice to landlord—Landlord
avoid it—Sale in execution of rent
if affected.

A transfer of an absolute occupancy holding is valid unless and until it is avoided by the landlo manner and to the extent provided by S. 6 o P. Tenancy Act. The sale of such a holding tion of rent decrees to which the transferee was not a party when he was the tenant of the holding does not bind him. The transferee obtains becomes a tenant from the date of tran *Bose, JJ.*) MADHORAO *v.* SETH PAN

——S. 63 A (3)—*Right in the d*
Extent—Building of a house—Mo
placed in possession in execution of h
of the occupancy tenant.

Although S. 63 A of the C. P. Tenancy Act retains holding it does such continue to

——S. 89—*Surrender by tenant in favour of landlord—Effect of.*

When there is a determination of the tenancy by a surrender to the landlord, there is only a blotting out of the intervening interest and no transfer of any title from one to another and hence in such a case a landlord cannot be said to obtain title from the tenant. (*Bose, J.*) HINDUSINGH *v.* KHETSINGH. 193

CHOTA NAGPUR TENANCY AC
1908), S. 210 (2)—*Scope—Permission of—If to be express—If can be implied.*

The permission of the Deputy Commissioner required by S. 210 (2) of the Chota Nagpur Tena a mere formality; nor can it be implied fact that the Court allows execution to section expressly requires the permission to be granted for reasons to be recorded in writing. It is not given as a matter of course. (*Dhavle, J.*) S MANGHI LAL BISWANATH SAHI DEC

CIVIL PROCEDURE CODE (V OF
—*Decree—Appeal memo. stamped after limitation,*

the appeal as time barred is a decree within the meaning of S. 2 (2), C. P. Code. (*Pollock, J.*) SONBA KESHAO SONAR *v.* RODRIGUES. 1938 N.L.J. 155.

C. P. CODE (1908), S. 11.

——Ss. 2 (2) and 47—*Decree—Fight between judgment-debtor and decree-holder auction purchaser—Order—Appeal.*

The case of a judgment-debtor when he is fighting with the decree-holder auction-purchaser falls under S. 47 and an order passed against the judgment-debtor is a decree under S. 2 (2) and as such appealable. (*Stone, C. J. and Puranik, J.*) MST. SEMABI *v.* g. 212.

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CHETTIAR *v.*
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——S. 10 (as amended by Government of Burma Adaptation of Laws Order, 1937)—*Retrospective effect—Power of courts in British Burma to stay suits*

effect. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) ARUNACHALAM CHETTYAR *v.* VALLIAPPA CHETTYAR. A.I.R. 1938 Rang. 130 (F.B.).

——S. 11—*Co-defendants—Applicability of* Res Judicata—*Conditions necessary.*

The plea of *res judicata* can prevail, even if the contesting parties in the subsequent suit or those through whom they claim were ranged as co-defendants in the

order to give the plaintiff the relief he claims; and (3) *the question between the defendants must have been* ere in a suit by the plaintiff claim- against defendants 1 and 2, who both the plaintiff and the defen- dants was impleaded as defendant No. 3, and the Court dismissed the suit on account of the finding that *X* was nancy rights in suit in pre- and the defendants, all the fulfilled and the question of tenancy rights is, therefore, re-opened in a subsequent suit by X against defendants 1 and 2. The fact that suit was dismissed as against defendants 1 and terial, as they could appeal against the decision in that suit if they wanted to escape its con- (*Coldstream and Din Mohammad, JJ.*) MST. PANAH BIBI. I.L.R. 1938 Lah. 75.

——S. 11—*Decision on question of l*
of decision—If material.

C. P. CODE (1908), S. 11.

The correctness or otherwise of a judicial decision has no bearing upon the question whether it does or does not operate as *res judicata*. A party taking the plea of *res judicata* has to show that the matter directly and substantially in issue has also been directly and substantially in issue in a previous suit and has been heard and decided. The principle of *res judicata* is not to be ignored merely on the ground that the reasoning whether in law or otherwise of the previous decision can be attacked on a particular point. It is not correct to say that a previous decision on a question of law is not *res judicata* in a subsequent suit. (*Puranik, J.*) SHEORAM *v.* MULCHAND. **A.I.R. 1938 Nag. 195.**

——S. 11—"*Directly and substantially in issue*"—*Meaning of—Test to decide whether matter directly and substantially in issue.*

Before a matter can be said to operate as *res judicata* it is necessary, *inter alia*, to establish that the matter was directly and substantially in issue in the earlier suit, and that it was heard and finally disposed of by the Court in the earlier suit. It is, of course, not necessary that before a matter can be said to be *res judicata*, it should form the subject-matter of a definite issue. If the Court can gather from the materials before it namely, the pleadings the judgment and the decree, that that matter was directly and substantially in issue and formed the basis of the judgment arrived at in the earlier suit, either expressly or by necessary implication, then the principle of *res judicata* would apply. It is difficult to lay down a hard and fast rule as to what matters can be said to be arising directly and substantially. The Court can only look at the manner in which that particular matter is dealt with by the parties themselves, having regard to the course of the litigation, the conduct of the parties and the manner in which the Court itself has dealt with it. Where it is impossible to show for want of proper materials as to whether an issue was raised and heard and finally disposed of, or whether it formed the basis of the decree in the suit or that it was necessary for the Court to decide it, the plea of *res judicata* must fail. (*Rangnekar, J.*) JAMBU TAVANAPPA ADAKE *v.* GOPALAKRISHNAMACHARYA. **40 Bom.L.R. 359.**

——S. 11—*Directly and substantially in issue—Rent suit—Question of title—Decision—If* res judicata *in subsequent title suit.*

If, in a suit for rent, a question of title is raised, not directly, but incidentally, then any decision on the question of title cannot operate as *res judicata* in a subsequent suit between the parties based upon title between them. But if a question of title is raised and has a direct bearing upon the decision of the Court, then a subsequent suit between the parties based on title would be barred by *res judicata* even though the earlier suit be one for rent. (*Rangnekar, J.*) JAMBU TAVANAPPA ADAKE *v.* GOPALAKRISHNAMACHARYA. **40 Bom.L.R 359.**

——S. 11—*Heard and finally decided—Final judicial pronouncement on issue—Necessity.*

No matter can be said to operate as *res judicata* unless there is a final judicial pronouncement upon it. (*Rangnekar, J.*) JAMBU TAVANAPPA ADAKE *v.* GOPALAKRISHNAMACHARYA. **40 Bom.L.R. 359.**

——S. 11—*Litigating under same title—First suit setting up purchase from defendant alleging that defendant inherited property from grandfather—Second suit alleging that defendant inherited property from father who obtained it by deed of gift from grandfather.*

It is well settled that the expression "same title" in S. 11, C. P. Code, means same capacity, the test being whether the party litigating is in law same or a different person. Where in the first suit the plaintiff set up his purchase of property from the defendant alleging that the defendant had inherited that property from his grandfather, and in the second suit the plaintiff alleged that the defendant had inherited the property in question from his father who had obtained it under a deed of gift executed in his favour by the defendant's grandfather,

Held, that in both suits the plaintiff occupied the same capacity that of a purchaser from the defendant, and that, therefore, the plaintiff was litigating under the same title in the second suit as that which was set up in the first suit.

Held, further, that the question raised in the second suit was not directly and substantially in issue in the first suit, as in the second suit the matter upon which the plaintiff's claim was founded was the deed of gift executed by the defendant's grandfather in favour of his father, a matter about which there was neither allegation nor traverse in the first suit. (*Khundkar, J.*) FAKIR CHANDRA BISWAS *v.* EKKARI SARKAR. **42 C.W.N. 560.**

——S. 11—Litigating under the same title—Suit under O. 21, R. 103 by defeated purchaser—Decree—Delivery of possession—Execution under writ—Report of process-server that well, house and trees not actually delivered—Subsequent application for re-issue of writ—Dismissal—Decision that dispossession alleged took place subsequent to delivery under writ—Fresh suit for possession— *Res judicata*. *See* LIMITATION ACT, S. 14. **19 Pat.L.T. 250.**

——S. 11—*Parties and representatives—Title suit against vendor and vendee—Decree holding that vendor had no title—Appeal by vendee impleading plaintiff alone—Vendor not party to appeal—Vendor not appealing—Effect—Finding against vendor—If* res judicata *against vendee so as to bar his appeal.*

Plaintiff filed a suit against defendants 1 and 2, claiming the suit property. The second defendant claiming to be the owner sold it to the 1st defendant who therefore claimed it as the purchaser from the 2nd defendant. The trial Court held that the plaintiff and not the second defendant was the owner and passed a decree in favour of the plaintiff. The 1st defendant appealed impleading the plaintiff alone and without making the 2nd defendant a party to the appeal the appellate Court allowed the appeal and reversed the decree and dismissed the suit. The plaintiff filed a second appeal and the High Court held that the trial Court's decree negativing the 2nd defendant's title became final in the absence of an appeal by the latter and operated as a bar to the 1st defendant's attempt to reopen the decision and that the trial Court's finding on title, not having been appealed against by the 2nd defendant became *res judicata* against the 1st defendant who claimed through the 2nd defendant. The second appeal of the plaintiff was therefore allowed.

Held, in Letters Patent Appeal, that the 1st defendant in assailing the decree of trial Court in appeal must be deemed to do so not only on his own behalf but also on behalf of his vendor, the 2nd defendant, that his success in the appeal would operate not only to his advantage but also to the advantage of the absent party. There was consequently no bar of *res judicata* against the 1st defendant's appeal. 1936 M.W.N. 789, reversed. (*Venkatasubba Rao and Abdur Rahman, JJ.*) ARULAYI *v.* RAKKA KUDUMBAN. **47 L.W. 467.**

——S. 11—*Plea of* res judicata—*Availability observation in judgment in earlier litigation that party is prevented from raising such plea.*

C. P. CODE (1908), S. 11, Expl. IV.

If the circumstances of the earlier litigation entitle the defendant to raise the plea of *res judicata*, the observations contained in the judgment of the Court in that litigation that the defendant was prevented from raising any plea of *res judicata* in any subsequent suit would not preclude another Court from considering that plea and examining the circumstances upon which it rests, (*Khundkar, J.*) FAKIR CHANDRA BISWAS *v.* EKKAI SARKAR. 42 C.W.N. 560.

——S. 11, Expl. IV—*Might and ought—Party not aware at the time of first suit of the right relied on in second suit—Bar of* res judicata.

In all litigation there are innumerable matters that might be made ground of defence or attack but whether they ought to be so made would defend largely upon the circumstances of each case. The question whether a party had at the time of the previous suit knowledge of the matter relied on in the subsequent suit is of great importance If he had at the date of the former suit neither knowledge nor means of ... of the right relied on in the second suit, the ... is not barred by the rule of constructive ... embodied in S 11, Expl. IV, C. P. Code. (... *J.*) FAKIR CHANDRA BISWAS *v.* EKKARI ...
42 C.W N. 560

——S. 11, Expl IV—*Rent suit—Denial of relationship—Prior rent decrees between same parties*—Res judicata.

In all cases for recovery of rent the relationship of landlord and tenant is the foundation of a decree and therefore when such a suit is decreed the Court must proceed on the footing that it was a matter necessary to be determined and in fact determined in the earlier rent suit. Where therefore in a rent suit brought by the landlord the tenant denies the relationship of landlord and tenant and pleads that he is a tenant of some other ...

for mesne profits from date of suit or decree in prior ...

(*Beaumont, C. J., Broomfield and Wassoodew, JJ.*) GANGADHAR GOPALRAO *v.* SHRIPAD ANNARAO.
40 Bom.L.R. 324 (F.B.).

——S. 20—*Place of suing—Commission agent* ...

... an intimation on his part of his readiness to transact business with them on those terms. Where a merchant residing in Hoshangabad District asked, by correspondence, a commission agent in Bombay what his charges were for selling coal and the commission agent wrote a letter stating his charges in detail and saying "let us have your transaction once. Then you shall have reliance on us".

Held, that the letter written by the commission agent stating the terms on which he did business was not an offer but an intimation of offer. The fact that the letter included the words "let us have your transaction once" would not convert it into an offer to be bound by acceptance for there had been no indication up till then what business the merchant residing in Hoshangabad wished to transact. The cause of action therefore did not arise in Hoshangabad District but in Bombay. (*Pollock, J.*) SHYAMSUNDER RAMDAS *v.* ABDUL SATTAR. 173 I.C. 943=A.I.R. 1938 Nag. 186.

——Ss. 20, 23 and 151—*Leave granted under S. 20 (b) without notice to opposite party—Objections against such leave—If can be heard.*

Where leave under S. 20 (*b*) is granted without issuing notice to the opposite party, the Court cannot ...

... DAS *v* KISHAN CHAND. A.I.R. 1938 Pesh. 15.

——S. 20 (b)—*Leave under—Grant of—Effect—Suit on same cause of action against many defendants—Some resident beyond Court's jurisdiction and one outside British India—Suit instituted after obtained leave of Court—Decree—Validity—Suit, by non resident foreigner to declare decree void—Competency—Propriety of grant of leave—If can be challenged.*

There is no reason to read Cl (*b*) of S. 20, C. P. Code, as limited to persons merely residing outside the limits of the territorial jurisdiction of the Court but within British India, when in some respects the Code is ... British Indian ... ainst non-resi... nst a number ... ent within the ... one of whom ... of action be... ere leave has ... Code to im... plead them in the suit, the suit is properly instituted ...

SWAMINATHAN CHETTIAR *v.* SOMASUNDARAM CHETTIAR. 47 L.W. 552.

——S. 21—*Objection to place of suing—If can be allowed in revision.*

An objection as to the place of suing cannot be allowed in a revisional Court where there has not been a consequential failure of justice. (*Abdul Rashid, J.*) G. P. CHATTERJEE *v.* DHANPAT MAL DIWAN CHAND.
40 P.L.R 234.

——S. 35-A—*Special compensatory costs—If can be awarded in addition to heavy counsel's fee.*

Where such a large sum as Rs. 2,275 have been awarded to the plaintiffs for ...

C. P. CODE (1908), S. 47.

per to award special costs under S. 35-A of the C. P. Code. (*Bennet and Ganga Nath, JJ.*) GOPAL DAS *v.* JAGANNATH PRASAD. **1938 A.L.J. 390 = 1938 A.W.R. (H.C.) 209.**

——**S. 47 and O. 21, R. 2 (3)**—*Applicability—Instalment decree with default cause—Application for execution—Plea of payment—Burden of proof—Payments alleged beyond 90 days—If can be recognised—Decree-holder—If bound to prove default.*

When no payment or adjustment of a decree has been certified under O. 21, R. 2, C. P. Code, and the decree-holder applies for execution of his decree for the entire amount due under the decree, the executing Court has to assume that there has been no payment or adjustment and cannot after the lapse of the period of 90 days prescribed by Art. 174 of the Limitation Act permit the judgment-debtor to plead any adjustment or payment. The fact that the decree is an instalment decree with a default clause does not take the case out of O. 21, R. 2 (3) or bring it under S. 47, C. P. Code. If the holder of the instalment decree applies for execution, it must be taken that his case is that default has been made, and the judgment-debtor must prove payment. As this has to be done in the executing Court, O. 21, R. 2 (3) comes into play, and the judgment-debtor cannot evading it by invoking S. 47. It is not open to the executing Court to recognise payments made beyond 90 days. (*Dhavle and Varma, JJ.*) SHAIKH DARSAN ALI *v.* SURAJ MAL. **17 Pat. 128.**

——**S. 47**—*Question relating to execution—Decree-holder taking possession of property not covered by decree—Application by judgment-debtor for restoration of possesssion—If competent.*

If the decree-holder takes into possession under the decree some property in excess of what has been granted to him by the decree, it will be a matter relating to execution. Where, therefore, by the decree cultivating rights in *sir* lands were expressly excluded and yet in execution of his decree the decree-holder has taken possession of the judgment-debtor's cultivating rights in *sir* lands, the judgment-debtor can apply under S. 47, C. P. Code, for restoration of possession of those rights. (*Puranik, J.*) ANANDRAO *v.* BENDU.
173 I.C. 563 = 10 R.N. 312 = A.I.R. 1938 Nag. 193.

——**S. 47**—*Question relating to execution—Payment prior to decree—If can be enquired into in execution.*

Where a payment made prior to a decree, is pleaded in bar of execution, the executing Court cannot go into that question as it is not one relating to execution, discharge or satisfaction of a decree. In putting forward such a claim the judgment-debtor is asking the Court to embark on an enquiry whether the decree to be executed is the decree as passed by the Court or as modified by parties. (*Pollock, J.*) BHASKAR DATTATRAYA *v.* NILKANTH DATTATRAYA. **1938 N.L.J. 148.**

——**S. 47**—*Scope of—Decree-holder auction-purchaser if a party till delivery of possession—Resistance by judgment-debtor—Question, if falls under S. 47 or O. 21, R. 103.*

S. 47 should be construed liberally. A decree-holder purchasing the property sold in execution of his decree with the permission of the Court retains his character of a party to the suit and continues to be a party to the suit till the delivery of possession to him of the property purchased by him and if any question is raised by the judgment-debtor at the time of delivery of possession relating to the nature of the rights purchased and resistance to delivery of possession is offered, the question will be one relating to the execution, discharge and satisfaction of the decree, arising between the parties to the suit and falling under S. 47 and an appeal would lie from an

C. P. CODE (1908), S. 100.

order passed in relation to the question. The case is not governed by O. 21, R. 103. (*Stone, C.J. and Puranik, J.*) MST. SEMABI *v.* GANPATRAO YADORAO. **A.I.R. 1938 Nag. 212.**

——**S. 51, Proviso, Cl. (b)**—*Judgment-debtor after decree selling his property but neglecting to pay decretal amount—If liable to be detained in civil prison.*

Where a judgment-debtor after the date of the decree sells his property, receives the consideration but neglects to pay the decretal amount or a substantial part thereof, Cl. (*b*) of the Proviso to S. 51 comes into play and he is liable to be detained in civil prison. (*Mir Ahmad, J.*) SURJAN SINGH *v.* RAM SINGH. **A.I.R. 1938 Pesh. 17.**

——**S. 60**—Applicability—Crown grant of village—Conferment of successive life-estates on grantee and his heirs—Prohibition on alienation—Attachability—Rights of creditor. *See* CROWN GRANTS ACT, S. 3. **1938 M.W.N. 440.**

——**S. 60**—Property—Thiccadar—Decree against for arrears of thicca rent—Saleability of thicca in execution. *See* LANDLORD AND TENANT—THICCADAR. **19 Pat. L.T. 280.**

——**S. 100**—*Finding of fact—Finality—Failure to consider material evidence—Effect.*

If an appellate Court, while reversing a well-considered judgment of the trial Court, fails to advert to, or in any way indicate that it has considered, a most material piece of evidence which militates against its own view, its finding cannot be accepted as an unassailable finding of fact in second appeal. (*Venkatasubba Rao and Abdur Rahman, JJ.*) BAPAYYA *v.* RAMAKRISHNAYYA.
1938 M.W.N. 354 = 47 L.W. 477 = (1938) 1 M.L.J. 582.

——**S. 100**—*Finding of fact—Finality of—Powers of High Court.*

The High Court, in dealing with second appeals under S. 100, C. P. Code, is confined strictly to questions of law, and is bound to accept the lower Court's findings of fact. The High Court has no jurisdiction to reverse the findings of fact arrived at by the lower appellate Court, however erroneous, unless they are vitiated by some error of law, although, if it were dealing with the case as a Court of fact, it might take a different view of the evidence in the case. (*Agarwala and Varma, JJ.*) JOALA PRASAD SINGH *v.* CHANDERJOT KUER. **1938 P.W.N. 250 = 19 Pat. L.T. 281.**

——**S. 100**—*Finding of fact—Finding on point not pleaded based on slender evidence—Finality.*

The lower appellate Court as the final Court of fact is entitled to draw such inferences from facts as it thinks proper, and in second appeal there is no power in High Court to interfere with those findings; but when the appellate Court, on the slenderest of evidence, makes out a case which is not in the pleadings, its finding of fact cannot be binding in second appeal. (*Agarwala, J.*) BINDESHWARI RAI *v.* RAM PALAK SINGH. **A.I.R. 1938 Pat. 181.**

——**S. 100**—*Finding of fact—Hindu coparcener—Intention to separate from joint family—Suit for partition—Finding that institution of suit was not voluntary act and did not evidence clear intention to separate—If conclusive in second appeal.*

A finding by the lower appellate Court, that a Hindu coparcener in filing a plaint for partition was under the influence of profligate persons who were bent upon ruining him, and that in effect the institution of the suit for partition was their act rather than his act, and that therefore the institution of the suit did not evidence an unequivocal intention on the part of the member concerned to separate from the other members of the joint

C. P. CODE (1908), S. 100.

family, is one of fact, and the High Court in second appeal cannot disregard the same, but must accept it as conclusive. (*Agarwala and Varma, JJ.*) JOALA PRASAD SINGH *v.* CHANDERJOT KUER.

1938 P.W.N. 250 = 19 Pat L T. 281.

——S. 100—*New plea—Plea of estoppel—If can be raised for first time.*

Estoppel is always a mixed question of fact and law, can a plea of estoppel cannot be al the first time in second appeal, w tate the taking of further evidence J.) JAMBU TAVANAPPA *v.* CHARYA. 40 Bom.L.R

——S. 100—*New plea—Point of law—If raised for first time in second appeal.*

It is well settled that the Court will allow, e second appeal, a question of law to be raised for the first time, if it can do without any unfairness to the opponents, and if a question of law is such that it does not necessitate the taking of further evidence, the High ... allow it to be raised for ...) JAMBU

L R. 359.

——S. 100—*Question of law—Inference from facts—Interference.*

facts and to review the legal conclusion, if erroneous. The proper effect of a proved fact is essentially a question of law. (*Dhavle and Manohar Lal, JJ.*) NRISINGHA CHARAN NANDY *v.* TRIGUNAND JHA.

19 Pat.L.T. 309.

——S. 100—*Second appeal—Dismissal of appeal under O. 41, R. 11—Right of second appeal.*

The m under O. that no se

allowing claim in respect of others—Appe parties—Decree allowing one appeal and other—If one of reversal—Leave to appeal.

In cases where parties claiming under vari tions are brought before the Court, the mere fact that the rules of procedure permit the claims to be joined in one suit does not justify the decree being treated as one single and inseparable decree when the High Court confirms the lower Court's decree in respect of some of the parties and claims and reverses it as regards others. In a suit by a Hindu reversioner for possession of pro-

widow of the last male owner. The trial Court dismissed the suit in so far as it related to the properties claimed through the mother of the last male owner, but decreed it in respect of the properties alienated by the widow of the last male owner. Two appeals were pre-

C. P. CODE (1908), S. 115.

ferred, one by the plaintiff against the dismissal of part of his claim, and the other by the alienees from the widow who were directed by the decree to surrender possession. The High Court by its decree allowed the plaintiff's appeal, but dismissed the appeal of the alienees from the widow of the last male-holder. The properties involved in each of the two appeals exceeded Rs. 10,000 in value.

that the two appeals arose out of the same Court was no ground for regarding the decision of the High Court as a single decree so as to entitle the defeated parties to appeal against the whole decree taking the appeals together on the ground that the High Court in part modified the decree of the lower Court. (*Varadachariar and Horwill, JJ.*)

——S. 110—*V alued at over Rs. 25 000—Plaintiff's share valued than Rs. 10,000—Dismissal of suit—Appeal— allowing claim to property worth less than Rs. 10,000—Leave to appeal to Privy Council—Competency.*

In order to satisfy the conditions as to valuation in S 110, C. P. Code, the suit must involve rights and claims to property which rights and claims are worth Rs. 10,000 or upwards. In a partition suit it is the particular share claimed which has to be looked at and not the entire estate for purpose of valuation. In a suit for partition, the plaintiff valued the entire estate as a over Rs. 25,000, and his own share at Rs. The defendants denied that the plaintiff was upheld and the suit High Court held r and allowed his s. 5,162 5-4. The peal to the Privy

an Rs. 10,000, the aim or question or d value, and that the fact that the of an estate worth within the second leave J.)

433.

——S. 115—Applicability—Order of Civil Court under S. 476-B, Cr. P. Code—Revision—Procedure—If governed by S. 115 or S. 439, Cr. P. Code—Nature of proceedings. *See* CR. P. CODE, S. 439.

40 Bom L R. 297 (F.B.).

——S. 115 — *Applicability — Presidency Small Cause Court.*

plies to suits and proceedings Cause Court. 41 Cal. 323, *Williams, J.*) MAHOMED

42 C.W.N. 602.

——S. 115—*'Case'—If includes interlocutory orders.*

The word 'case' used in S. 115 is wide enough to include an interlocutory order and the High Court will interfere even in the case of

C. P. CODE (1908), S. 115.

otherwise fulfil the requirements of S. 115. (*Bose, J.*) KRISHNA KUMAR *v.* RADHELAL.

A.I.R. 1938 Nag. 210.

———**S. 115**—*Case decided—Order under O. 9, R.* 13 *setting aside* ex parte *decree—Revision.*

An order purporting to set aside an *ex parte* decree under O. 9, R. 13 is an order deciding a case within the meaning of S. 115, C. P. Code, and revision therefore lies. The fact that an appeal lies against an order made under O. 9, R. 13 refusing to grant an application to set aside an *ex parte* decree and that no appeal lies against an order granting an application to set aside a decree does not exclude the remedy by revision in the latter case, much more restricted though the remedy by revision is. (*Davis, J.C. and Lobo, J.*) ZENAB *v.* MAHOMED HAJI ALLAHDINO.

A.I.R. 1938 Sind 76.

———**S. 115**—*Case decided — Subordinate Court—Order by District Judge under S.* 36, *Legal Practitioners Act declaring person tout—Revision—Jurisdiction of High Court—Interference—Grounds—Cr. P. Code, S.* 439—*Government of India Act, S.* 224 (2).

S. 36 of the Legal Practitioners Act confers a special jurisdiction on Subordinate Court; and an order passed by a District Judge under S. 36 declaring a person a tout is an order which the High Court has power to revise under S. 115, C. P. Code, being a case decided by a Court subordinate to the High Court. S. 439 of the Cr. P. Code does not apply to such a case. Nor can it be revised under the Government of India Act, 1935. The jurisdiction to revise is, however, of an exceptional character and cannot be invoked except in furtherance of justice. If the Judge in passing the order had no clear conception of the law on the subject or if he has failed to apply the law to the facts of the case and bases his finding on mere suspicion or conjecture, the High Court would interfere with the order. (*Abdur Rahman, J.*) SOMANNA, *In re.*

1938 M.W.N. 426=47 L.W. 578.

———**S. 115**—*Defective judgment—Interference.*

Where there had not been any real consideration of the evidence at all before the lower appellate Court and all that the Judge did was to seize hold of a rule of law about the burden of proof, a rule which incidentally loses most of its significance when there is evidence for consideration and then to seize hold of two or three superficial points in the case and rest content with that.

Held, that that was not what an appellate Judge was there for, especially when he was reversing a well considered finding of a lower Court and that interference in revision was necessary. (*Bose, J.*) KISANGOPAL *v.* UMRAO KESHEO RAO.

A.I.R. 1938 Nag. 216.

———**S. 115**—Discretion—Wrong exercise of discretion under S. 5, Limitation Act—Interference. *See* LIMITATION ACT, S. 5. **19 Pat.L.T. 309.**

———**S. 115**—*Error of law—Revision, if competent.*

The fact that the lower Court erred in law in coming to its findings, does not render a revision petition competent under S. 115, C. P. Code. (*Addison, J.*) EMPEROR *v.* GHANI. **I.L.R. (1938) Lah. 125.**

———**S. 115**—Jurisdiction—Refusal to exercise—Application to set aside sale in execution—Prayer for permission to give landed property as security instead of cash deposit—Refusal without fixing amount of security and without applying mind to the case—Revision—Interference. *See* C. P. CODE, O. 21, R. 90 (1) (PATNA AMENDMENT), PROVISO (1) (*b*) **17 Pat. 107.**

———**S. 115**—*Jurisdiction—Refusal to exercise—Court declining to further proceed with execution on wrong view of law—Revision—Interference.*

C. P. CODE (1908), S. 145.

If a Court, taking a wrong view of the law, assumes jurisdiction or declines to exercise jurisdiction, it is a matter for interference under S. 115, C. P Code. Where a Court refuses to proceed further with a pending application for execution, erroneously holding on a wrong view of the law, that it has no jurisdiction to deal with it, and dismisses the same, it acts illegally in declining to exercise its jurisdiction by refusing to proceed further; and its order is liable to revision by the High Court under S. 115, C. P. Code. (*Burn and Venkataramana Rao, JJ.*) KRISHNAN *v.* NARAYANAN NAYAR.

1938 M.W.N. 330.

———**S. 115**—*Leave to sue—If revisable.*

An order allowing a person to sue as a pauper is revisable if it otherwise fulfils the provisions of S. 115. (*Bose, J.*) KRISHNA KUMAR *v.* RADHELAL.

A.I.R. 1938 Nag. 210.

———**S. 115**—*Material irregularity—*Ex parte *decree—Order setting aside on insufficient grounds—Revision—Interference.*

The applicant sued for a declaration that she was validly divorced from her husband. The dispute was referred to arbitration and extension of time was granted until certain date. On that date applicant was present through her pleader but the defendant was not present and the reference was superseded. The case was fixed for hearing for a certain date. Again the defendant was not present and an *ex parte* decree was passed. The defendant applied to have the *ex parte* decree set aside alleging various grounds for his non-appearance. The Judge before whom the case then came allowed the application and set aside the *ex parte* decree on the ground that his predecessor made no order that the suit was to be put down for *ex parte* hearing.

Held, that the Judge acted with material irregularity in setting aside the *ex parte* decree. (*Davis, J. C. and Lobo, J.*) ZENAB *v.* MAHOMED HAJI ALLAHDINO.

A.I.R. 1938 Sind. 76.

———**S. 115**—*Subordinate Court—Order by Sessions Judge under S.* 111, *Bombay Municipal Boroughs Act—Revision to High Court—Competency—Interference—Grounds.*

A Sessions Judge acting under S. 111 of the Bombay Municipal Boroughs Act in revision from a decision of the Magistrate under S. 110 of that Act, is a Court subordinate to the High Court within the meaning of S.115, C. P. Code, and a revision application would therefore lie to the High Court under S. 115, against an order passed by the Sessions Judge under S. 111 of the Municipal Boroughs Act; but such an application being a second application in revision, the High Court would not interfere unless it appears that there has been some grave abuse of its power by the Sessions Court, or the decision is manifestly erroneous or unjust (*Norman, J.*) SURAT MUNICIPALITY *v.* HAMIDUDDIN.

40 Bom.L.R. 387.

———**S. 144**—Inherent power of Court—Order holding surety liable for payment—Reversal—Application by surety for restitution. *See* C. P. CODE, S. 151—RESTITUTION. **40 P.L.R. 289.**

———**S. 145**—*Father's liability as surety—Son's interest—If can be proceeded against.*

Section 145 permits the execution of a decree (passed against a stranger) against the surety as though it were a decree passed against the surety. It may be that he is a party only for a limited purpose. Hence where a father has become liable as surety for a decree passed against a stranger, the interest of surety's sons can be taken in execution of the decree. The fact that the decree-holder has power to sue the surety instead of taking recourse to execution under S. 145 does not

C. P. CODE (1908), S. 149.

preclude the decree-holder seeking a shorter and less expensive remedy of execution under S. 145. (*Stone, C.J. and Puranik, J.*) PANDURANG GADIBA KUNBI *v.* ABDUL HUSSAIN ISAJI BOHRI. 173 I C. 950 = A.I.R. 1938 Nag. 148.

——S. 149—*Discretion under—Exercise of—Appeal memo stamped with a moiety of court fee payable—Plea of inability to pay—Extension of time—Powers.*

A Court has a discretion to extend time for payment of the requisite court-fee due on a memorandum of

——S. 151—*Restitution—Order holding surety liable for payment—Reversal—Application by surety for restitution—Inherent power of Court.*

A surety who is a party to an order holding him liable for payment to the decree holder can, on reversal of that order on appeal, apply to the Court for restitution under

suit.

40 P.L.R. 235.

——O. 3, R. 4—*Vakalat filed in suit—How long remains in force—Collector's cases—Fresh vakalat—Necessity.*

not necessary for his appearance in execution proceedings, so also in Collector's cases which are only part of those proceedings in the suit, a fresh vakalatnama is not necessary for the pleader's appearance. (*G. P. Burton F. C.*) THE CO-OPERATIVE SOCIETY *v.* RAMCHANDRA BHAGWATT. 1938 N.L.J. 122.

——O. 6, R. 10—*Plea of insanity—Pleadings—Contents—Duty of final Court of fact.*

Though it may be that a party seeking to avoid the

lity to scrutinise the pleadings of the parties when pleas have been made and if these pleas appear to be destructive of the case of usual insanity it will not be proper for the final appellate Court of fact to infer usual insanity from the statement of

the pleading. (*Puranik, J.*)

FATMABI.

——O. 6, R. 17—*Cause of ac*

for recovery of land based on

mortgage—Amendment to base

bility.

C. P. CODE (1908), O. 21, R. 2.

Where a person brings a suit for recovery of possession of land but it is found that in fact his claim is for redemption of an unprovable usufructuary mortgage, such person cannot be allowed an amendment of the pleadings by basing his suit on his title, the causes of action for the two suits being different. (*Baguley, J.*) U NAING *v.* KO SEIN. A.I.R. 1938 Rang. 125.

——O. 6, R. 17—*Discretion of trial Court—Interference.*

The trial Court has complete discretion whether to

of pleadings

een exercised

ourt will not

JJ.) JAINI BROTHERS & CO *v.* SHANKAR LAL. A.I.R. 1938 Lah. 270.

——O. 6, R. 17—*Suit on contract of sale of land—Contract found to be void—Refund of purchase money—Amendment of plaint—Permissibility.*

Held that the purchaser should be permitted to

efund of the

to a separate

KAM ALI *v.*

938 Lah. 244.

under—Ascer-

The correct procedure under O. 20, R. 12, C. P. Code, is for the Court to direct an inquiry as to the mesne profits, and then pass a final decree for the amount found due on inquiry. The Court which is directed to

to determine

recovery. It

for recovery

) BALARAM

40 Bom.L.R. 416.

——O. 20, R. 17—Scope—Effect of on rules 114 to 120 of the Madras Civil Rules of Practice—Validity of latter rules. *See* MADRAS CIVIL RULES OF PRACTICE, RR. 114 TO 120. (1938) 1 M.L.J. 495 (F.B.).

——O. 21, R. 2—*Adjustment—Compromise under which Judgment debtor makes over certain decrees to decree-holder in partial adjustment of claim and*

Compromise, if

certain decrees

debtor had been

ial adjustment of

paid by means

to an adjust-

nents does not

amount to substitution of a new decree for the old decree. (*Abdul Rashid, J.*) DARU MAL *v.* TODAR. 40 P.L.R. 264.

——O. 21, R. 2—*Applicability—Payment prior to*

where money

urt. But where

s no decree in

(*Pollock, J.*)

DATTATRAYA.

——O. 21, R. 2—(Patna Amendment)—*Applicability—Pending execution.*

Order 21, R. 2 refers to the stage when there is no execution case pending and when the judgment-debtor comes to notify to the Court an adjustment outside the Court. The rule therefore does not apply when an execution case is pending. (*Mohamad Noor, J.*) SURAJMAL *v.* MANBODH BHAGAT LALL CHAND RAM.

A.I.R. 1938 Pat. 204.

——O. 21, R. 2 (3)—Applicability and Scope—Instalment decree with default clause—Execution—Plea of payment and non-default—Burden of proof—Power of executing Court to inquire into payments. *See* C. P. CODE, S. 47 AND O. 21, R. 2 (3).

17 Pat. 128.

——O. 21, R. 31—*Decrees executable under.*

A decree for delivery of specific movable property which can be enforced by the stringent method prescribed by O. 21, R. 31, C. P. Code, can be passed only in a suit where the plaintiff alleges and proves facts which give him a right to compel its delivery under the provisions of S. 11 of the Specific Relief Act. 39 M. 1 (F.B.), rel. on. (*S. K. Ghose, and Nasim Ali, JJ.*) KARNANI INDUSTRIAL BANK LTD. *v.* BARABANI COAL CONCERN LTD. **42 C.W.N. 523.**

——O. 21, R. 31—*'Specific movable'—If includes money.*

The words "specific movable" in R. 31 do not include money. 37 M. 381, relied on. (*S. K. Ghose and Nasim Ali, JJ.*) KARNANI INDUSTRIAL BANK LTD., *v.* BARABANI COAL CONCERN LTD. **42 C.W.N. 523.**

——O. 21, R. 63—*Scope—Order allowing claim to attached property—Suit by decree-holder—Frame of—If to be representative suit on behalf of all creditors of judgment-debtor—Right of decree-holder—If subject to Sec. 53, T. P. Act.*

A judgment-creditor who is defeated at the instance of an intervenor in proceedings taken in execution of his decree is not bound necessarily to file a suit under S. 53 of the T. P. Act. He is entitled under O. 21, R. 63, C.P. Code, to bring a suit for a declaration that the intervenor-claimant has no title and that he (the decree-holder) has the right to attach the property and bring it to sale in execution of his decree. O. 21, R. 63, C. P. Code, does not say that the suit by the defeated decree-holder must be a representative suit brought by the judgment-creditor for and on behalf of the general body of creditors of the judgment-debtor. The rule is not subject to S. 53 of the T. P. Act. All that the last paragraph of S. 53 (1), T. P. Act, say is that if a creditor (which term includes a decree-holder) wants to avoid a transfer on the ground that it has been made with intent to defeat or delay the *creditors* of the transferor, then he must sue on behalf and for the benefit of all the creditors. But it does not say that a creditor who wants to enforce his own right to property as against another creditor or a transferee must bring a representative suit. A suit to establish the decree-holder's priority need not be a representative suit. S. 53 does not cover the case of a transfer in which the intention is only to prefer one creditor to another; the section does not refer to the question of priority or preference among the creditors of the transferor or the debtor under the section the intention must be to defeat or delay the creditors generally. Though a suit under S. 53 (1), last paragraph, has to be brought by the plaintiff on behalf of himself and all other creditors the debtor, a suit under O. 21, R.63, C.P. Code., need not necessarily be on behalf of the defeated decree-holder and all other creditors. S. 53, T. P. Act. merely confers a privilege upon a creditor (or decree-holder) to impeach a transaction of his debtor in the

interest of other creditors; but there is nothing in it which compels a decree-holder who wants to establish his own rights as against a transferee from the judgment-debtor in order to realize the fruits of his decree to bring a representative suit under S. 53, T. P. Act. (*Rangnekar, J.*) SHRIMAL *v.* HIRALAL.

40 Bom.L.R. 371.

——O. 21, R. 90—(Patna amendment), Proviso (i)—*Discretion of Court—Application for permission to give landed property as security instead of deposit—Court not applying mind to it and refusing—Dismissal of application to set aside sale for failure to make deposit—Appeal—Order refusing to accept security—Revision—Interference.*

Under O. 21, R. 90 (1), C. P. Code, as amended in Patna, the Court in an application to set aside an execution sale, has a discretion to accept landed property as security instead of a cash deposit in a proper case. If the Court refuses to dispense with cash deposit and to accept landed property as security and then dismisses the application for failure to make the deposit, the latter order is appealable under O. 43, R. (1) (*j*), C. P. Code, though the order refusing to accept security is not appealable. But the order refusing to accept security can be set aside in revision, but does not apply its mind to the facts of the case and does not judicially determine the application for permission to give landed property as security. If it does not fix the amount of the security, interference in revision on the simple ground that it does not exercise a jurisdiction vested in it by law. (*Mahomed Noor and Varma, JJ.*) BALMAKUND MARWARI *v.* PIRTHIRAJ GANESHDAS. **17 Pat. 107= A.I.R. 1938 Pat. 240.**

——O. 21, R. 93—*Judgment-debtor having no saleable interest in property sold—Right of purchaser to sue for refund of purchase money.*

(Per *B. K. Mukherjea, J.*)—A suit for refund of purchase money on the ground that there is no saleable interest of the judgment-debtor in the property sold, does not lie at the instance of the auction-purchaser. The auction-purchaser has now got under the C. P. Code to set aside the sale under O. 21, R. 91, by an application made within 30 days from the date of sale, before he can apply for refund under O. 21, R. 93. Where however the invalidity of the proceeding is due to fraud, carelessness, or neglect of duty on the part of the decree-holder, the auction-purchaser can sue to recover the purchase money on the ground of failure of consideration, and such right is unaffected by any provision of the C. P. Code. (*Nasim Ali and B. K. Mukherjea, JJ.*) CHAITANYA DAS BANERJEE *v.* RANJIT PAL CHOWDHURY. **A.I.R. 1938 Cal. 263.**

——O. 21, Rr. 95 to 99 and S. 47—*Relative scope of.*

O. 21, R. 95 and the subsequent rules in O. 21, relating to delivery of possession to the decree-holder or auction-purchaser fall under an order relating to the execution of decrees and orders. When a question arises as to the kind of possession to be delivered, it is a question relating to the execution of the decree. (*Stone, C.J. and Puranik, J.*) MST. SEMABI *v.* GANPATRAO YADORAO. **A.I.R. 1938 Nag. 212.**

——O. 21, R. 103—*Court fees—Suit under*—Advalorem *fee—If payable* obiter.

The view that in a suit under O. 21, R. 103, C. P. Code, the plaintiffs would have to pay Court-fees on that part of the claim which amounts to a prayer for recovery of possession is erroneous. (*Courtney Terrell, C.J. and James, J.*) GAJANAND MARWARI *v.* NONIDH LAL. **1938 P.W.N. 307=19 P.L.T. 250.**

C. P. CODE (1908), O. 22, R. 9.

——O. 22, R. 9—*Abatement—Rent cases—Technical*

death of the defendant before decree, refrains taking steps to remedy his decree, which he has year known to be null and void, then the law abatement cannot be interpreted liberally in his favour. (*Darling, S.M. and Bemford, J.M.*) RAJ BAHADUR v. ADMINISTRATOR GENERAL OF THE ESTATE OF C.J. BARBAR. 1938 R.D. 431.

——O. 23, R. 2—*Applicability*— —*Plea by defendants of being agric* *withdrawing suit with liberty*— *moffusal Court—Right to deduct period of prior suit—Lim. Act, S.* 14—*Applicability.*

The C. P. Code and the Limitation Act are rules of procedure and must be interpreted strictly. A plaintiff who prays for an order for withdrawal of his suit with leave of the Court under O. 23, R. 1, C. P. Code, must face R. 2 of O. 23, and cannot have the benefit of S. 14 of the Limitation Act. In a suit under the High Court the defendant pleaded that they were agriculturist. The plaintiff applied for leave to withdraw the suit under O. 23, R. 1, with liberty to file a fresh suit, and the Court granted the same. Subsequently the plaintiff filed a suit in a subordinate Court in the moffussil and claimed the right to deduct the period during which he was prosecuting the first suit, under S. 14, Limitation Act.

Held, that the High Court in the prior suit had jurisdiction to decide the plea raised by the defendant as to their status, and that the case fell under O. 23, R. 2, C. P. Code, but not under S. 14 of the Limitation Act, and the plaintiff could not therefore avail himself of the benefit of S. 14, Limitation Act. (*Barlee and Norman, JJ.*) ACHUT DADAJI JOSHI v. PARSHARAM VASUDEV. 40 Bom L.R. 377.

——O. 26, R. 8—*Scope and effect of—Absence of conditions mentioned in R.* 1—*Consent of parties, if can render such evidence admissible.*

In the case of consent of the parties, it would not be necessary that the conditions and limitations prescribed in R. 1 of O. 26 should exist. It will appear from R. 8 of O. 26, that with the consent of the parties, the evidence of a person in cases where the conditions and limitations laid down in R. 1 or Cls. (*a*) and (*b*) of R. 8, do not exist may be admissible in evidence. (*Bennet and Ganga Nath, JJ.*) GOPAL DAS v. JAGANNATH PRASAD. 1938 A.L.J. 390 = 1938 A.W.R. (H.C.) 209.

——O. 32, R. 7—*Scope—Leave of Court—Express order of Court—Necessity.*

It is enough if the attention of the Court is directed specifically to the fact that there is a minor involved in the suit and the compromise entered by the guardian *ad litem* on behalf of the minor is brought to its notice; if thereafter a decree is ordered to be passed in terms of the compromise it must be assumed that the Court has complied with the requirements of the law.

specified in R. 5.

Where notices have been issued under R. 6, the opposite party has a right to adduce evidence and to be heard in connexion with any matter specific in R. 5; and the High Court will interfere in revision under S. 115 (*c*) if the opposite party is prevented from defending himself on any of those grounds. (*Bose, J.*) KRISHNA KUMAR v. RADHELAL. A.I.R. 1938 Nag 210.

——O. 33, R. 5 (b) and (c)—*Opposition on grounds under—Burden of proof.*

pplication on any (*c*), the primary rty (defendant). HELAL. A.I.R. 1938 Nag. 210.

——O. 34, R. 1—*Attaching creditor—If necessary party.*

Per *Nasim Ali, J.*—An attaching creditor is a neces- K. Ghose and Nasim AL BANK, LTD. v. 42 C.W.N. 523.

——O. 34, R. 5—*Decree for sale—Application of sale proceeds—Costs and interest—If can have priority over mortgage debt.*

There is no doubt that a creditor to whom principal and interest are due, is entitled to appropriate against the interest any sum the debtor pays without stipulating that it is to be appropriated against the principal. But there is no reason why this principle should be imported into the execution of decrees which are provided for by the C. P Code. In cases in which a decree has been passed in the usual form, prescribed under R. 5 of O. 34, costs and interest cannot have priority over the actual mortgage debt declared to be due in the preliminary decree and the rule laid down in O. 34, Rr. 10 and 13, relating to properties which are subject to prior mortgages cannot be inferentially applied to cases in which the property sold is not subject to any mortgage other than the one for the realization of which the property of the judgment-debtor was ordered to be sold. A.I.R. 1931 Rang. 153, Appr. (*Addison and Din Mohammad, JJ*) CENTRAL BANK OF INDIA, LTD. v. ATTAR CHAND. A.I.R. 1938 Lah. 289.

——O. 34, R. 14, Sub R. (1)—*Applicability—Exemption of certain item of security from mortgage suit and sale thereon—Decree under O.* 34, *R.* 6 *for balance* —*O* 34, *R.* 14 *if bars execution against exempted item.*

Where a mortgagee exempts a certain item of security from the mortgage suit and brings the remaining property to sale and on its being insufficient obtains a decree under O. 34, R. 6 it could be executed against the exempted item, as by the operation of O. 2, R. 2 the mortgage security no longer exists; O. 34, R. 14 (1) is not a bar to the sale of such property, for the sub rule cannot apply to a simple money decree under O. 34, R. 6. (*Bennet, A C.J. and Verma, J.*) DIRGPAL SINGH v. GULZARI LAL. 1938 A L J. 379 = 1938 A.W.R. (H C.) 245.

——O. 38, R. 5—*Applicability—Attachment before judgment—Order for—Conditions—Duty of plaintiff to adduce evidence—Intention of defendant—Reference to previous transactions—If justified.*

Before the power under O. 38, R. 5, C. P. Code, is exercised, the Court must be satisfied that transfers are going to be made by the defendant after the suit has been filed and that such transfers are made with the

be effected by the defendant, previous transactions may be referred to, they must be transactions subsequent to the filing of the suit. The applicant for attachment must adduce evidence to show what properties are going to be transferred, to whom they are going to be transferred, and under what circumstances.

COMPANIES ACT (1913), S. 91-A.

Held,
final orde
proceed ex

S. 91-A (1) of the Companies Act is not limited to contracts entered into at a meeting of the directors but applies also to cases in which contracts were not made at such a meeting.
DRANATH MITRA *v.*

——S. 91-A (1)
Letter by purchasing

A letter written by the purchasing director to the chairman of the Board of Directors who merely signed it as noted, does not prove that the disclosure of the director's interest was made at any meeting of the directors as required by S. 91-A (1) of the Companies Act, when it is not referred to in the minutes of any of the meetings. (*Jack and Patterson, JJ.*) RABINDRA NATH MITRA *v.* EMPEROR. 42 C.W.N. 533.

——S. 91-A (1).
tor—Disclosure of i

Petty purchases b
firm in which he has an interest, are covered by the proviso to S. 91-A (1) of the Companies Act, and the director's interest should be disclosed in the manner provided for therein. (*Jack and Patterson, JJ.*) RABINDRA NATH MITRA *v.* EMPEROR. 42 C.W.N. 533.

——S. 153—*Depositor who has obtained decree and depositor who has not—If belong to same class.*

A depositor who has obtained a decree against the company in respect of the amount of his deposit is in a different position from those persons who have not. He is entitled to be considered
class when the provisions
Act are sought to be enfor
to. (*Derbyshire, C. J. and Mukherjea, J.*) RAJASHAHI BANKING AND TRADING CORPORATION, LTD. *v.* PULINBEHARI MUKHERJEE. 42 C.W.N. 610.

——S. 153—*Scheme, when takes effect—Depositor obtaining decree after order of Court to prepare scheme but before its preparation—If bound by scheme.*

A scheme becomes binding from the date when it is arrived at, subject to subsequent sancti
A depositor who obtains a decree
Court for the preparation of a scheme
actually prepared is not bound by the
prevented from putting the decree
(*Derbyshire, C.J. and Mukherjea,*
BANKING AND TRADING CORPORATION, LTD. *v.* PULIN BEHARI MUKHERJEE. 42 C.W.N. 610.

COMPROMISE — *Construction—Language used—If controlled by antecedent claims of parties to suit—"Heirs" and "own heirs"—Meaning and distinction—Clause giving properties to widow and her heirs with powers of alienation by way of gift exchange, sale, etc.—Effect of.*

On the death of a Zamindar 1888, disputes arose as to the succession to the Zamindari. The Zamindar's widow alleged that her husband was a divided member and set up her title both as heir to her husband and as the legatee under a will alleged to have been left by him on the footing that her husband had become divided. A son of one of the uncles of the deceased claimed as the survivor by rule of lineal primogeniture alleging that the deceased Zamindar was undivided, and in 1889 he

CONTRACT ACT (1872), S. 12.

mindari. The parties, a compromise dated ontained three sets of rties. Cls. 1 indari proper arrangement ne during her ild enjoy the same after her death. Cl. 6 of the razinama dealt with certain properties which belonged to or were in the possession of the deceased Zamindar excluding the Zamin-

Cl. 7 of the compromise dealt with the third set of properties, namely, acquisitions that might be made by the widow out of the income of the estate in her hands or by other means, and it was provided by Cl. 7, that these properties should not merely belong to the widow exclusively, with powers of alienation, etc., but that after her death they should belong to the widow's *own heirs* and that the plaintiff and his heirs should

omise, (1) that s. 1 to 4, in respect of the Zamindari was a strict life-estate and not an ordinary widow's estate, and that the plaintiff took a vested remainder as regards the same; (2) that Cl. 6, of the compromise gave the properties dealt with by it absolutely to the widow, and the clause could not be read as giving her only a widow's estate; (3) that the said Cl. 6 expressly mentioned the widow and her heirs as absolute owners with powers of alienation by way of gift etc., and it was not reasonable to say that the words did not connote what their natural meaning undoubtedly conveyed; (4) that it was not fair to allow the antecedent
the construc-
6; (5) that
read as mean-

heirs, nor would the fact that a reference to her husband occurred in some distant part of the clause after the words "heirs" connote that her husband's heirs were meant. (*Varadachariar and Abdur Rahman, JJ.*)
JA PAN-
.J. 563.
1926),
nishable

he Contempt of Courts Act is that where there is already a provision in the Penal Code for punishing a contempt of Court as such the Contempt of Courts Act itself shall have no application. But where an act amounts to an offence under the Penal Code and also under the Contempt of Courts Act, it will be punishable under both Acts. (*Iqbal Ahmad and Harries, JJ.*) EMPEROR *v.* JAGANNATH PRASAD. 1938 A.L.J. 430 = 1938 A.W.R. (H.C.) 275.

CONTRACT ACT (IX OF 1872), S. 12—*Suit to avoid deed on ground of insanity—Scrutiny of pleading and evidence—Necessity—Absence of—Scrutiny—Finding if binding in second appeal.*

Where a party executing a deed seeks to avoid the effect of the same by pleading insanity at the time of executing the same, it is of utmost importance that the pleadings and evidence of parties on record are scrutiniz-

CONTRACT ACT (1872), S. 25.

ed with advertence to the law of contract as contained in S. 12; where the trial Court and the final appellate Court fail to bear this in mind while deciding the case the decision of the final appellate Court of fact on the issue of insanity will not bind the Court in second appeal. (*Puranik, J.*) MST. HAZRA BI *v.* MST. FATMABI.

A.I.R. 1938 Nag. 204.

——**S. 25**—*Acknowledgment without express promise to pay—Effect of.*

Mere acknowledgment of liability without any express promise to pay or without any reference to the future liability to pay does not fall within the meaning of S. 25. (*Jai Lal and Dalip Singh, JJ.*) BASHESHAR NATH GOELA *v.* BAIJ NATH. **A.I.R. 1938 Lah. 264.**

——**S. 25 (3)**—*Applicability.*

Unless a promise to pay is in writing it cannot fall within the purview of S. 25 (3). (*Bose, J.*) RAMPRASAD JAGBANDHOO *v.* ANANDI BRINDAWAN RAWAT.

A.I.R. 1938 Nag. 180.

——**Ss. 133 and 134**—*Scope—Failure of consideration for contract of creditor with principal debtor—Effect—Subsequent variation of original contract between creditor and principal debtor—Surety not party to such variation—If discharged.*

It is a fundamental principle of the law of suretyship that a surety cannot be bound to something for which he has not contracted. The provisions of the Contract Act cannot be deemed to be exhaustive. S. 133 of the Act cannot in any view, operate to alter the primary law of the contract of guarantee that the promisee must show performance before he can hold the promisor liable. If the contract with the principal debtor is varied without the consent of the surety, the latter who is not a consenting party to the variation is discharged from liability, although the principal debtor who is entitled to cancel and does cancel the contract, subsequently withdraws the cancellation and submits to the claim of the creditor. If the consideration for the original contract with the principal debtor fails, the latter is relieved of all liability, and necessarily the surety also ceases to be liable as surety. The fact that the principal debtor withdraws his defence to an action by the creditor and allows judgment to be given against him cannot affect the position of the surety. (*Leach, C.J. and Venkataramana Rao, J.*) NUSERWANJI CURSIDJI BHESANIA & CO. *v.* MAHAMUJI AMMAL **1938 M.W.N. 325.**

——**S. 133**—*Surety for tax-collector of municipal committee—Son of tax-collector allowed to collect taxes without notice to surety—Defalcation by son—Liability of surety.*

A person stood surety for the tax-collector of a Munipal Committee. The security bond provided that the surety was to be liable in case the tax-collector misappropriated any amount that came in his hands or in case any default in payment was made by him. Subsequently the son of the tax-collector began to collect the taxes in his father's name with the consent and knowledge of the President and Secretary of the Municipal Committee. The President or the Secretary did not give any notice of this fact to the surety. On a defalcation being made by the son the surety was sought to be made liable.

Held, that as the person had stood surety only for the personal honesty of the tax collector and not of his son and as the kind of employment was such that it should have been conducted personally by the man for whom the surety had given security, the surety could not be bound to something for which he had not contracted. (*Mosely, J.*) H. PIN SEIN *v.* PAUNGDE MUNICIPALITY. **A.I.R. 1938 Rang. 126.**

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——**S. 230** — *Applicability — Hindu joint family business—Loan advanced by manager—Suit by manager alone without stating that suit is on behalf of family—Maintainability. See* HINDU LAW—JOINT FAMILY.

(1938) 1 M.L.J. 526.

——**S. 230**—*Applicability—Pucca Arhtia.*

Ordinarily the words "Pacca Arhtia" convey that the so-called agent is acting as a principal on behalf of the person with whom he buys or sells the commodities in question. There can therefore be no question of the application of S. 230 of the Contract Act in his case. (*Dalip Singh and Skemp, JJ.*) B.C.G.A. PUNJAB LTD. *v.* BHARAT KRISHNA TRADING CO. LTD.

A.I.R. 1938 Lah. 253.

CO-OWNERS—*Ouster—Joint property of minor and major—Minor's guardian and mother attempting to live in house—Major co-sharer opposing and offering to pay rent for minor's share—If exclusion of minor—Liability for rent.*

Plaintiff, a minor and his paternal uncle, the defendant were co-owners in respect of a dwelling house which was allotted to them jointly at a partition. The adoptive mother of the plaintiff, who was appointed as his guardian by Court applied to the Court that she should be permitted to open a new gate way to the house so as to enable her to give and live in the house so that her motion might be quite distinct from the defendant's portion of the house. The defendant opposed the application, averring that two families could not conveniently reside in the house and adding that the guardian should not be allowed to live in the house and that, if necessary, he was prepared to credit in the minor's account any reasonable rent which could be realised from his half-share in the house. On this, the guardian's petition was dismissed. The plaintiff sided with the defendant in the quarrel.

Held, though the defendant could not be made liable for rent unless it was shown that the plaintiff was excluded, the conduct of the defendant in opposing the petition of the plaintiff's guardian afforded the clearest possible evidence of exclusion amounting to an ouster in law, and the defendant was therefore liable to pay rent for the plaintiff's half share in the house. The attitude of the minor in siding with the defendant and his likes and dislikes were matters which were irrelevant to the question. (*Venkatasubba Rao and Abdur Rahman, JJ.*) KUPPUSWAMI AYYAR *v.* SUBBA AYYAR.

(1938) M.W.N. 399.

COPYRIGHT—*Ideas, if protected—Distinction between copyright and patent—Extent of protection.*

The laws of copy right do not protect ideas. Its protection falls within the patent laws. While a patentee has the sole right to use his invention within certain limits and if any body uses the patent, though or independent investigations, there is infringement of the patent, in the case of an infringement of copy right, it must be shown that the defendant has derived his work from the plaintiff's. (*Bennet and Ganga Nath, JJ.*) GOPAL DAS *v.* JAGANNATH PRASAD.

1938 A.L.J. 390 = 1938 A.W.R. (H.C.) 209.

——*Infringement—Case relating to—Trial—Help of expert evidence—Desirability.*

Where an infringement of a copy right is complained of, as it involves minute scrutiny of alleged similarities and dissimilarities and extensive and lengthy comparison, it is not only proper but essential, that the case should be tried with the aid of experts who might be appointed commissioners to investigate and report similarities. (*Bennet and Ganga Nath JJ.*) GOPAL DAS *v.* JAGANNATH PRASAD.

1938 A.L.J. 390 = 1938 A.W.R. (H.C.) 209.

COPYRIGHT ACT (1911), S. 1.

——*Infringement—Compilation not requiring originality—Use of previous works—Limits—Appending of additional information—Work, if ceases to be an infringement.*

The compiler of a work in which absolute or
is by the very nature of the work excluded is
without exposing himself to a charge of piracy,
use of preceding works upon the subject, where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction as to produce an original result. But no one is entitled to convey the same information, merely with some additions. (*Bennet and Ganga Nath, JJ.*)
NATH PRASAD.

19

COPYRIGHT ACT, (1911), ENGLISH S. 1—*"Original literary work"—Current traditional poems given*

S. 1 of the Copy right Act, 1911. (*Panckridge, J.*) RAMNARAIN TRIVEDI *v.* SHIB KUMAR TEWARY.

42 C.W.N. 541.

——**S. 1**—*Traditional songs copied from dictation of another person and published—Right to copy right.*

A man who gets another to sing or recite traditional poems for the express purpose of recording the words and then publishes the record is entitled to a copy right in it. (*Panckridge, J.*) RAMNARAIN TRIVEDI *v.* SHIB KUMAR TEWARY. **42 C.W N. 541.**

——**S. 7**—*Owner of copy right—Right to infringing copies—Extent.*

a right to recover the possession of the infringing copies unsold and the price of the copies sold. (*Bennet and Ganga Nath, JJ.*) GOPAL DAS *v* JAGANNATH PRASAD **1938 A.L J. 390 = 1938 A.W.R. (H C.) 209.**

CO-SHARERS—*Mortgage with possession by one—Raiyat admitted by mortgagee cultivating and paying rent to mortgagee—Possession for 12 years—Effect—Acquisition of occupancy rights—Partition of estate—Right of mortgagee or co sharer getting land on parti-*

cannot be ejected by the mortgagee and his representatives or by the co-sharer mortgagor and his representatives who may get the land allotted to them on a partition. (*Courtney Terrell, C.J. and James, J*) RAJA RAM RAI *v.* NIRANJAN RAI. **17 Pat. 143.**

COURT-FEE—Procedure— Duty of Court— Court holding additional Court-fee necessary and returning plaint for necessary amendments instead of demanding additional Court-fee and rejecting plaint on failure to pay—Propriety—Power of Court to direct amendment. *See* PRACTICE—PROCEDURE.

47 L.W. 523.

COURT FEES ACT (VII OF 1870), S. 7 (iv) (c)—*Applicability—Suit to declare lands not liable to charge under maintenance decree.*

COURT-FEES ACT (1870), S. 7.

A person was a *bona fide* purchaser for value of lands which were found to be burdened with a charge of a maintenance decree. The person brought a suit for a declaration, "that the lands were not liable for the main-
(c)

ecla-
ration, yet it involved the consequential relief of amendment of the maintenance decree and hence S. 7 (iv) (c) applied. (*Stone, C.J. and Digley, J.*) DATTAJI PARASHRAMJI *v.* BHAGIRATHI.

A.I.R. 1938 Nag. 183.

—*Declaration and cancel-*
S. 7 (4) (c) or S. 7 (5)

Where a plaintiff asks for declaration and a consequential relief, though it is enough for his purposes to

possession of an item of gifted property seeking cancellation of gift deed—Valuation.

Where a suit falls under S. 7 (4) (c) of the Court-fees Act, the plaintiff cannot put any arbitrary value on his consequential relief. Where a person in possession of an item of gifted property sues for a declaration and consequential reliefs of cancellation of the gift and possession of the remaining items, then he has to pay a Court-fee only on the value of the properties, possession of which is asked for. (*Niyogi, J.*) MT. THAMABAI *v* LALSINGH. **1938 N L J. 130.**

——**Ss. 7 (iv) (c) and 8 (c)**—*Suit for rectification preliminary decree was made in ation by plaintiff—If final.*

cation of a *solenama* upon which a preliminary decree was made in a partition suit, on the ground of fraud or mutual mistake of parties, the value of the property which would be affected by the preliminary decree which would be made in the partition suit if the plaintiff ultimately succeeded in his suit, cannot be taken as an objective standard for the purpose of determining the value of the relief in the suit. In the absence of any other satisfactory objective standard, the plaintiff's valuation must be taken as correct and final. (... Alı, JJ.) KANAI LAL *v.*

42 C.W.N. 614.

plicability—Suit for accounts
Court fee—Appeal against pre-
decree—Dis-

decree for
of appeal
annot value
be approximately correct. Where a defendant appeals against a final decree, he should pay Court-fee on the amount of the decree passed against him, except in cases where he appeals only against a portion of the decree. S. 7 (iv) (f) applies to appeals by a defendant (*Leach, C. J., Varadachariar, Burn, King and Venkataramana Rao, JJ.*) DHANUKODI NAYAKAR, *In re.*

1938 M.W N. 373 = 47 L.W. 485 = (1938) 1 M.L.J. 628 (F.B.)

——**S. 7 (v) (d) and Oudh Civil Rules, Rr. 1 and (iv)**—*Suit against trespasser by tenant for possession—Calculation of market value.*

Where a suit is by a tenant to recover possession from a trespasser, it falls under cl. (v) (d) of S. 7 of the Court-fees Act

according to R. IV of the Oudh Civil Rules R. 1 (1) has no application to such a case. (*Yorke, J.*) BHULAI *v.* GAYA DIN. **1938 O.W.N. 453.**

——**S. 7 (xi) (cc)**—*Applicability—Suit against former tenant who set up a title in himself.*

Section 7 (xi) (cc) applies only to a suit by landlord for recovery of immovable property from his tenant, which includes a tenant holding-over after the determination of the tenancy. *P* purchased a house and asked *D* who was a tenant of his predecessor to attorn to him. *D* repudiated *P's* title and set up a title of his own. On *D* continuing to set up his own title *P* served him with a notice to vacate the premises in the event of his not paying the arrears of rent and on his refusal to do so brought a suit for recovery of the house from *D*. The suit was based on title and was not one between landlord and tenant.

Held, that S. 7 (xi) (cc), did not apply and court-fees were to be paid on the market value of the property and that was the value for purposes of jurisdiction. *P* having terminated *D's* tenancy because of the right vested in him under S. 111 (*g*), T. P. Act, *D* ceased to be a tenant and became a trespasser; *D* having set up an adverse title in himself could not be said to be holding-over. (*Bose, J.*) AHMADALI FAJRUDDIN *v.* MULLA FIDAALI. **A.I.R. 1938 Nag. 162**

——**Sch. II, Art. 11**—*Applicability—Mesne profits—Direction for enquiry in execution—Executing Court ascertaining amount and making order for recovery—Appeal to High Court—Court-fee.*

Where the executing Court, which is directed under O. 20, R. 12, C. P. Code, to determine the amount of mesne profits in execution, ascertains the amount and makes an order for recovery of such amount, the order is one falling under S. 47, C. P. Code, an appeal from such an order falls under Art. 11 of Sch. II, of the Court-Fees Act, and when presented to the High Court has to be stamped only with a Court-fee stamp of Rs 2. (*Beaumont, C. J.*) BALARAMCHARYA *v.* CHIDAMBARAGAUDA. **40 Bom.L.R. 416.**

CRIMINAL PROCEDURE CODE (V OF 1898), S. 88—Property—Claim or interest in property attached—Hindu Joint family—Attachment of property in the hands of sole surviving co-parcener who absconds—Rights of maintenance and marriage expenses of widow and un-married daughters of deceased co-parcener—Enforceability against Government. *See* HINDU LAW—JOINT FAMILY. **40 Bom.L.R. 422.**

——**S. 88 (6-A) and 6-D)**—*Scope—Failure to prefer Claim—Separate suit—If barred.*

Where a property belonging to an absconder has been attached and is at the disposal of the Government under Sec. 88, Cr. P. Code, persons who have claims to that property but who do not prefer claims under sub-sec. 6-A, of the section are not debarred from bringing an independent suit to enforce their claims as against the Government. Sub-sec. 6-A only says that if any claim is preferred it shall be inquired into. It does not say that an independent suit is not maintainable. So long as the property has not been sold by Government or otherwise disposed, and so long as Government continue to remain in possession of the property attached, it is open to any party claiming an interest in it to file a suit and obtain a decree in a Civil Court declaring his rights in the property, and if he succeeds in obtaining such a decree before Government have finally disposed of the property, that decree would be binding on Government, and the property can be disposed of only subject to the rights established under such decree. The omission to file a claim under S. 88 (6-A) does not bar an independent suit. (*Divatia, J.*) SECRETARY OF STATE *v.* AHALYABAI **40 Bom.L.R. 422.**

——**S. 94**—Scope—If inconsistent with Bankers Books Evidence Act—Prosecution of Bank's auditors for false statements in balance sheet—Production of Bank's books—If may be ordered—Considerations—Right of prosecutor to inspection of books produced. *See* BANKER'S BOOKS EVIDENCE ACT, S. 5. **I.L.R. (1938) Bom. 31.**

——**S. 109 (a)**—*'Concealing'—If refers to isolated act.*

Per *Jack, J.*—The word 'concealing' in S. 109, Cr. P. Code, refers to continuous concealment and not to an isolated act of concealment. (*Jack and Patterson, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* ISABALI. **42 C.W.N. 588.**

——**S. 109 (b)**—*'Satisfactory account'—Interpretation.*

The expression "has failed to give a satisfactory account of himself" in S. 109 (b), Cr. P. Code, means a satisfactory account of his presence at the place and in the circumstances in which he was found, and not merely a satisfactory account of himself generally. Where a person is arrested in extremely suspicious circumstances, and fails to give any reasonable explanation as to how he came to be in that position, he cannot be said to have given a satisfactory account of himself. (*Jack and Patterson, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* ISABLI. **42 C.W.N. 588.**

——**S. 110**—*Proceedings under—Previous conviction—If necessary—Habitual offender—Proof of.*

A previous conviction is not necessary for proceedings under S. 110, Cr. P. Code. There is no such provision in the law itself which on the other hand lays down in S. 117 (4) that the fact that the man is an habitual offender can be proved by evidence of general repute or otherwise. (*Blacker, J.*) EMPEROR *v.* KHUDA BAKHSH. **40 P.L.R. 222.**

——**S. 133**—Power to direct removal, of obstruction in public pathway. *See* CR. P. CODE, SS. 147 (2) AND 133. **1938 N.L.J. 139.**

——**Ss. 147 (2), and 133**—*Mandatory order—If can be passed under S. 147 (2)—Removal of obstruction—Procedure.*

Under S. 147 (2), Cr. P. Code, a magistrate has no power to make an order in the nature of a mandatory injunction for the removal of an obstruction from any way lawfully used by the public. But he has powers under S. 133 to bring about its removal. (*Gruer, J.*) SYED USMAN ALI *v.* EMPEROR. **1938 N.L.J. 139.**

——**S. 162**—*Construction and scope—"Any person"—Previous statement by accused—Admissibility and use of—Rule as to—Admissions and previous statements of witness—Distinction—Previous statement of accused amounting to confession—Admissibility.*

S. 162, Cr. P. Code has no reference whatever to accused persons or to their statements, but merely codifies with certain modifications the law as to the use which may be made of previous statements which may have been made by witnesses. Admissions by a party to a litigation, whether civil or criminal, differ fundamentally from previous statements made by a witness. An admission is direct evidence of the relevant fact admitted. A previous statement by a witness is not direct evidence of the fact stated by the witness, but is material which may be used either to corroborate the oral testimony of the witness or it may be put to him in cross-examination for the purpose of destroying his credit. It cannot be used to supplement that oral testimony, that is to say, a previous statement of fact by a witness

CR. P. CODE (1898), S. 162.

cannot be tendered as evidence in direct proof of the fact stated. The evidence upon which the Court is consider the material allegation of fact must be the evidence of the witness as given in Court. This fundamental distinction cannot be ignored or lost sight of. It must however be observed that an admission by a party (or an accused), although in itself evidence of the fact admitted, may be attacked on the ground that the party or accused has not in fact made the admission. He may also reduce or destroy its weight as evidence by producing evidence to show that the true facts are contrary to the admission. It will then be for the Court to weigh the evidence afforded by the admission against the evidence produced at the trial by the defence. An accused against whom a previous statement by him is tendered in evidence is entitled to have the whole statement placed before the Court. If that statement, taken as a whole amounts to a confession the whole statement must be excluded. It is not permissible to place a part of a single statement as a mere admission or series of admissions and to omit merely the confessional part of it. If the statement tendered in evidence does not contain any admission of the offence charged nor indeed an offence of any kind, and there is no indication whatever that it is part of a larger statement making any admission of guilt, it is admissible in evidence against the accused of the truth of the facts stated therein.

Manohar Lal, J. S. 162, Cr. P. Code, is necessary corollary to Ss. 160 and 161, and must be read along with those two sections. It was never the intention of

to be secured as provided for in othe code dealing with the arrest of the summons or warrant to the accused. admissibility of the statement of the accused by the general provisions of the Evidence A *ney Terrell, C.J. and Manohar Lal, J.)* SWAMY *v.* EMPEROR.

——S. 162—*Statement of witness in Court that he identified accused before Police Officer—Admissibility.*

A statement made by a witness in Court that he identified the accused before the Sub-Inspector of Police, is not inadmissible under S. 162, to that section, a statement Police Officer is not evidence a statement of the witness which that he identified the accused (*M. C. Ghose and Bartley, JJ.* PEROR. 42 C.W.N. 620.

——S. 173—*Order striking off case on police report—Nature of.*

An order of a magistrate on a police report under S. 173, Cr. P. Code, that a case be struck off is an administrative order and not a judicial order. (*Blacker, J.*) BRAHM DEV *v.* EMPEROR. 40 P.L.R. 239.

——S. 195 (1) (a)—*Enquiry before making of complaint—Mode of.*

Per *Patterson, J.*—The law does not require that proceedings with a view to the making of a complaint under S. 195 (1) (*a*), Cr. P. Code, should be in the form of a public judicial enquiry. *Some* enquiry before making a complaint is of course desirable, but that enquiry ought to be of a purely administrative character and need not be made in public; nor need the statement of witnesses be recorded on oath. (*Jack and Patterson, JJ.*) RAMESH CHANDRA PODDAR *v.* HARI MOHAN PODDAR. 42 C.W.N. 531.

——S. 195 (1) (a)—*Orders of Subordinate and District Judges—Nature of—Revision.*

CR. P. CODE (1898), S. 239.

Per *Patterson, J.*—Orders passed by a Subordinate or District Judge under S. 195 (1) (*a*), Cr. P. Code, are purely administrative orders and as such are not subject to revision by the High Court. The question of the competency of a complaint made by a District Judge can only be raised by a Rule directed against the order of the Magistrate taking cognisance of such complaint. (*Jack and Patterson, JJ.*) RAMESH CHANDRA PODDAR *v.* HARI MOHAN PODDAR. 42 C.W.N. 531.

——S. 195 (1) (a)—*Refusal to make complaint by Subordinate Judge—Power of District Judge to make complaints—Civil Court peon, if subordinate to latter.*

A public servant is not barred from making a complaint under S. 195 (1) (*a*), Cr. P. Code, merely because his subordinate has refused to do so. A District Judge is, therefore, entitled to make a complaint in respect of an obstruction offered to a civil Court peon, although the Subordinate Judge has refused to do so. A civil Court peon, although his immediate superior may be the Subordinate Judge, is none the less a subordinate of the District Judge. (*Jack and Patterson, JJ.*) RAMESH CHANDRA PODDAR *v.* HARI MOHAN PODDAR. 42 C.W.N. 531.

——S. 197—Prosecution of Sub-Inspector of Police—Previous sanction of Local Government—If necessary. *See* POLICE ACT, S. 7. 1938 Rang. L.R. 101.

——S. 213—*Commitment—Power and duty of magistrate*

The Magistrate who having the powers to punish adequately for an offence which is within his jurisdiction mmits the accused to Sessions Judge, the provisions of S. 254, Cr. P.

have been inflicted but what injury was in fact inflicted. (*Davis, J. C.*) EMPEROR *v.* WAROO. A.I.R. 1938 Sind. 79.

——S. 215—*Quashing commitment—Grounds—*

v. WAROO. A.I.R. 1938 Sind. 79.

——Ss. 225 and 537—*Misjoinder of charges—Irregularity.*

Where offences which ought to have been separately charged are joined together but the specific offences are satisfactorily proved by competent evidence corroborated in all necessary respects and no miscarriage of justice is caused, the irregularity is cured under Ss. 225 and 537 (*Lord Wright.*)

1938 A.W.

1938 A.L.J. 382 = A.I.R. 1938 P. C. 130 = (1938) 1 M.L.J. 647 (P.C.).

——S. 239—*Conspiracy—Each accused charged with one or more of seven specific offences—Legality.*

Where certain persons are charged under S. 120-B, Penal Code, for of trust and cheating one or more of seven cheating or criminal

CR. P. CODE (1898), S. 239.

suance of the conspiracy the charges are not contrary to law and there is no misjoinder. (*Guha and Lethbridge, JJ.*) AKHIL BANDHU RAY *v.* EMPEROR.

A.I.R. 1938 Cal. 258.

——S. 239—*Misjoinder of charges—Question of—Duty of Court of appeal or revision.*

A Court of appeal or revision in dealing with a question of misjoinder, must look to the position as it appeared when charges were framed. In deciding whether charges were rightly framed, it must look at the position as it appeared to the Magistrate, when he framed them. But it does not follow, that a Magistrate must wait till the stage of framing of charges before he makes up his mind whether to split a case up. Such a course is most inconvenient, and it should ordinarily be possible for a Magistrate to decide the question of joinder after the case has been opened by the Public Prosecutor. (*Guha and Lethbridge, JJ.*) AKHIL BANDHU RAY *v.* EMPEROR.

A.I.R. 1938 Cal. 258.

——S. 239 (d)—*'Same transaction'—Determination of question—Relevant point of time.*

The relevant point of time in the proceedings at which the condition as to sameness of transaction must be fulfilled is the time of accusation and not that of the eventual result. (*Lord Wright.*) BABU LAL CHOUKHANI *v.* EMPEROR. **42 C.W.N. 621 = 1938 A.Cr.C. 27 = 1938 O.W.N. 416 = 1938 A.L.J. 382 = 174 I.C. 1 = 1938 A.W.R. (P.C.) 116 = 1938 P.W.N. 320 = A.I.R. 1938 P.C. 130 = (1938) 1 M.L.J. 647 (P. C.).**

——S. 239 (d)—*'Same transaction"—Overt acts committed in pursuance of conspiracy.*

If several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy (a circumstance which makes the act of one the act of each and all the conspirators) these acts are committed in the course of the same transaction, which embraces the conspiracy and the acts done under it. The common concert and agreement which constitute the conspiracy, serve to unify the acts done in pursuance of it. (*Lord Wright.*) BABU LAL CHOUKHANI *v.* EMPEROR.

42 C.W.N. 621 = 1938 A.Cr.C. 27 = 1938 O.W.N. 416 = 1938 A.L.J. 382 = 174 I.C. 1 = 1938 A.W.R. 116 = 1938 P.W.N. 320 = A.I.R. 1938 P.C. 130 = (1938) 1 M.L.J. 647 (P.C.).

——S. 263—*Scope—Summary trial—Requirements.*

Although a certain expedition is necessary and is most desirable in summary trials, yet the summary procedure laid down in the Criminal Procedure Code must not be made more summary. S. 263 lays down the minimum requirements of law. Although S. 263 dispenses with the formality of recording evidence, it does not dispense with the necessity of hearing evidence or of following the procedure laid down in Chap. 22, Cr. P Code, for summary trials. Nor does it dispense with the necessity of complying with the provisions of S. 342, the examination of the accused after the case for prosecution is closed S. 263 merely relieves the Court of the burden of recording evidence. (*Davis, J. C. and Lobo, J.*) CHOITHRAM *v.* EMPEROR. **A.I.R. 1938 Sind. 70.**

——S. 307 (3)—*Duty of High Court.*

S. 307 (3), Cr. P. Code, imposes upon the High Court in the clearest terms the duty of considering the entire evidence and of giving due weight to opinions of both the judge and jury. (*M. C. Ghose and Khundkar, JJ.*) EMPEROR *v.* MAJA KHAN. **66 C.L.J. 500.**

——S. 342—Applicability—Summary trial. *See* CR. P. CODE, S. 263. **A.I.R. 1938 Sind. 70.**

——S. 397—*Applicability—Consecutive sentences of detention under Madras Schools Act—Legality.*

CR. P. CODE (1898), S. 417.

S. 397 of the Cr. P. Code, does not apply to sentences of detention under Sec. 8 of the Madras Borstal Schools Act, consquently a direction that the sentence of detention in one case should commence after expiration of a previous sentence of detention is illegal and liable to be set aside. (*Lakshmana Rao, J.*) *In re* PUBLIC PROSECUTOR, MADRAS. **42 L.W. 473 = (1938) M.W.N. 352**

——S. 403, Ill. (e)—*Accused tried by 2nd class magistrate under S. 323, I. P. Code and acquitted by him—Power of District Magistrate on revision to order his retrial under S. 324, I. P. Code.*

A second class magistrate tried *X* along with others under S. 323, I. P. Code, and acquitted him while convicting the rest. On revision, the additional District Magistrate held that the proper charge against *X* would have been one under S. 324, I. P. Code, and as he had not been charged under that section, he ordered that he should be tried under it.

Held, that the case was fully covered by Ill. (*e*) to S. 403, Cr. P. Code, and that the additional District Magistrate had no power to order that *X* should be retried under S. 324, I. P. Code, as that charge could have been framed by the second class Magistrate. (*Addison, J.*) BHAG SINGH *v.* EMPEROR.

I.L.R. 1938 Lah. 127.

——S. 417—*Appeal from acquittal—Interference—Powers of High Court—Principles.*

In dealing with an appeal from an order of acquittal on a matter of fact, the High Court has full power to review at large the evidence upon which the order of acquittal was founded and to reach the conclusion that upon the evidence the order of acquittal should be reversed. Such power is not limited to cases of obstinate blunder on the part of the lower Court and incompetence stupidity or perversity of conduct or misconduct resulting in a clear miscarriage of justice. In exercising this power, the High Court will always give proper weight and consideration to such matters as the views of the trial Court as to the credibility of the witnesses, the presumption of innocence in favour of the accused, his right to the benefit of any doubt, and the slowness of an Appellate Court in disturbing a finding of fact by a Judge who had the advantage of seeing the witnesses. (*Davis, J.C. and Lobo, J.*) EMPEROR *v.* GHULAMALI BAHAWAL. **A.I.R. 1938 Sind 67.**

——Ss. 417 and 418—*Appeal from acquittal and appeal from conviction—Distinction—Considerations.*

Although Cr.P. Code makes no distinction between an appeal from a conviction and an appeal from an acquittal, yet there is a real distinction, apart from the provisions of Cr. P. Code. Every man is to be presumed innocent until his guilt is established; if there is a reasonable doubt, the accused must have the benefit of that doubt. An appellant from a judgment of conviction can always invoke the support of these principles. If he can show that the essential evidence against him is not sufficiently reliable, as the lower Court thought, or that all reasonable doubt as to his guilt is not removed thereby, he is bound to succeed on these principles. An appellant from a judgment of acquittal has, on the contrary, to work in the face of these principles and satisfy the Court that the accused can derive no benefit from them on the facts of the case under appeal. His task is thus naturally more difficult than that of the convict appellant. The effect of this and other considerations is to make in fact a considerable difference between an appeal from a conviction and one from an order of acquittal though both appeals are placed on the same footing in the statute law of procedure. (*Davis, J. C. and Lobo, J.*) EMPEROR *v.* GHULAMALI BAHAWAL.

A.I.R. 1938 Sind. 67.

CR. P. CODE (1898), 420.

——**Ss. 420 and 421, Proviso**—*Jail appeal—Right of appellant to be present in Court and to be heard.*

The proviso in S. 421, Cr. P. Code, directing that an appeal shall not be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard does not apply to an appeal presented under S. 420 by a convicted person from jail; and the accused has no right to insist on being heard, and to be present in Court for the purpose of arguing his appeal. (*Beaumont, C.J. and Wassoodew, J.*) EMPEROR *v.* JALAM BHARAT SING. **40 Bom.L.R. 317.**

——**S. 439**—*Acquittal—Revision against—Acquittal in appeal—Power of High Court to order rehearing of appeal.*

in proper cases where the appellate Court has misdirected itself on a point of law, point out the error and direct the rehearing of the

THAUNG *v.* NANDIYA.

——**S. 439**—Applicability declaring person to be tout under S. 36, Legal Practitioners' Act—Revision—Jurisdiction of High Court. *See* C. P. CODE, S. 115. **47 L.W. 578.**

——**S. 439**—*Applicability—Order under S. 476-B by Civil Court—Revision to High Court—Procedure governing—C. P. Code, S. 115—Applicability.*

An application in revision from an order under S. 476 B, Cr. P. Code, by a Civil Court to the High Court should be heard and decided in accordance with the provisions of S 439, Cr. P. Code, and not S. 115, C. P. Code. The order in question is one made by a criminal Court or a Court exercising criminal power, and power to revise, such order arises under S. 439, Cr. P Code, S. 115, C. P. Code, does not apply to such a case.

Broomfield, J. The common sense view is that proceedings relating to prosecutions for criminal offences alleged to have been committed in Court are proceedings of a criminal nature, whether the alleged offence took place in a criminal, Civil or Revenue Court. *Prima facie* the procedure as to revision should be the same as in all other criminal proceedings. (*Beaumont, C. J., Broomfield and Wassoodew, JJ.*) EMPEROR *v.* BHATU SADU MALI. **40 Bom L.R. 297 (F.B.).**

——**S. 439**—*Enhancement of sentence—Exercise of power.*

The power to enhance sentences should be sparingly exercised by the High Court and sentences should be enhanced only in cases where the failure to enhance the sentence would lead to a serious miscarriage of justice. The mere fact that the High Court, had it been trying the case, might have imposed capital sentence is not a sufficient reason for enhancement. (*Young, C. J. and Abdul Rashid, J.*) UTTAM SINGH SOCHET SINGH *v.* EMPEROR. **A.I R. 1938 Lah. 260.**

——**S. 439**—*Pending proceedings—Interference—Reference by Sessions Court.*

Sessions Courts should not readily ask the High Court to interfere with pending proceedings in a criminal Court. If it is a false and vexatious or frivolous case, the trial Court may, and should, take action under S. 250, Cr. P. Code, when it acquits the accused. (*Coldstream, J.*) PARMESSHARI DAYAL *v.* GUMANI RAM. **40 P.L R. 311.**

——**S. 476-B** — Revision—Procedure — Order by Civil Court—Nature of—Application in revision—If one under S. 439 or under S. 115, C. P. Code. *See* CR. P. CODE, S. 439. **40 Bom.L.R. 297 (F.B.).**

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——**S. 480**—*Debt Conciliation Board—If a Court—Power to punish for contempt—Punjab Relief of Indebtedness Act, S. 16.*

A Debt Conciliation Board is a Court and its proceedings are judicial proceedings by virtue of S. 16 of the Punjab Relief of Indebtedness Act. The Board would, therefore, be acting within jurisdiction in passing an order of fine for contempt under S. 228, I P. Code, and in adopting the procedure laid down in S. 480, Cr. P. Code. (*Skemp, J.*) BUDHU *v.* EMPEROR. **40 P.L.R. 218.**

——**S. 488 (1)** — *Construction — Application for maintenance for wife and child—Power of Court to award sum in excess of Rs.* 100 *for both—Total sum Rs.* 100.

on for maintenance Court has power to 00 for both. To hold that when a woman makes an application for herself and for her child she can only be given Rs. 100 in all elf and her child is to wrongly. The Court ach of the applicants. (*Leach, C.J. and Madhavan Nair, J*) BULTEEL *v.* BULTEEL. **1938 M.W.N. 424.**

——**S. 522**—*Order by appellate Court—Time limit.*

A Court of appeal can pass an order under S. 522, Cr P. Code, at any time, however long, after conviction. One month is the time limit fixed for the trial Court in sub S (1), but there is nothing in sub-S. (3) to show that this limitation applies to a Court of appeal. If it did, the result would be that sub-S. (3) would be of little or no practical use, as a case will not usually reach the appellate Court before the expiry of the month. (*Gruer, J.*) NAMDEO *v.* EMPEROR. **173 I.C. 620 = 10 R.N. 314 = 39 Cr.L.J. 342.**

——**S. 526 (8)**—*Adjournment granted on condition that applicant should within reasonable time apply to High Court—Application wrongly but in good faith made to local Court—If fatal.*

Where an adjournment under S. 526 (8), Cr. P. Code, is granted to an applicant on condition that he should, within reasonable time, apply to the High Court for transfer of the case, if the applicant in mistake but in good faith first moves the local Court for transfer, he should, if the mistake is made for the first time, be pardoned the delay. (*Davis, J.C. and Lobo, J.*) GAJADHAR BHAGCHAND *v.* EMPEROR. **A.I R. 1938 Sind 66.**

CRIMINAL TRIAL—*Bail bond—Forfeiture—Liability of sureties.*

There can be no forfeiture of penalty in a bail bond except on its own terms. It is no concern of the sureties to find out what exactly it is that the police officer has been directed to do in the way of taking bail with sureties. Their liability must be determined by the agreement that is actually taken from them. (*Dhavle, J.*) BHATTACHARJEE *v.* EMPEROR. **A.I.R. 1938 Pat. 211.**

——*Confession—Proof of—Duty of Court—Confession not recorded—Circumstantial evidence—Value of—Witness proving confession changing statements from time to time—Admissibility of confession.*

In dealing with an extra judicial confession, particularly when it is not anywhere recorded, the Court must be very careful and should not act upon it unless it is proved by evidence of the most reliable character. Particular care is necessary in cases of circumstantial evidence bolstered up with extra-judicial confessions. And when the only witness who proves the confession changes his statements from time to time on material

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points obviously with some purpose, he cannot be regarded as a reliable witness, and the confession cannot be held proved on the sole testimony of such a witness. The confession in such a case must be ruled out and excluded. (*Dhavle and S. C. Chatterji, JJ.*) EMPEROR *v.* MT. JAGIA. 1938 P.W.N. 293 = 19 Pat.L.T. 268.

——*Conviction—Murder—Circumstantial evidence—Sufficiency for conviction.*

In order to convict an accused person of the offence of murder on circumstantial evidence, the Court must be satisfied that the circumstantial evidence is of such a nature that it would be inconsistent with his innocence. If it is not of that character, it cannot be made the basis of a conviction. (*Dhavle and S. C. Chatterji, JJ.*) EMPEROR *v.* MUSSAMMAT JAGIA. 1938 P.W.N. 293=19 Pat.L.T. 268.

——*Evidence—Comments on—Duty of trial Court.*

Judges sitting in appeal are inclined to attach great weight to the views of the trial Judge on the manner in which evidence has been given before them. It is therefore essential that a trial Judge should endeavour to be strictly accurate in making any comment on the evidence given before him. (*Young, C.J. and Monroe, J.*) MEHNGA ALLA BAKHSH *v.* EMPEROR. A.I.R. 1938 Lah. 288.

——*Evidence—Value of—Eye witnesses first telling their stories* 40 *days after occurrence.*

The oral evidence of eye witnesses who first told their stories about 40 days after the occurrence is not fully worthy of credit, and if further the circumstantial evidence is not such that it is inconsistent with the innocence of the accused, the accused must be acquitted. (*M. C. Ghose and N. A. Khundkar, JJ.*) EMPEROR *v.* MAJA KHAN. 66 C.L.J. 500.

——*Inherent powers of Court—Power to split up case at the time of charge owing to misjoinder—Order of* de novo *trial—Propriety.*

Criminal Courts have an inherent power to make such orders as may be necessary for the ends of justice. This inherent power is not capriciously or arbitrarily exercised; it is exercised *ex debito justitiae* to do that real and substantial justice for the administration of which alone Courts exist; but the Court, in the exercise of such inherent power, must be careful to see that its decision is based on sound general principles and is not in conflict with them or with the intentions of the Legislature as indicated in statutory provisions. Certain persons were charged with conspiracy to commit criminal breach of trust and cheating. After the prosecution evidence was over, the Magistrate found at the stage of framing of the charges that all the accused could not be tried together and the case should be split up in order to avoid misjoinder. The Magistrate thereupon formed two groups of the accused persons and ordered a *de novo* trial of one of them.

Held, that the Magistrate had acted rightly in the exercise of his inherent power in ordering a *de novo* trial of one of the groups. (*Guha and Lethbridge, JJ.*) AKHIL BANDHU RAY *v.* EMPEROR. A.I.R. 1938 Cal. 258.

CROWN GRANTS ACT (XV OF 1895), S. 3—*Scope and effect of—If confers a right to sue.*

All that S. 3 of the Crown Grants Act means is that the Crown is entitled to put such conditions in a grant which a private individual could not, but the only advantage to the grantee is that the grant to him is not invalid if given by the Crown when it might be invalid if given by an individual. It cannot be said to confer the right to sue on the grantee, if he had no such right, had the grant in his favour been made by an individual. (*Hamilton and Yorke, JJ.*) RAZA HUSAIN KHAN *v.* SAIYID MAHOMED. 1938 O.A. 353.

——**S. 3**—*Scope and effect — Grant of village to poligar to be enjoyed by grantee and his heirs—Prohibition an alienation—Successive life estates to grantee and his heirs—Validity—Attachability of village—C. P. Code, S.* 60.

It is competent to the Crown to make a heritable grant of a village, conferring on the grant not an absolute estate, but a limited interest to enjoy the rents and profits of the village for his life and a similar interest on his heirs who will succeed him; it is open to the Crown to create successive life estates or limited interests, and prohibition as to alienation may be imposed by the Crown either by virtue of an enactment or by a grant. S. 3 of the Crown Grants Act is clear and expressly mentions that all limitations contained in a Crown grant shall be valid and take effect according to their tenor notwithstanding any statute or enactment of the Legislature, which would take in S. 60, C. P. Code. A village was granted to one *S*, a poligar, on 1—8—1902; by the East India Company by a deed of grant. The object was of the grant was to make a permanent provision for the grantee and his heirs as compensation for the loss sustained by resumption of the emoluments attached to the office as a result of abolition of such emoluments. The grantee was "to collect those Russooms and Marahs at the rate stipulated in the dowle . . . and to appropriate the amount to your own use." The grantee was also made "to understand that the said village is inalienable by gift, sale or otherwise, but in default of legal heirs, the said village shall revert to the honourable company".

Held, (1) that it was competent to the Crown to make such a heritable grant providing for a succession of heirs; (2) that S. 60 of the C. P. Code was not applicable to the case; (3) that the rents and profits of the estate in the hands of the holder could be appropriated for the use of the creditors; (4) that the prohibition against alienation under the grant was not intended for the protection of the Government, but was made in pursuance of a policy of preserving intact the property in the family; (5) the only right of the holder was to enjoy the rents and profits during his life and they are attachable and saleable; (6) and the proper order to be made was to direct the appointment of a receiver. (*Venkataramana Rao, J.*) SUNDARARAJULU NAIDU *v.* PAPIAH NAIDU. 1938 M.W.N. 440 = (1938) 1 M.L.J. 686.

CUSTOM—*Proof of—Requisites—Different versions—Effect.*

The evidence for custom must be substantial. The custom must be certain. Where a plaintiff was changing the terms of an alleged custom from time to time and failed to formulate the custom clearly and consistently the custom cannot be said to be proved. (*Bennet and Ganga Nath, JJ.*) JALESHWARI PRATAP NARAIN SINGH *v.* PATESHWARI BAKSH SINGH. 1938 A.W.R. (H.C.) 284.

——Validity—Custom opposed to public policy—Transfer of office of temple trustee in return for monetary consideration—Legality of. *See* MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, S 57. (1938) 1 M.L.J. 517.

——**(Punjab)**—*Applicability—Burden of proof.*

The law to be applied, in relation to the devolution of property, is normally the personal law of the parties; and if a party asserts that the personal law does not apply, the onus is on that party of showing that custom applied, and further he must plead the custom alleged in precise terms and must by evidence establish the custom

CUSTOM—(Punjab).

as pleaded. In many cases the party alleging a custom may by the mere production of the *riwaj-i-am* be able to give *prima facie* evidence of the custom alleged and so cast the onus of proof on his opponent, but this circumstance does not obviously affect the universality of the proposition
plead and prove
Mohammad, JJ.)

A.I.R. 1938 Lah. 299 (F.B.).

———(Punjab)—*Shamilat land—Right of co-sharer to erect building.*

Per *Din Mohammad, J.*—No individual proprietor can appropriate to himself a portion of the common land without the consent of all other co sharers and use it in such a way as to affect the rights of all the co-sharers at the time of partition. Where therefore a co-sharer begins building on a part of common land (shamilat abadi) the other co-sharers can restrain him from so doing without proving any special damage to them and relief of injunction can be granted in such a case. (*Coldstream, Monroe and Abdul Rashid, JJ.*) INDER SINGH *v.* BHANA.

A.I.R. 1938 Lah. 296 (S.B.).

———(Punjab)—*Will — Mair Minhas of Tahsil Chakwal—Powers of bequest.*

A Mair Minhas of Tahsil Chakwal in the Jhelum District has power, in the absence of sons, to dispose of by will both his ancestral and self-acquired property. (*Addison and Din Mohammad, JJ.*) WALI DAD *v.* MT. IMAM KHATUN. 40 P.L.R. 267.

DECLARATION—*Granting of—Discretion of Court —Wrongful dismissal of servant—Refusal of declaration where damages adequate remedy.*

In the case of a wrongful dismissal of a servant, the relief by way of damages is an adequate remedy and that being so, a Court can in its discretion refuse a declaration or injunction.
Singh, JJ.) PRABHU LAL
BOARD OF AGRA.

DECREE—*Construction—Scheme for temple—Provision conferring right to vote on Vaishnavas of Tengalai sect—"Untouchable" Vaishnavas—If excluded—Principles of construction—Omission to put forward claim to vote for ninety years—Effect of.*

It is a primary rule of construction that whatever the instrument, it must receive a meaning according to the plain sense of the words and the sentences therein contained. When an enactment is unambiguous in itself, the question is not what the legislature meant, but what its language means, that is, what the Act has stated that it meant. This fundamental principle of construction applies not only to statutes but to wills and in fact to all written instruments. Where a scheme framed by the High Court for a temple contains a clause which confers the right to vote at the election of dharmakarthas of the temple, *inter alia*, on *Vaishnavas of the Thengalai* sect, the term *Vaishnavas of the Thengalai* sect, must be construed as meaning all *Vaishnavas* of the *Thengalai* sect, including untouchables as well if they are *Vaishnavas*, where there is no specific exclusion of untouchables as such.
deny that the words are
different from what they n
years (ninety years) no
community ever claimed to be included in the voters' list signifies nothing. From the fact that no claim has been made, it does not follow that had the claim been made and contested, it would have been disallowed. Nor would the fact that the community abstained from making a claim for ninety years destroy their legal rights. "It must be remembered that the necessity of the times often forced on men customs which in later years were not necessary. (*Venkatasubba Rao and Abdur Rahman, JJ.*) SUBBARAYALOO *v.* RANGANATHA MULALIAR.

1938 M.W.N. 376=47 L.W. 480=(1938) 1 M.L.J. 530.

DEED.

...D—*Consideration—Proof—Recital as to passing ...sideration—Impeaching of—Onus.*

...person having an undoubted right to convey certain property conveyed it to his wife in lieu of dower debt and the recitals in the deed of conveyance said that consideration did pass. The persons claiming through him claimed that consideration did not pass and the property in fact belonged to them.

Held, that the burden of proving this was on them and they were in no better position than the transferor through whom they claimed. (*Bose and Puranik, JJ.*) DALCHAND MULCHAND *v.* HASSANBI.

A.I.R. 1938 Nag. 152.

———*Construction—Boundaries and area—Surrounding circumstances—When can be looked to—Intention of parties—Grant—Extent of property granted—Ascertainment—* Falsa demonstratio—*Doctrine of—Applicability and value of.*

In construing the terms of a document or grant it is permissible not only to look at the terms of the document but also to the surrounding circumstances with a view to discover the intention of the parties as expressed in the deed. Where the terms of the deed are not clear and unambiguous and there is some inconsistency between the different parts of the same document, the only way of solving the ambiguity, if any, is to look to the surrounding circumstances, namely, the circumstances which led to the grant or deed, and the circumstances subsequent to the grant in order to discover whether any portion of the deed or instrument of grant amounts to a *falsa demonstratio*. No doubt in a case where the
efinitely ascertain-
ong according to
falsa demonstratio and therefore ignored. Where the intention of the parties is that the boundaries are to be looked to for the
entire extent of the land within the boundaries given in the deed is to be held by the grantee subject only to the condition that if that extent be found to be in excess of a specified area rent should be paid for the area in excess, if the given boundary is a well-defined about which there is no really no dispute, that boundary must be acted upon and cannot be ignored. If, however, it were certain that only a certain extent is given and no more, and that the boundaries can therefore be entirely ignored, the case may be different. The doctrine of *falsa demonstratio non nocet* can be of very little use unless one can be fairly certain that any particular *demonstratio* is false. In the case, however, of a boundary which is not well-defined and which is disputed, and which fails to throw light, the boundary is of little
ZAMINDAR OF SIVAGANGA *v.* KARUTHAN AMBALAM.

1938 M.W.N. 335.

———*Construction—Rules of.*

An instrument must be construed according to the plain meaning of the words and sentences contained therein. It is not proper to
from the language of the

EASEMENTS ACT (1882), S. 60.

AYYAR *v.* SANKARAN EMBRANDI.
1938 M.W.N. 414=47 L.W. 564.

grantee

reside in the rooms, any additions made by them would not be governed by the grant and hence S. 60 of the Easements Act will not come into operation. (*Ismail,*

S. 39—*Propriety.*

Where an offence falls under both Ss. 39 and 44 (*c*) the mere fact that a charge could have been made under S. 44 (*c*) does not prevent a charge made under S. 39 from being properly made especially where the offence under S. 39 is clearly established. S. 39 is in fact the major offence. (*Lord Wright.*) BABU LAL *v.* EMPEROR. 42 C.W.N. 621=1938 A.Cr.C. 27=1938 O.W.N. 416=1938 A L J. 382=174 I C. 1=1938 A.W.R. (P.C.) 116=1938 P.W N. 320=A.I.R. 1938 P.C. 130=(1938) 1 M L.J. 647.

ESTOPPEL—*Approbate and reprobate—Party accept-*

after he has enjoyed a benefit under the order, contend that it is valid for one purpose and invalid for another. If he ac
consider
Court.
tiff was
the waste of time, money and energy caused to him. The costs were paid at once and received by the plaintiff's pleader without protest in Court plaintiff having applied to the High Court for revision of the order setting aside the *ex parte* decree.

Held, that the revision application was
and the plaintiff was not entitled to attack
revision. (*Abdur Rahman, J.*) SATYANARAYANAMURTI *v.* SUNDARA RAO. 1938 M.W.N. 383.

EVIDENCE—*Proof—Deed—Contents—Certified copy.*

The contents of a document can be satisfactorily established by producing a certified copy. (*Bose and Puranik, JJ.*) DALCHAND MULCHAND *v.* HASSANBI. A.I.R. 1938 Nag. 15.

EVIDENCE ACT (I OF 1872), S. 8, Illus. (j) an (*l*)—*Accusation by woman against man for attempt ravish—Statements by her to witnesses—Silence of accused—Relevancy.*

A woman brought an accusation against a certain

the woman was accusing the man to her witnesses he kept silent and on these considerations lower Courts
n revision,

he
di
make statements.

Held, further, that the silence of the accused to be relevant should have come under Illus. (*l*) to S. 8, *i.e.*, it should have been proved that the accusations made by

EVIDENCE ACT (1872), S. 25.

the woman against the man were made in his presence. (*Spargo, J.*) NGA AYE MAUNG *v.* THE KING. A.I.R. 1938 Rang. 127.

——Ss. 13 and 32 (3)—*Will conferring life-estate on widow—Probate proceedings—Statement by widow as to necessity for mortgage by her—Admissibility in suit by mortgagee after widow's death against successor-in interest.*

life-state under
necessity for an
s not admissible
rest to the estate
in a suit against the latter by the alienee to enforce the mortgage. (*Wort and Varma, JJ.*) MANKI KUAR *v.* HANSRAJ SINGH. 173 I.C. 983=4 B.R. 370=19 Pat.L.T. 234.

——Ss. 24 and 26—*Applicability—"Inducement, threat or promise"—Accused arrested by chowkidar and tied to cattle peg by both hands—Chowkidar leaving accused in custody of private person and going to police station temporarily—Accused feeling pain and requesting to be released—Person in charge releasing one hand and asking accused to speak truth—Confession by accused—Admissibility.*

The accused was arrested by a village chowkidar, and
peg. The chowkidar had
l therefore left the accused
The accused was feeling

Held, that though no inducement, threat or promise was expressly offered to the accused, the accused must in
afraid of being tied
that would not be
ence Act, the con-
ntary, and could
have little weight.

Held, further, that the chowkidar's custody was at an end when he made over the accused to the private individual, as it could only terminate either by his releasing

1938 P.W.N. 293=19 Pat.L.T. 268.

——S. 24—*Confession—To be taken as a whole—Scope of rule.*

No doubt the admission of an accused is to be taken as a whole. But where there is evidence to show that any portion of the exculpatory statements is inherently

GHULAM NABI *v.* EMPEROR. 40 P.L.R. 265.

——S. 25—*"Confession"—What is—Statement to*

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de
of
Police who examined the accused after taking the accused into custody. The statement was to the effect that (1) the deceased had come to his house on the evening of

Held, that the statement was not a confession and was therefore admissible in evidence against the accused, but that so much of the statement
sions in his favour could not be

GIFT.

misunderstood their situation, and mistaken their rights, a Court of equity will not disturb the quiet, which is the consequence of that agreement; but when the transaction has been unfair, and founded upon falsehood and misrepresentation, a Court of equity would have a very great difficulty in permitting such a contract to bind the parties. In this case it was found that the deed was a family arrangement not tainted even remotely with undue influence and that the deed was generous and could not be set aside. (*Lord Maugham.*) MARTIN CASHIN v. PETER J. CASHIN. **A.I.R. 1938 P.C. 103.**

GIFT—*Validity—Imperfect gift followed by appointment of donee as executor.*

An imperfect gift followed by the appointment of the donee as executor, the intention to give continuing, entitles the donee to the property. (*Lord Maugham.*) MARTIN CASHIN v. PETER J. CASHIN.

A.I.R. 1938 P.C. 103.

GOVERNMENT OF BURMA ACT (1935), S. 124—*Protection of Crown servants.*

S. 124 of the Government of Burma Act purports to be a general indemnity to all servants of the Crown for acts committed in the execution of their duty as such before the commencement of the Act. The protection given by this section is in addition to the existing protection given by S. 197 of the Cr. P. Code. (*Mosely, J.*) RAI MOHAL PANDEY v. MAUNG PO SEIN.

1938 Rang.L.R. 116 = A.I.R. 1938 Rang. 189.

———S. 124 (2)—*Duty of committing Magistrate.*

Under S. 124 (2) of the Government of Burma Act, it is the duty of the Magistrate to take the available evidence and come to a finding whether the acts complained of were done or not done in good faith before he decides whether to commit the accused. (*Mosely, J.*) RAI MOHAL PANDEY v. MAUNG PO SEIN.

1938 Rang.L.R. 116 = A.I.R. 1938 Rang. 189.

GOVERNMENT OF BURMA ADAPTATION OF LAWS ORDER (1937), Cl. 10—*'Right' and 'Privilege—Interpretation.*

The words "right, privilege, objection or liability already acquired, accrued or incurred" in the Government of Burma Adaptation of Laws Order, 1937, must have reference not to the mere enjoyment of what is in fact a boon or to the existence of being in fact under a disadvantage, but to rights and privileges, objections or liabilities which are enforceable at law.

Per *Dunkley, J.*—Cl. 10, Government of Burma Adaptation of Laws Order, 1937, must be construed strictly and the words 'right' and 'privilege' must be given their legal meaning. In law a 'right' is an advantage which can be enforced by appropriate action before a Court, and a 'privilege' is nothing more than a special right enjoyed by certain persons, beyond the rights which the public in general enjoy. Accordingly the right to have a suit stayed is in law neither a right nor a privilege. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) ARUNACHALAM CHETTYAR v. VALLIAPPA CHETTYAR. **A.I.R. 1938 Rang. 130 (F.B.).**

GOVERNMENT OF INDIA ACT (1935), S. 224 (2)—Jurisdiction of High Court—Order under S. 36, Legal Practitioners' Act—Revision. *See* C. P. CODE, S. 115. **47 L.W. 578.**

GRANT—Construction—Crown grant—Successive life-estates to grantee and his heirs—Prohibition on alienation—Effect of. *See* CROWN GRANTS ACT, S. 3.

1938 M.W.N. 440.

———Construction—Extent granted—Decision as to—Basis—Boundaries—When prevail—*Falsa demonstratio*—Doctrine of—When available—Intention of parties—Surrounding circumstances—Admissibility—Possession

GRANT.

—Value of. *See* DEED—CONSTRUCTION.

1938 M.W.N. 335.

———*Construction—Right to minerals—Shrotriem grant to pious Mahomedans reserving jodi—Grantee's to minerals—Burden of proof.*

Certain lands were granted by way of shrotriem to certain pious Mahomedans reserving a jodi. The original deed of grant was lost and was not produced. In 1790, the Collector wrote to the then shrotriemdar a letter asking him to pay a beriz of 130 pagodas into the Treasury in respect of the shrotriem, to obtain a receipt and happily enjoy the income (*phalam*) derived from the village certain extracts from the list of sanads were produced, referring to three grants in Persian made 1760, 1769 and 1777. The inam register described the lands granted as consisting of 1647. 41 acres of dry land, 112·50 acres of wet land, and 9·37 acres of garden land as well as 636·77 acres of poromboke land. The entry in the column containing the recommendation of the Deputy Collector was to the following effect: "The shrotriem being of an order date than 50 years can be confirmed. The shrotriemdars are willing to enfranchise. Quit rent 1/8th. Rupees 597 inclusive of jodi. In Mr. Traver's account of Fasli 1211 this shrotriem is entered as a grant only for the lives of the persons in col. 14. All of them died about 30 years ago and the shrotriem continues to be uninterruptedly enjoyed by the persons in col. 16. Mr. Travers seems to have entered so because the word "hereditary" is not mentioned in the Parvanas. Under the present rules the title is perfectly valid as fifty years' undisturbed possession is proved." There was no word in the register about minerals and the assessment of land revenue was based entirely on the value of the agricultural land. The land was used entirely for the purpose of producing crops till about 1900, but in 1900, the grantees began to extract and work mica from the land.

Held, (1) that there was no grant of minerals to the grantee, and the fact that the Government agreed to treat the grant as being a hereditary grant could not in any way alter the nature of the original grant; (2) that the burden of proving that the original grant did pass the right to the minerals was upon the grantee who claimed the same; (3) that the fact that mica had been worked from the land from 1900 was no ground for presuming that the original grant permitted the same. (*Leach, C.J. and Lakshmana Rao, J.*) MAHARAJA OF VENKATAGIRI v. SECRETARY OF STATE.

1938 M.W.N. 409.

———*Construction—Taluqdari sanad—Kaiser Bagh house—Restriction as to transfer—Scope of—Intention of Government.*

Where the sanad recited that the grantee should not transfer his share 'to any one not taluqdar of the heir to a taluqa', it only means that the grantee could transfer his share only to any one in his own position or to his own heir apparent or to the heir apparent of such other person. The intention of the Government was that these houses should go with Taluqa as an appurtenance thereof. The house should follow the Taluka. (*Hamilton and Yorke, JJ.*) RAZA HUSAIN KHAN v. SAIYID MAHOMED. **1938 O.A. 353.**

———*Construction—Taluqdari sanad—'Taluqdar' and 'heir to taluqa'—Meaning of.*

In connection with sanads issued prior to the Oudh Estates Act, the word 'Taluqdar' ought to be understood only in the general sense in which it is commonly used to-day namely the owner of a taluqa, and the expression 'heir to a taluqa' means the heir apparent to such a person as was then regarded as taluqdar.

GROVE.

Hamilton and Yorke, JJ.) RAZA HUSAIN KHAN *v.* SAIYID MAHOMED. 1938 O.A. 353.

GROVE. *See* LANDLORD AND TENANT—GROVI

GUARDIANS AND WARDS ACT (VII OF 18

S. 35—*Security bond by guardian securing immov property for due performance of duties—Breach— signment of bond by Court to newly appointed guara... —Assignment by latter again toward on latter attaining majority—Suit by latter to enforce bond—Competency—T.P. Act, S. 6 (e)—Mere right to sue.*

Where a person appointed as guardian of a minor under the Guardians and Wards Act executes a security bond in favour of the Court under account for all the movable property money which he shall receive on accoun and immovable properties of the mino profits and other incomes thereof at suc judge shall appoint and to duly pay ... balances in his hands", and to be liable for a certain *amount of money in default of the due performance of* his duties as guardian, making his security for the amount in addition lity, the bond is conditioned for the ... the duties of the executant as guardian. The obligation there is failure to he guardian. If as bond not being kept

property, the charge or mortgage is also with the right to enforce the liability. under S. 35 is entitled to enforce the lia charge or mortgage therefor as if the b executed in his favour. When a newly appointed guardian of the ward takes an assignment of the security bond executed by a previous guardian, who has failed to discharge his duties as guardian, the assignment is in trustee for the ward who is entitled to the beneficial in- tee for to the When ward on the latter becoming a maj fulfilment of the duty the all the property of the assignment is perfectly v. sue on the bond and to e *Rao and Venkataramana* AYYAR *v.* KRISHNA AYY...

HINDU LAW—*Adoption—Burden of proof.*

Where a son in-law is alleged to have been adopted, it is for the alleged adopted son to prove that he was in fact adopted (*Darling, S.M. and Bomford, J.M.*) KANT LAL *v.* BANSI KHATIK. 1938 B.D 442.

———*Adoption—Prior gift by adoptive father—Validity as against adopted son—Adoption and gift part of same transaction—Validity of gift—Test—Point of time to be considered.*

It is competent to a sole absolute owner under the Hindu Law to alienate his property before making an adoption, and the subsequently adopted son cannot repudiate the transaction. Any disposition of property made by the adoptive father before the adoption cannot be challenged by the adopted son. If a deed of gift is executed and passed by the adoptive father before the adoption takes place, it would be binding on the subsequently adopted son, but if the gift deed is passed subse-

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quent to the adoption, it would not be binding on the adopted son and would be voidable at his instance. It

that, the gift can be challenged by the adopted son. (*Divatia, J.*) KAMALABAI *v.* PANDURANG. 40 Bom.L.R. 428.

———*Adoption—Widow—Subsequent alienation—Validity—Agreement between adopting widow and natural* ... *deal* ... *son's*

the ... s the ... own sweet will without any reference to the rights and interests of the adopted son is not binding on the adopted of a son an agreement adopting widow and the ed boy which was to the effect, that the widow should make management of and enjoy all her husband's property during her lifetime and after her death the adopted son should take possession thereof and manage. The widow made several alienations thereafter of practically the whole of the

SHANKARDAS *v.* CHANNAPPA. 40 Bom. L. R. 443.

———*Alienation by widow—Setting aside—Suit for—Proper decree—Order for payment by one party to opposite party—Power of Court to pass.*

a Hindu widow on legal necessity, the is that the sale should be set aside if it is not justified; if it were justifi-

consideration of Rs. 2,500. Rs. 1,300 was for legal necessity but the balance was not, passed an order that the alienees would be entitled to retain possession of properties conveyed beyond the lifetime of the widow on payment of Rs. 1,200 with interest thereon.

Held, that the order was wrong and should be set aside. (*Wort and Varma, JJ.*) MST. ... KUAR *v.* NAURANGI SINGH. A.I.R. ...

———*Applicability—... of Malabar ... and grandfather's ...—... grandson—Rule as to applicability of.*

The rule of Hindu Law as to the pious ... the son and grandson to pay the ... father's debts is not ... Malabar. ... NARAYANA ...

HINDU LAW.

——Debts—Father—Liability as surety—Son's interest if could be proceeded against. *See* C. P. CODE, S. 145. **A.I.R. 1938 Nag. 148.**

——*Debts—Father—New business started by father—Mortgage for antecedent debts and for fresh cash advance—Liability of minor son—Latter's share in family property—If can be proceeded against—Pious obligation of son—Suit against son after father's death—Limitation.*

A Hindu minor son's interest in the joint family property is bound by, and liable to be sold for satisfying a debt incurred by his father, even in the case of a new business started by the father, on the ground of the son's pious obligation to pay his father's debts. The pious obligation of a Hindu son to pay his father's debts under a mortgage executed by the father, part of which consists of antecedent debts and part of cash advance, can be divided into two parts. With regard to the former, the mortgage would bind the minor son's interest in the property, but with regard to the latter (cash advance), though the minor son would not be bound by the debt as a mortgage debt, his interest in the joint family property would be liable for that debt by virtue of the fact that it is a debt of the father, and the son's interest is therefore liable to be sold in execution of a money decree against the father. This liability can be enforced even in a suit brought against the son after the death of the father. In the case of a mortgage which is registered the period of limitation for a suit against the son for a money decree, is the same as for a suit against the father namely, six years from the date of the mortgage under Art. 116 of the Limitation Act. (*Divatia and Sen, JJ.*) GULAMKHAJA *v.* SHIVLAL.

40 Bom.L.R. 381.

——*Family arrangement—Validity—Arrangement between some members of family.*

Even though some members of a family do not join a family arrangement, the arrangement will still be a family arrangement and will be binding on those who joined it. But those members of the family who did not join it will not be bound by the arrangement. (*Zia-ul-Hasan, J.*) JAGAT NARAIN SINGH *v.* SALIK RAM SINGH. **173 I.C. 991 = 1938 O.W.N. 355 = 1938 O.L.R. 157 = 1938 O.A. 259 = A.I.R. 1938 Oudh 110.**

——*Joint family—Business—Ancestral business—What is—Sons born after starting of business—Liability.*

A business started by a manager of a joint Hindu family cannot be regarded as ancestral. The fact that certain minor members were not born at the time when the business was started, was held not to make any difference. It is only with regard to a debt incurred for an ancestral business that the minor members of a joint Hindu family or their shares in the joint family property are liable. (*Wort and Manohar Lal, JJ.*) GANPAT RAI MARWARI *v.* SUKHDEO RAM. **174 I C. 218.**

——*Joint family—Manager—Loan by firm out of funds of family—Suit in our name for recovery—Maintainability in the absence of statement that suit is on behalf of family—Contract Act, S. 230.*

Where moneys belonging to a joint Hindu family are lent out by the person who is the manager of the family, and the evidence shows that the transaction of lending was entered into by him and it also discloses that he is the manager of the family as well as the manager of the family money-lending business, he is entitled to sue for recovery of such moneys in his own name without stating in his plaint that he is suing to recover on behalf of the family. A manager of a Hindu joint family comes within S. 230 of the Contract Act which allows an agent who does not disclose the name of his principal to maintain a suit on a contract entered into by him on behalf of the principal. (*Leach, C.J. and Lakshmana Rao, J.*) MALLIKARJUNA VARAPRASADA RAO *v.* VENKATARATNAM. **47 L.W. 511 = 1938 M.W.N. 437 = (1938) 1 M.L.J. 526.**

——*Joint family—Survivorship—Widow and unmarried daughters of deceased co-parceners—Right to maintenance and marriage expenses from property in hands of surviving co parcener—Nature of—Right to charge—Attachment of property by Government under S. 88, Cr. P. Code, as against absconding co-parcener—Effect—Rights of widow and daughters—If lost.*

The widow and unmarried daughters of a deceased Hindu co-parcener are entitled to be maintained by the surviving co-parceners. The latter taking by survivorship takes it subject to the burden of maintaining the widow and unmarried daughters and of defraying the marriage expenses of the unmarried daughters. This right to maintenance and marriage expenses is not merely personal; it is an obligation which attaches to the property taken by the surviving co-parcener. This right is an interest in the property which cannot be defeatd by an attachment obtained by the Government under S. 88, Cr P. Code, against the surviving co-parcener who absconds. The widow and daughters are always entitled to ask the Court as a matter of right to create a formal charge, and their right cannot therefore be attached or defeated by Government who under S. 88, Cr. P. Code; are only concerned with confiscating the absconder's right, title and interest in the property. (*Divatia, J.*) SECRETARY OF STATE *v.* AHALYABAI. **40 Bom.L.R. 422.**

——*Maintenance—Widow—Amount—Determination—Facts to be taken into account—Family debts—Arrears—Rate—Discretion—Interest on arrears—Practice.*

In arriving at the figures of maintenance to be allowed to a Hindu widow, the Court should take into account the debts with which the family is burdened. Where the family formerly comprised of three brothers, one of them being the widow's deceased husband and the widow takes into adoption her husband's brother's son and subsequently one of the remaining brothers (other than the one whose son is taken into adoption) takes his share and separates from the family but the rest of the family remains joint, the widow is entitled to maintenance from the whole of joint family and not merely from the income of the property allocated to her adopted son as the share of his adoptive father at the time of the determination of the share of the brother who has separated. The widow is, under the circumstances of the case, entitled to be treated generously in the matter of maintenance. The arrears of maintenance to be awarded to the widow need not necessarily be at the same rate at which the Court has fixed the future maintenance and may be at a lessor rate. The Court has discretion in the matter. As regards the interest to be awarded on the arrears of maintenance, the Court should follow the usual course in such matters and should allow the Court rate of interest from the date of decree. (*Stone, C. J. and Niyogi, J.*) SHRIDHAR BHAGWANJI *v.* SITABAI. **A.I.R. 1938 Nag. 198.**

——*Maintenance—Widow—Joint family—Liability if can be against individual members.*

Where in a suit for maintenance by a widow, the family has been found to be joint at all material times, both costs and maintenance are payable from joint family and not by any individual member. (*Stone, C.J.*

HINDU LAW.

and Niyogi, J.) SHRIDHAR BHAGWANJI *v.* SITABAI. A.I.R. 1938 Nag. 198.

——*Marriage—Validity—Gandharva marriage of*

minor

... inge of garlands, is in fact recognised by Hindu Law, but a minor girl cannot contract such a marriage as she is incapable of giving the necessary consent which is essential to such a minor. (*Courtney-Terrell, C. J. and Mahomed Noor, J.*) BAMDEB DAS *v.* RAJA BRAJASUNDER DEB. 17 Pat. 134.

——*Partition—Evidence—Separation in residence—Value.*

Separation in residence is only one of the factors that goes to prove partition, but is by no means conclusive evidence of it. (*Ismail, J.*) KARAN SIEGH *v.* BUDH SEN. 1938 A.W. R. (H C.) 280.

——*Partition—Intention to separate—Evidence of—Filing of suit for partition—If conclusive proof of intention to separate.*

According to the Hindu Law, the declaration or expression of an intention to separate effects a severance of the joint status; but that expressing of intention has to be proved in a Court of justice by evidence. The evidence to prove the same may consist of a notice, or

that there was an intention to separate, it

wala and Varma, JJ.) JOALA ... CHANDERJOT KUER.

——*Widow—Position and powe* ... *without necessity—If void—Suit by reversioner to set aside—Decree—Right to mesne profits—Possession of*

and Sen, JJ.) MOHAN LAL *v.* JAGJIVAN. 40 Bom.L.R. 394.

ILAQADAR—*Appointment of—Ilaqadar dismissed on conviction under S. 420, I. P. Code—His brother who is under his influence—If can be appointed.*

On the dismissal of an Ilaqadar in consequence of a conviction under S. 420, I P. Code, his brother who is under his influence cannot be appointed in his place, although there is nothing personally against his character. (*Garbett, F. C.*) RAHMAT KHAN *v.* NUR ALAM. 17 L.L T. 11.

INCOME-TAX ACT (XI OF 1922), S.10 (2)—*Right to deductions—Burden of proof.*

INCOME-TAX ACT (1922), S. 23.

It is a well settled principle that if any deduction is claimed, it is for the assessee to prove that that deduction is legally allowable to him. If he fails to do so, the amount so claimed is liable to be assessed. (*Addison and Din Mahomed, JJ.*) GOPI NATH VIR BHAN *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. 40 P.L.R. 228.

——S. 10 (2) (i) and (ix)—*Payment out of and conditional on profits—If deductible.*

A payment by the assessee out of profits and conditional on profits being earned cannot be treated as rent. Nor can such payment be described as a payment made to earn profits. Money so paid by the assessee cannot, therefore, be deducted either under Cl. (*i*) or under Cl. (*ix*) of sub S. (2) of S. 10 of the Income-tax Act. (*Addison and Din Mahomed, JJ.*) GOBI NATH VIR BHAN *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. 40 P.L.R. 228.

——S. 10 (2) (vi)—*Construction—Person taking over business of another—Assessment of successor under S. 26 (2)—Claim to depreciation in respect of premises, machinery plant etc.—Calculation of depreciation—Basis of—Original cost to successor or original cost to predecessor—"Assessee"—Meaning of.*

(*Beaumont, C.J. and Rangnekar, J., Blackwell, J., contra.*) In the case of a fictional assessment, under S. 26 (2) of the Income-tax Act, the word "assessee" in S. 10 (2) (*vi*) of the Act has not got the same meaning as it bears for the purpose of subsequent assessment, namely, the person being assessed, but must be constru- ... ofits the assess- ... the premises, ... tion is claimed ... e earned. The Income-tax Act has to be construed as a whole and the ... the context. "Asses- ... se of an assessment ... of a predecessor-in- ... and the successor who is assessed on the profits earned by the predecessor is entitled to claim deduction for depreciation on the

Rangnekar, J. Where the Court is concerned with a

inappropriate, it would be difficult to hold that depreciation should be allowed on the original cost to the successor and not on the original cost to the predecessor. (*Beaumont, C.J., Blackwell and Rangnekar, JJ.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* MAZOGOAN DOCK, LTD., BOMBAY. 40 Bom.L.R. 343 (S.B.)

——S. 23 (4)—*Assessment under—Interference—Inherent jurisdiction of High Court.*

The jurisdiction exercised by the ... Court under the Income tax Act is a special ... conse- quently circumscribed within ... the statute. The power of ... in any other manner with

S. 23 (4) being nowhere conferred upon the High Court expressly or impliedly by the Act, do such power can be exercised merely by virtue of the general inherent jurisdiction of the High Court, if any. (*Addison and Din Mohammad, JJ.*) SOM CHAND-MALIK CHAND *v.* COMMISSIONER OF INCOME-TAX. **40 P.L.R. 308.**

——**S. 25-A**—*Enquiry under—Discretion of Incomtax Officer—Reference to High Court.*

Under S. 25-A of the Income-tax Act, the Income-tax Officer has a discretion to conduct an inquiry in such manner as may seem to him, in his judgment, to be best in the circumstances of the particular case and to hear such evidence, and such evidence only, as he may in his discretion consider it necessary to hear to enable him to come to a decision on the question whether a separation of the members of the family has taken place or not. His decision is a decision on a question of pure fact, and so long as his discretion is not exercised arbitrarily or fancifully, and there are before him some materials on which he can arrive at the conclusion at which he has arrived, his decision cannot be canvassed before the High Court on an application under S. 66, because no question of law can arise thereout. (*Roberts, C.J. and Dunkley, J.*) BANSIDAR & SONS *v.* THE COMMISSIONER OF INCOME-TAX. BURMA. **1938 Rang.L.R. 130.**

——**S. 25-A**—*Hindu undivided family—Claim to be assessed as members of contractual partnership—Proof required.*

Before persons who have been previously assessed as a Hindu undivided family can claim to be separately assessed as members of o contractual partnership, they must established that the joint family has been dissolved. 57 Cal. 1336, relied on. (*Roberts, C.J. and Dunkley, J.*) BANSIDAR & SONS *v.* THE COMMISSIONER OF INCOME TAX, BURMA. **1938 Rang.L.R. 130.**

——**Ss. 42 and 43**—*Non-resident having property or business connection in British India—Method of charging to income-tax—Nitices, if can be served on the principal—Scope and effect of proviso to S. 42—'Agent' in S. 42, meaning of.*

S. 42 of the Income-tax Act provides the method of charging a non-resident and lays down that his profits and gains shall be chargeable to income-tax in the name of the agent and that such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax. According to S. 42 (1) it is the agent alone and not his non-resident principal, that shall for the purposes of the Act, be treated as the assessee (*i.e.*) as the person to whom a notice under S. 22 (2) shall issue and by whom the tax is payable. The word 'shall' in S. 42 (1) shows that the provisions of that section are mandatory and the department is precluded from issuing notices to the principal and from treating the principal as the assessee except to the limited extent of recovering any arrears of tax. The proviso to S. 42 does not militate against the above view, but it only contemplates the possibility of the assessee, (*i.e.*) the agent not being able to pay the tax and provides the necessary method of recovery. The word 'agent' for the purposes of S. 42 has a wider scope than it has in ordinary use. (*Collister and Bajpai, JJ.*) MAHARAJAH OF BENARES *v.* COMMISSIONER OF INCOME-TAX.
1938 A.W.R. (H.C.) 247 = 1938 A.L.J. 341.

——**S. 66**—*Question of fact—Advance made by partner—If loan or increase in capital.*

The question whether an advance made by a partner is a loan to the partnership or an increase in the capital of the firm is a question of fact, and when once the Income-tax authorities have held that it was by way of an increase in the capital of the firm and not aloan independent of the partnership capital, the High Court has no authority to interfere. (*Addison and Din Mahomed, JJ.*) GOPI NATH VIR BHAN *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **40 P.L.R. 228.**

——**S. 66 (3)**—Decision of Income-tax Officer under S. 25-A—Reference to High Court. *See* INCOME-TAX ACT, S. 25-A. **1938 Rang.L.R. 130.**

——**S. 66 (3)**—*Question not raised before Commissioner—Jurisdiction of High Court to entertain.*

Under S. 66 (3) of the Income-tox Act, the jurisdiction of the High Court is confined only to those matters which are contained in the application made to the Commissioner under S. 66 (2) and it is only in relation to such matters that the refusal of the Commissioner to state the case can be investigated by the High Court. Consequently if a point is not raised before the Commissioner, it cannot be raised for the first time before the High Court under S. 66 (3). (*Addison and Din Mohammad, JJ.*) SOM CHAND-MALIK CHAND *v.* COMMISSIONER OF INCOME-TAX. **40 P.L.R. 308.**

INSOLVENCY—*Annulment of deed—Burden of proof.*

It can be inferred from the usual course of human conduct that a party who has evidence in his possession favourable to his case will not fail to produce it. This principle is particularly important in insolvency proceedings where the primary burden of proof is on the receiver or the petitioning creditor while knowledge of all the essential facts is usually with the other side. It is not meant by this that the primary burden can be abrogated. Of course the person seeking annulment must produce *prima facie* proof before he can hope to succeed, but having done so the attitude of the other side is of the utmost importance in judging the truth of his story and his good faith. (*Bose, J.*) KISANGOPAL *v.* UMRAO KESHEO RAO. **A.I.R. 1938 Nag. 216.**

——*Suit on mortgage—Application for appointment of receiver—Insolvency of mortgagor—Mortgagee plaintiff appointed receiver after hearing objections of Official Receiver—Application by plaintiff for order directing Official Receiver to furnish particulars and to deposit monies collected—Power of Court.*

The plaintiff in a mortgage suit applied for the appointment of a receiver. The 1st defendant mortgagor having become an insolvent, the Official Receiver, was impleaded as party defendant. In the presence of the latter and after objection by him the plaintiff himself was appointed receiver by the Court. The Official Receiver had granted certain leases of the property, and the plantiff as receiver applied for an order directing the officer to furnish certain particulars regarding the leases and secondly to deposit the monies collected by him into Court.

Held, that the application was perfectly competent, and there was no warrant for holding that the receiver in insolvency was not subject to the orders of the Civil Court. It made no difference that the person against whom the order was to be made happened to be the Official Receiver; he was a party to the suit and was bound by the order of appointment of receiver made in his presence. The Official Receiver as much as any other party to the suit, was bound by the orders of the Court. The question of ownership of the amounts collected by the Official Receiver subsequent to the order of appointment of receiver but accrued due before that order should, however, be properly be reserved. (*Venkatasubba Rao and Abdur Rahman, JJ.*) SUNDARAM AIYANGAR *v.* OFFICIAL RECEIVER OF TRICHINOPOLY.
(1938) 1 M.L.J. 543.

INTERPRETATION OF STATUTES—*Alternative construction—Obvious injustice to be avoided.*

INTERPRETATION OF STATUTES.

Where the language of a statute admits of two constructions, the construction which would lead to obvious injustice should be avoided. (*Niyogi, J.*) HAJI MOHMAD *v.* HARBAJI. 1938 N.L.J. 141.

——*Harmonious construction.*

Law must be interpreted in a way which will not render one of its provisions entirely nugatory. (*Bose, J.*) RAMPRASAD JAGBANDHOO *v.* ANANDI BRINDAWAN RAWAT. A.I.R. 1938 Nag. 180.

——*Marginal notes and headings—Reference to.*

It is undoubtedly permissible to the Court to refer to marginal notes and headings as aids in interpretation of statutes. But where a section of the statute is plain on t r

(*Rangnekar and Sen, JJ.*) RAMKRISHNA *v.* BAPURAO. 40 Bom L.R. 390.

——*Meaning of words—Construction placed by Courts—Re-enactment in same terms—Inference.*

It is a well established principle to be applied in the construction of statutes that where a certain construction has been placed by the Courts upon words in an Act, and that Act is subsequently re-enacted in a later Act which uses the same words, the Legislature must be taken to have known of the construction placed upon the old Act and to have intended to adopt it, unless there is something in the rest of the Act which negatives such a conclusion. (*Beaumont, C. J., Broomfield and Wassoodew, JJ.*) GANGADHAR GOPALRAO *v.* SHRIPAD ANNARAO. 40 Bom L.R. 324 (F.B.).

——*Meaning of words—'Privilege' and 'right'.*

Where the word 'privilege' is coupled with 'right' in a statute it must be held to have a well defined meaning. It does not mean some advantage or boon which by reason of existing procedure a party may deem himself in fact to possess, but may be defined as a right, advantage or immunity in law enjoye[illegible] persons beyond the common ad[illegible] word must be construed in [illegible] legal meaning when it is emplo[illegible] as having a loose or figurative [illegible] *Mya Bu and Dunkley, JJ.*) [illegible] TYAR *v.* VALLIAPPA CHETTYAR. A.I.R. 1938 Rang. 130 (F.B.).

——*Preamble—Effect of.*

The preamble does not govern plain provisions in the body of the Act. (*Leach, C. J., Varadachariar and Mockett, JJ.*) RANGAREDDI *v.* DASARADHARAMI REDDI. 1938 M.W.N. 369 = 47 L.W. 498 = (1938) 1 M.L.J. 552 (F.B.).

——*Repeal by implication.*

An assumption of repeal by implication is not favoured. (*Niyogi, JJ.*) SHRIDHAR *v.* GANESH. 1938 N.L.J. 133.

——*Retrospective operation—Amending Act.*

Where it is clear that an amending Act is more than

[illegible]

are certain exceptions, for instance, declaratory statutes passed to remedy defects in form have retrospective effect. Whenever the intention is clear that the Act should have a retrospective operation, it must unquestionably be so construed, even though the consequences may appear unjust and hard. (*Thomas, C. J., Zia-ul-Hasan*

JURISDICTION.

and Hamilton, JJ.) B. KUNDAN LAL *v.* FAQIR BAKSH. 1938 O.W.N. 401 = 1938 O.A. 270 (F.B.).

JAMMU AND KASHMIR COURT OF WARDS REGULATION, Ss. 15 and 16—*Contract by ward—Subsequent ratification—Validity.*

A contract by a person during the period of his wardship is void *ab initio* and cannot, therefore, be ratified by him subsequently. (*Kichlu and Wazir, JJ.*) LAJPAT RAI ANAND *v.* LACHMAN SINGH JI. 40 P.L.R. J. & K. 34.

JAMMU AND KASHMIR MOTOR VEHICLE REGULATION, S. 16—*Offence of overloading—Sentence of fine—Considerations.*

[illegible]

ing. (*Kichlu and Wazir, JJ.*) STATE *v.* NAND LAL. 40 P.L.R. J. & K. 33.

JURISDICTION—*Civil Court—Bar of suit—Acts of executive authority in exercise or under colour of statutory powers—Right of subject to resort to Civil Court for redress.*

When executive authorities in the exercise or under colour of statutory powers interfere with the person or property of the subject, improperly or in excess of the limits authorised by law, the subject has the right to resort to the Civil Court, unless its jurisdiction has been taken away by express words or by clear implication. (*Varadachariar and Pandrang Row, JJ.*) MASK & CO. *v.* SECRETARY OF STATE. 1938 M.W.N. 341 = 47 L.W. 505.

——*Civil and Revenue Courts—Suit for joint possession of tenancies—Entertainability by Civil Court—Test.*

Where the suit is for the joint possession of certain

[illegible] SINGH. [illegible] A.W.R. (R.C.) 206.

——*Decision of the Calcutta High Court—Suit to set aside on ground of want of jurisdiction—Forum.*

Where a decree of the Calcutta High Court was transferred to a Court in Monghyr for execution the defendant files a suit in Monghyr Court to set aside the decree of the Calcutta High Court as being without Jurisdiction, that Court cannot entertain the suit for such a suit can be filed only in the Calcutta High Court. (*Manohar Lall and Chatterji, JJ.*) LACHMI PRASAD SINHA *v.* CHARTOTTE BANARJI 173 I.C. 786 (1) = 4 B.R. 341.

——*Non-resident foreigner—Suit against on cause of action arising in British India—Decree—If void—Question of jurisdiction and of correctness of decree—*

[illegible]

on the ground that the decree is incorrect. It is necessary to emphasise the distinction between the question of the existence of jurisdiction and that of the correctness or otherwise of the decree passed in the suit. When the cause of action has arisen in British India and the suit is based on that cause of [illegible] a decree

could be passed against the non-resident foreigner only in his capacity as a legal representative or son of his father and not against him personally, is no ground for holding that the decree passed is invalid or void. That is obviously a question relating to the correctness of the decree and not a question of jurisdiction and cannot be raised and decided in a suit to set aside that decree in a Court in British India, whatever the validity of such a decree may be when if such decree is impugned in a foreign Court. (*Varadachariar and Horwill, JJ.*) SWAMINATHAN CHETTIAR *v.* SOMASUNDARAM CHETTIAR. **47 L.W. 552.**

——*Pecuniary jurisdiction—Objection to—When to be raised—Duty of Court.*

Ordinarily a Court should not encourage frivolous objection as to the valuation of a suit on the part of defendants, if they are raised only with a view to protect litigation. Objections based on over-valuation or under-valuation must be raised at the earliest possible opportunity and in all cases in which issues are settled at or before such settlement as laid down in S. 21, C. P. Code. In a case in which there has been a deliberate over-valuation or deliberate under-valuation with a view to give jurisdiction to a particular Court that matter has to be investigated into, if an objection is raised at the earliest possible opportunity. The objections regarding valuation are in many cases such as are difficult to decide as value of a particular property is after all a matter of opinion and may vary; where the objection raised is of a nature which would show that the valuation put by she plaintiff is not grossly wrong but *prima facie bona fide*, it does not appear necessary for a Court to enter upon an elaborate enquiry regarding the valuation. If the over-valuation or under-valuation appears on the face of the plaint and is patent, it is the duty of the Court to return the plaint to the plaintiff to present it to the proper Court under O. 7, R. 10, but if it is not patent on the face of the plaint but objection is taken by the defendant that the property is over-valued or under-valued the Court may require the plaintiff to show that the suit has not been over-valued if there are *prima facie* grounds for showing that the suit is not properly valued, but not otherwise. (*Stone, C. J. and Puranik, J.*) J. COOK *v.* G. H. COOK. **A.I.R. 1938 Nag. 149.**

LAMBARDAR—*Appointment of — Conviction of lambardar under S. 193, I. P. Code—Rights of other members of family—If affected.*

Conviction of a lambardar under S. 193, I. P. Code, is not in itself sufficient to debar other members of the family from their right to succeed to the lambardari. (*Garbett, F. C.*) ISSA *v.* FATEH MAHOMED. **17 L.L.T. 10.**

——*Appointment of—Hereditary rights.*

Hereditary rights in *lambardaris* are to be guarded jealously; and the line of succession may be broken on financial grounds only when the safety of the collection of the land revenue cannot be secured. (*Garbett, F.C.*) LAL DIN *v.* RAHMAT ALI. **17 L.L.T. 13**

LAND ACQUISITION ACT (I OF 1894), S. 11 (iii)—*Persons interested—Inam land granted to family to continue so long as there are male descendants of grantee—Government—If interested in land—Chance of inam ending by failure of male line—If to be taken into account for apportionment.*

Under the Land Acqiusition Act, the amount of compensation is to be divided in proportion to the value of interests of all persons interested in the land. But the question of apportionment of the sum awarded between the several interests must not be based on hypothetical grounds. Any remote interest should not be taken into consideration. In the case of an inam village

granted under a sanad providing that the inam should continue in the family so long as there may be in existence descendants of the original grantee in the male line, it cannot be said that the grantor Government has any interest which is saleable of which the law can take note and which could be made the basis of an apportionment of compensation on compulsory acquisition of the inam village. The interest of the Government is at best a remote contingent interest, the chance of the inam coming to an end by failure of the male line. Such an interest or chance can scarcely be appreciable by a money value or a money payment. The inamdar is therefore entitled to the whole compensation money without deduction. (*Rangnekar and Macklin, JJ.*) MAHADEV BALKRISHNA *v.* DT. DEPUTY COLLECTOR, POONA. **40 Bom.L.R. 432.**

——**Ss. 31 (2) and 32**—*Applicability—' If there be no person competent to alienate the land"—Meaning of—Personal inam grant to family with full rights in soil and heritable—Absence of condition against alienation—Inamdar—Interest of—If incompetent to alienate—Acquisition of inam land—Deposit in Government securities—If justified.*

The words "if there be no person competent to alienate the land" in S. 31 (2) of the Land Acquisition Act must necessarily apply to a case where there is no present title in the person who has come forward as a claimant to the compensation fixed by the Collector. Ss. 31 and 32 provide for the case of persons who by reason of a personal disability have no absolute power to alienate and are intended to protect the interest of reversioners. When land is taken away from the possession of such persons who hold it only on a life-estate or similar limited estate, such as minors, lunatics, Hindu widows, administrators, etc. Where the legal estate is in one person and the beneficial estate in another. In the case of inam granted as a personal inam to the family of the grantee, the grantee having a heritable estate in full proprietorship, the grant being of the soil and conveying a full interest in the land without any condition in restraint of alienation, the inamdar and his assigns are owners of the villages and have an interest in the land and are entitled to the benefit of that interest. Such a person cannot be said to have no power to alienate the land within the meaning of S. 3 (2) of the Act. Such an inamdar does not fall under Ss. 31 and 32. The amount of compensation awarded for acquisition of such inam lands cannot therefore be directed to be deposited in Government securities and interest alone directed to the inamdar. He is entitled to receive the full amount of compensation in cash. (*Rangnekar and Macklin, JJ.*) MAHADEV BALKRISHNA *v.* DT. DEPUTY COLLECTOR, POONA. **40 Bom.L.R. 432.**

LAND CUSTOMS ACT (XIX OF 1924), S. 7 (2)—*Sub-Inspector of Customs—Complaint by—Competency—Notification under S. 3 (1)—Effect of.*

Under S. 7 (2) of the Land Customs Act, a Land Customs Officer is competent to make a complaint to a Magistrate. In view of the Notification of the Governor-General in Council under S. 3 (1) of the Act, appointing all Sub-Inspectors of Customs to be Land Customs Officers, a Sub-Inspector of Customs is competent to prefer a complaint under S. 7 (2), because he is a Land Customs Officer. (*Burn, J.*) PUBLIC PROSECUTOR *v.* KRISHNAMURTHI AYYAR. **47 L.W. 576.**

LANDLORD AND TENANT—*Ejectment—Burden of Proof—Ejectment suit by inamdar claiming both warams and alleging tenancy-at-will—Onus.*

In an action for ejectment by an inamdar who claims that he is the owner of both the warams and the defendant is a tenant-at-will, it is incumbent on the plaintiff to

LANDLORD AND TENANT.

prove that he is the owner of both the melwaram and Kudiwaram. No presumption can be made that the grant was of both the warams. Even if he establishes that he is the owner of both the warams, he must, in order to sustain the action in ejectment, prove that the defendant was let in under a terminable tenancy which entitles him to eject the defendant from the land. (*Venkataramana Rao, J.*) LAKSHMANA REDDIAR *v.* SRI SUBRAMANIA SWAMI. 47 L.W. 559 = (1938) 1 M.L.J. 634.

raiyat—Competency. *See* CO-SHARERS—MORTGAGE WITH POSSESSION BY ONE. 17 Pat. 143.

———*Ejectment—Notice to quit — Validity — Joint Hindu landlords—Notice to quit by one alone—Validity —Rule as to.*

A tenancy created by joint landlords governed by the Hindu Law, can only be put an end by all the lessors acting together; but when one of the joint acting as manager of the estate with the con other or others, a notice to quit sent by hin valid. (*Broomfield and Sen, JJ.*) KRISHNA LAXMIBAI. 40 Bom [illegible]

———Grove—Grove holder's right of transfer. *See* AGRA TENANCY ACT, S. 197. 1938 A.W.R. (H.C.) 251 (S.B.).

———*Grove—Right to transfer—Custom as to non existence of—Pachenda Kalan village*

There is no custom in village Pachenda Kalan disentitling persons in possession of groves as occupancy tenants or groveholders from cutting and selling trees standing in the plots forming parts of their holdings. (*Bennet, Iqbal Ahmad, Yorke and Verma, JJ.*) MUBARAK HUSAIN *v.* SAGAR MAL. 1938 A.L.J. 400 = 1938 A.W.R. (H.C.) 251 (S.B.).

———*Rent—Enhancement—Inamdar— Limit to enhancement of rent of tenants.*

Obiter.—An inamdar, in cases where he is entitled to enhance the rent of his tenants, can claim a fair rate of enhancement which must be fixed in accordance with

———*Rent—Liability for—Land included in area allotted to plaintiff on partition—Liability of inter-*

———Sir *land—Co-sharer mortgaging specific plots of* sir *and also surrendering possession—Rights of mortgagee.*

Where a co-sharer transfers by way of mortgage specific plots of *sir* and also surrenders possession to

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the mortgagee, the possession of the mortgagee is as *khudkasht murtahin* and it should be so entered in the papers, if the other co sharers do not object. (*Darling, S.M. and Bomford, J.M.*) DHANUKDHARI KEWAT *v.* SANDAGAR SINGH. 1938 R.D. 422.

———Sir *land—Joint* sir*—Mortgage by one of the co-sharers—Effect—Mortgage in representative capacity—How affects the other co-sharer.*

The general rule is that if a part of joint *sir* is disposed of by one of the co sharers and ex-proprietary ... hole *sir* ... maining ... a person ... brother ... must be held that the widow acquiesced in the mortgage and so could not question it. Necessary corrections in the papers should be made. (*Darling, S.M. and Bomford, J.M.*) AMRITA *v.* RAM NATH MISRA. 1938 R.D. 448.

———*Thiccadar—Decree against for arrears of* thicca *rent—Execution—*Thicca *interest—Saleability of.*

for arrears of rent in respect of the *thicca* tenure. (*Dhavle, J.*) SUKRA URAON *v.* MANJHI LAL BISWANATH SAHI DEO. 19 Pat.L.T. 280.

LAND TENURE—Saranjam—*Nature and incidents of*—Saranjamdar—*Power to create* saranjam *in favour of stranger out of own property.*

A *saranjam* or jahgir is a political tenure created from or dependant on political considerations, the existence of which can only be determined by Government. It is not open to a *saranjamdar* to create a *saranjam* out of his own property in favour of a stranger, though he can make a grant of an inam.

Quaere.—Whether an alienation by a *saranjamdar* of the whole or any part of his *saranjam* beyond his lifetime is void and illegal. (*Rangnekar and Sen, JJ.*) RAMCHANDRA *v.* LAKSHMIBAI. 40 Bom L.R. 400.

———*Taberdari tenure—Nature and incidents of—*

... ure does not ... ber who has ... of the joint ... tenure or to ... for the time ... BAIKUNTH ... at.L.T. 246.

... *ession—Lease* ... *breach of a* ... *Court, ultimately decreed by appellate Court—Donee, if a trespasser.*

Where during the pendency of a suit to set aside a deed of gift on the ground of a breach of a covenant therein, the donee grants a perpetual lease of the gifted properties and the suit, though dismissed in the trial

Court is ultimately decreed in the Court of appeal, it is to this decree passed by the ultimate Court of appeal that one has to look to, in order to determine the nature of the possession of the donee on the date of the execution of the lease. The mere fact of the dismissal of the suit by the trial Court could not render the possession of the donee over the gifted property lawful. The appellate decree relates back to the date of the cause of action with respect to which the suit is brought. As the donee was not in lawful possession, he was not competent to execute a permanent lease of the properties concerned. Because a trespasser is in cultivatory possession of land, it could not clothe him with the right to grant a perpetual lease for a trespasser cannot be allowed to take advantage of his own wrong. (*Iqbal Ahmad and Verma, JJ.*) LACHHMINA KUNWARI *v.* MAKFULA KUNWARI. 1938 A.W.R. (H.C.) 199= 1938 A.L.J. 333.

——*Right to minerals—Grant of patni lease—Absence of covenant relating to working of minerals—Lessors right to minerals declared—Sub-lease to work mines during pendency of declaratory suit—Lessors suit for damages for coal wrongfully mined—Nature of the liability of the lessee and sub-lessee.*

A grant of a patni lease did not contain any covenant relating to the working of minerals. During the pendency of a suit to declare the lessor's right to the minerals, the lessee granted a sub-lease to work the mines. After the right of the lessors was declared, a suit was brought against the lessee to which subsequently the sub-lessees were also added, for damages, in respect of the coal wrongfully extracted. On a contention that the lessee was not liable for the wrongful extraction of coal by the sub-lessee it was, held that on the facts both the lessee and sub-lessee were jointly liable as joint tort-feasors in respect of the working of the coal. (*Wort and Mandhar Lal, JJ.*) MANGOBINDA SADHU *v.* BRAHMA NIRANJAN CHAKRAVARTY. 4 B.R. 381=174 I.C. 130.

LEGAL PRACTITIONER—*Misconduct—Conviction for criminal offence—Subsequent disciplinary action—Scope of enquiry—Advocate convicted of defamation—Disciplinary action—If called for.*

When criminal proceedings are taken against a pleader or an advocate and finally concluded, they must be taken to have been rightly decided, and the question to be determined in a subsequent enquiry as to whether the advocate or pleader ought to have disciplinary action taken against him is whether upon a perusal of the facts and circumstances disclosed in the evidence in the criminal proceedings his offence has been one implying a defect of character which unfits him to be a pleader or advocate. Such a defect of character normally involves moral turpitude. In a case where an advocate was convicted of the offence of defamation, the High Court, while holding that no disciplinary action was called for on their part, observed that responsible citizens, when afforded the opportunity of making charges against persons (whether known to them or not) of which they had not ascertained the truth, should be careful not to aggravate the defamatory nature of the matter by lending their support to an implied acceptance of it without careful investigation into its nature. (*Roberts, C.J. and Dunkley, J.*) *In the matter of* AN ADVOCATE. 1938 Rang.L.R. 125 (S.B.).

LEGAL PRACTITIONERS' ACT (XVIII OF 1879), S. 13—*Misconduct—Money given to pleader for payment to arbitrator—Appropriation by him towards fees.*

Where a pleader to whom money is given by his client for payment to an arbitrator appropriates that money towards his fees, his conduct is gravely improper and calls for disciplinary action. (*Coldstream and Monroe, JJ.*) B, A PLEADER, SIMLA, *In the matter of.* A.I.R. 1938 Lah. 248.

——**S. 36**—Order declaring person tout—Revision—Power of High Court. *See* C. P. CODE, S. 115. 47 L.W. 578.

LETTERS PATENT (Rangoon) (1922), Cl. 10—*Interpretation—Mortgage decree in respect of lands outside jurisdiction—Power of High Court to pass.*

As regards suits for land, the High Court can take cognizance, if the land is situate wholly within the local limits or, where the land is situate in part only within such limits, if leave has been first obtained; and as regards suits other than those for land, the High Court has jurisdiction, if the cause of action has arisen wholly within the limits or where the cause of action has arisen in part only within the limits, if leave of the Court should have been first obtained, or if the defendant dwells or carries on business or personally works for gain within those limits. The High Court can therefore pass a mortgage decree not only in respect of lands situated within its ordinary original civil jurisdiction but also in respect of lands situated outside its ordinary original civil jurisdiction when leave under Cl. 10 is obtained. (*Ba U, J.*) FIRM OF V. M. R. P. *v.* NAGOOR GANNY. A.I.R. 1938 Rang. 119.

LIMITATION—*Bar of—Claim barred by time—Defence also, if barred.*

Even if a claim based on certain facts is barred by efflux of time, a defence based on those facts is not so barred. (*Addison and Din Mahomed, JJ.*) NIZAM DIN *v.* RAM SUKH DARS. A.I.R. 1938 Lah. 286.

LIMITATION ACT (IX OF 1908), S. 5—*Discretion—Interference by superior Court—Refusal to extend time wrong view of land—Power of superior Court to interfere.*

Under S. 5 of the Limitation Act, the Court has a discretion to excuse the delay or to refuse to excuse it. Such discretion should be exercised judicially and not in an arbitrary manner. The superior Court has power to interfere with a wrong exercise of discretion by the Subordinate Courts in such cases both in its revisional and in its appellate jurisdiction. If the lower Court misdirects itself on a point of law and refuses to extend the time upon the findings of fact which it arrives at, it will be set aside by the superior Court. (*Dhavle and Manohar Lal, JJ.*) NRISINGHA CHARAN NANDEY *v.* TRIGUNAND JHA. 19 Pat.L.T. 309.

——**S. 5**—*Sufficient cause—Mistaken advice of counsel—If ground for excuse of delay.*

A reasonable care by a competent lawyer would be a sufficient cause within the meaning of S. 5 of the Limitation Act; to attract the operation of the section, it is enough to show that the mistake of the lawyer was of such a description that it may arise even amongst legal practitioners of experience. A litigant should not be made to suffer for such error or mistaken advice given by counsel. (*Dhavle and Manohar Lal, JJ.*) NRISINGHA CHARAN NANDEY *v.* TRIGUNAND JHA. 19 Pat.L.T. 309.

——**S. 12**—*Applicability—Appeal—Time requisite for obtaining copy of decree—Right of appellant to deduct—Application for copy—If to be made before expiry of time for appeal.*

In order to entitle an appellant to claim deduction of the time requisite to obtain a copy of the decree appealed against under S. 12 of the Limitation Act, it is not necessary that the copy should be applied for before the expiry of the time for preferring the appeal. An appeal which would have been in time if presented

LIMITATION ACT (1908), S. 12.

on 23-2-1937, was actually presented on 16-2-1937, but without the copies of the judgment and the decree which

copy of the decree was applied for on obtained on 1—3—1937 and filed on the same date.

——S. 12 (2) and S. 5—*Time requisite—Meaning of—Wrong suit number given—Delay in office—Party if to suffer—Want of funds—Effect.*

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——S. 14—*Applicability—Decree in suit under O. 21, R. 103, C. P. Code, setting aside order adverse to purchaser made under O. 21, R. 99—Execution—Delivery of possession of entire property—Defect in return of writ of delivery—Application for re-issue of writ—Refusal and order directing plaintiff to bring fresh suit on ground that defendant was in possession by reason of act subsequent to delivery of possession under writ—Fresh suit—Limitation—Time taken in prior suit—If to be excluded—Question of title*
If res judicata *by reason of decisic*

, Plaintiffs as assignees of a deci
gage suit executed that decree, bi
properties to sale and purchased th
ves on 22—3—1922. Having been resisted by the defendant-appellant, a third party, in their attempt to take possession the plaintiffs took proceedings under

21—9—1930. In view, however, of the process-servers report that a well, a house and some trees on the land had not been actually delivered over to the plaintiffs, the

The executing Court also held that the further dispossession complained of by the plaintiffs was a dispossession by the defendants after the plaintiffs had been put into possession by the process-server in execution of the writ of 1930, and that the fresh taking of possession by the defendant was a matter for further litigation. The plaintiffs thereafter commenced the present suit for possession. It was contended that the defendant was in possession continuously since 1919 under a grant from the original landlord and that the suit being more than 12 years from that date was barred by limitation; and that the suit was barred also by *res judicata* by reason of the decision in the prior suit of 1926.

LIMITATION ACT (1908), S. 18.

Held, (1) that the time commencing from 1926 when the plaintiffs commenced the prior suit under O. 21,
High Court
the period of
by bringing the
to recover possession; and that even if 1919 be taken to be the point from which limitation started, the suit was not
(2) that under the decision of the executing
on 19—9—1932, on the plaintiffs' application for
of the writ of delivery, holding that the possession asserted by the defendant only took place after the original writ was given effect, the decision as one of fact between the parties, established a date of possession by the plaintiffs which made the present suit well within

——S. 14—Applicability—Prior suit in High Court—Plea by defendants of status of agriculturists—Suit withdrawn with liberty—Fresh suit—Period taken up by first suit—Right to deduct—C. P. Code, O. 23, R. 2—Scope and effect of. *See* C. P. CODE, O. 23, R. 2. 40 Bom.L.R. 377.

——Ss. 14 and 2 (7)—*Prosecution of proceedings in wrong Court on counsel's advice—If a ground for*

foreclosure decree was passed by an Additional Subordinate Judge, but the application for making it final was made to another of co ordinate jurisdiction, on the
that it was a case of gross
pplicant was not entitled to
imitation Act. (*Hamilton*
TA *v.* MAHPAL SINGH.
. 956 = 1938 O.L.R. 147 =
288 = 1938 O.W.N. 360 =
A.I.R. 1938 Oudh 112.

ucted under—Calculation of—Plaint ordered to be returned for presentation to proper Court—If terminates suit at once.

Proceedings before a Court do not terminate when the

Time required for this can be excluded in computing period of limitation. (*Mohamad Noor, J.*) ISHWAR DAYAL *v.* BADRI LAL. A.I.R. 1938 Pat. 203.

——S. 15 (2)—Applicability — Ward of Court dharmakarta of trust—Suit in respect of trust property—Notice of suit to Court of Wards—Necessity—Period of notice—Right to deduct. *See* MADRAS COURT OF WARDS ACT, S. 49. 1938 M.W.N. 435.

——S. 18 and Art. 62—*Extension of time—Decree-holder fraudulently selling property not belonging to judgment-debtor—Suit by purchaser for refund of purchase-money—Decree-holder guilty of fraud subsequent to sale*

In execution of a simple money decree for arrears of rent, the landlord decree-holder brought to sale the holding, describing it as the property of the judgment-debtor even though he was aware of the fact that no vestige of interest in the property was left with the judgment-debtor on account of the transfer of such holding by the judgment-debtor prior to his decree. Not only the decree-holder did this but he went on realizing rents for some years after the sale from the auction-purchaser. On proceeding to take actual possession of the holding, the auction-purchaser was obstructed by the real owner. Thereupon he brought a suit for possession but it was dismissed on the ground that the sale was not held in execution of a rent decree but a simple money decree and the sale did not convey any title to the auction-purchaser in the holding and the judgment-debtor then had no saleable interest in the property put to auction. Thereupon the auction-purchaser brought a suit against the decree-holder for the refund of purchase-money had and received by him to the use of the plaintiff on failure of the consideration. It was contended by the decree-holder that the suit was barred by Art. 62.

Held, that as the decree-holder by fraudulent misrepresentation and suppression of truth, subsequent to the sale, went on realizing rents from the plaintiff for some years, it was really an act of fraud on his part which kept the plaintiff out of his right to institute the suit within the proper period of limitation. The plaintiff was therefore entitled to the benefit of S. 18, and the suit as brought by him was not barred, even though Art. 62 of the Act was held applicable to it. (*Nazim Ali and B. K. Mukherjea, JJ.*) CHAITANYA DAS BANERJEE *v.* RANJIT PAL CHOWDHURY.

A.I.R. 1938 Cal. 263.

——**S. 19**—*Acknowledgment addressed to dead person—Sufficiency.*

An acknowledgment, duly signed, although it is addressed to a dead person will operate as a valid acknowledgment of a debt to save limitation under S. 19, Limitation Act. (*Wort and Manohar Lall, JJ.*) AMRIT NARAYAN SINGH *v.* BAIJNATH PANDEY.

A.I.R. 1938 Pat. 180.

——**S. 19**—*Acknowledgment — Requisites—To be within time—Suit if can be based on the acknowledgment.*

A document as an acknowledgment under S. 19 cannot operate to save limitation unless it has been executed within time; also in such a case the suit must be found on the original cause of action. The document itself cannot be used as the basis of the suit. (*Bose, J.*) RAMPRASAD JAGBANDHOO *v.* ANANDI BRINDAWAN RAWAT. **A.I.R. 1938 Nag. 180.**

——**S. 19**—Acknowledgment—Unstamped promissory note—If can amount to—If should be an instrument under S. 2 (14) of the Stamp Act. *See* STAMP ACT, S. 35. **1938 N.L.J. 145.**

——**(as amended in 1927), S. 20**—*"As such"—Effect of—Payment before and after 1st January, 1928—Distinction—Decree-debt—Part-payment—Effect of.*

As to payments made before 1st January, 1928, the words "as such" have some significance because they serve to make it clear that in the case of a payment towards interest which is not required to be evidenced by writing, it should be clear that the payment was in fact towards interest and not left as a matter of doubt. As to payments made after 1st January, 1928, they are now placed on an equality. Therefore the words "as such" are material when the Court has to consider a payment made before 1st January, 1928, but they have no significance after the date mentioned. Where a judgment-debtor makes a part-payment to the decree-holder, such payment saves the entire debt from limitation. Any appropriation made by the decree-holder is immaterial. (*Courtney-Terrell, C.J. and James, J.*) BANKANIDHI SANTRA *v.* GODIPATNA CO-OPERATIVE SOCIETY. **A.I.R. 1938 Pat. 183.**

——**S. 20**—*"Payment"—What constitutes—"Person liable to pay the debt"—"Agent duly authorised"—Meaning—Vendee of mortgaged property authorised to pay part of consideration to mortgagee—Payment by vendee—Sufficiency—Mortgagee acknowledging receipt of payment without actual payment—Sufficiency.*

One of the properties comprised in a mortgage deed was agreed to be sold to one *P* for a certain amount and it was stipulated that out of that amount *P* should pay a sum of Rs. 1,500 to the mortgagee who in his turn should release the item purchased from his mortgage security. The mortgagee consented to this arragement made between the mortgagor and *P*. Simultaneously with the execution of the sale by the mortgagor to *P*, a release deed was executed by the mortgagee to *P* which recited that the mortgagee received Rs. 1,500 towards interest and that in consideration thereof he released his mortgage right over the item sold. No money was actually paid to the mortgagee on that day, the actual payment being deferred to a later date by agreement between the mortgagee and *P*. It was so paid subsequently.

Held, that the transaction amounted in law to a payment of interest by a person liable to pay the debt within the meaning of S. 20 of the Limitation Act. *P* was "a person liable to pay the debt" and was also the mortgagor's "agent duly authorised" to pay Rs. 1,500, and the payment therefore saved limitation. (*Venkatasubba Rao and Abdur Rahman, JJ.*). PARTHASARATHY AYYANGAR *v.* EKAMBARA MUDALIAR.

1938 M.W.N. 397=47 L.W. 517= (1938) 1 M.L.J. 624.

——**Ss. 20 and 21**—*Applicability—Co-mortgagors—Payment by one—If saves limitation for suit on personal covenant as against the other—Joint contractors—If agents for one another.*

For the purposes of Ss. 20 and 21 of the Limitation Act two joint contractors, such as co-mortgagors, are not agents one for the other, so far as a suit on the personal covenant is concerned. Although the mortgage itself may be kept alive by a payment made by one of the mortgagors, when the question is a matter not of the liability on the mortgage but the liability on the personal covenant, a payment made by one co-mortgagor (or joint contractor) cannot be deemed to be a payment of the other or others under S. 20 of the Limitation Act; S. 20 quite clearly implies a part from S. 21, that one joint contractor is not the agent of the other or others so as to save limitation as against the latter. (*Wort and Manohar Lall, JJ.*) BAIJNATH PRASAD *v.* SATI LAL SAHU. **174 I.C. 156=4 B.R. 386= 19 Pat.L.T. 240.**

——**S. 20, proviso**—*Payment appearing in handwriting of debtor—Same document, if can be taken as acknowledgment of payment also.*

Per *Nasim Ali, J.*—Where the fact of payment appears in the handwriting of the debtor there is no reason why the said writing should not be taken as an acknowledgment of payment also. There is nothing in the proviso to S. 20 of the Limitation Act which precludes the same document as being treated as evidence of the fact of payment as well as an acknowledgment of the payment. (*S. K. Ghose and Nasim Ali, JJ.*) PRAFULLA CHANDRA NAG *v.* JATINDRA NATH KAR.

42 C.W.N. 548.

LIMITATION ACT (1908), S. 20.

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the proviso to S. 20 of the Limitation Act. Payment may be made either in cash or by the execution of a promissory note. When the debtor executes a promissory note for the amount of interest due, the fact of payment is evidenced by writing signed by the debtor. If that

proved only by documentary evidence. (*Pandrang Row and Abdur Rahman, JJ.*)
v. THEVAMMAL.
47 L.W.

——S. 20, proviso—*Payment by cheque—Effect of—Cheque written out by debtor—If evidence both of payment and acknowledgment of payment.*

Under S. 20 of the Limitation Act, payment need not be in cash. If a cheque is delivered to a payee by way

...cular debt. (*S. K. Ghose and Nasim Ali, JJ.*) PRAFULLA CHANDRA NAG v. JATINDRA NATH KAR.
42 C.W.N. 548.

——S. 23—*Applicability—Title suits brought after attachment under S. 146, Cr. P. Code—Limitation.*

Suits for recovery of land brought more than six years after attachment under S. 146, Cr. P. Code, are not barred as those suits are cases of continuing wrong within meaning of S. 23, Limitation Act. (*Dhavle, J.*) GHAMANDI MISSER v. JAGARNATH MISSER.
A.I.R. 1938 Pat. 212.

——Art. 11-A—*Applicability—Claim by plaintiff for exclusive possession of homestead dismissed ... R. 99, C. P. Code—Subsequent suit by hi... tion of homestead brought more than one year ...*

...he plaintiff for possession ... land was dismissed under O. 21, R. 99, C.P. Code, a subsequent suit brought by him more than one year after the order of dismissal for partition of that homestead and for delivery to him of his share is not barred by limitation, as the plaintiff does not seek to establish the right which he claimed in his application under O. 21, R. 97, C. P. Code (*i.e.*) exclusive possession of the homestead. In these circumstances, Art. 11-A of the Limitation Act has no application. (*Jack, J.*) SATYA KINKAR GHANTY v. MUKHRAM MARWARI.
66 C.L.J. 537.

——Art. 14—*Application for redemption under Punjab Redemption of Mortgages Act dismissed but not on merits—Subsequent civil suit after more than one year—If barred.*

Where an application for redemption of land under the Punjab Redemption of Mortgages Act is dismissed by the Assistant Collector not on the merits but on

LIMITATION ACT (1908), Art. 74.

order of the Assistant Collector, is not barred by that article. (*Abdul Rashid, J.*) PRABHU MAL v. CHANDAN.
40 P.L.R. 245.

——Art. 36—*Applicability—Suit for damages in respect of a tort.*

...t, or if it arises both from ... is no waiver of the tort, it ... two years allowed by Art. ... *Collister, J.*) COURT OF WARDS, MUZAFFARNAGAR v. AJODHIA PRASAD.
...=1938 A.L.J. 328.

... *for possession by ... from guardian—Limitation—Art. 144—Application of.*

It cannot be denied that Art. 44 of the Limitation Act contemplates a suit for possession. It contemplates a suit for possession, and not a mere suit for declaration, against the parties in possession, including persons

... attains majority. Art. 44 and not Art. 144 would therefore apply to a suit for a possession by the ward against an alienee from the original transferee. (*Varadachariar and King, JJ.*) KASIM ALI v. RATNA MANIKKA MUDALIAR.
1938 M.W.N. 403.

——Art. 52—*Purchases on credit—Payments—Appropriation—Rule as to—When whole claim not barred.*

In each case, where there are more debts than one and a payment is made without a specific appropriation, it is a question of fact to be found, as to which debt it was made. If it is proved that it was made on ac... to save all ... *Niyogi, J.*)
1938 N.L.J. 157.

——Art. 64—*Account stated—Requisites.*

Before a document can be used as an account stated, it must be shown that there were items on both sides of the accounts. (*Bose, J.*) RAMPRASAD JAGBANDHOO v. ANANDI BRINDAWAN RAWAT.
A.I.R. 1938 Nag. 180.

——Art. 74—*Bond payable by instalments—What amounts to.*

Where in a bond it is stipulated that it will be paid back within a fixed period, and the principal amount of the bond is divided into annual instalments, provisions being also made for the payment of interest, and there are no express words in the bond which affirmatively give the creditor a right to sue for the entire amount after the date fixed for the last instalment and there is nothing which precludes the creditor from suing for a defaulted instalment, the bond is one payable by instalments and the proper article applicable to such a bond is Art. 74 of the Limitation Act. 4 Luck. 480, Appl.

(*Khundkar, J.*) SOHONLAL BARARIA *v.* LAKSHMICHAND KOCHAR. **42 C.W.N. 545.**

———**Art. 85**—*Applicability—Proof required.*

In order to apply Art. 85, it must be established that there have been mutual obligations and that it has been the intention of the parties that such obligations would be set-off against each other. It is not of course necessary that there should be direct evidence of a contract as such a contract can be gathered from the surrounding circumstances. (*Jai Lal and Dalip Singh, JJ.*) BASHESHAR NATH GOELA *v.* BAIJ NATH. **A.I.R. 1938 Lah. 264.**

———**Arts. 115 and 120**—*Applicability—License fee assessed under S. 180, Bihar and Orissa Municipal Act—Suit for—Limitation.*

A suit to recover license fee assessed by the Municipal Committee under S. 180, Bihar Municipal Act, in respect of a platfrom erected by the defendant in his holding, is governed by Art. 120 and not by Art. 115, Limitation Act. The liability of the defendant does not arise out of any contract between him and the Municipality, but out of an obligation imposed by the statute on the licensees of platforms to pay the fees assessed by the Municipal Commissioners. The Municipality is authorized by S. 368 of the Act to recover such fees by distraint or suit. (*Agarwala, J.*) MATHURA PRASAD *v.* SPECIAL OFFICER IN CHARGE, GAYA MUNICIPALITY. **A.I.R. 1938 Pat. 192.**

———**Art. 115**—*Applicability—Suit for compensation—Municipal Committee using another's land for cattle fair for years.*

Where a Municipal Committee continues to hold a cattle fair on another's land from year to year, an inference can be drawn that there was an implied contract between the Committee and the landowner that the Committee should pay to the owner and that the owner should allow the Committee to hold the fair. A suit therefore for compensation not received will be governed by Art. 115 and not by Art. 39 or Art. 120. (*Addison and Din Mahomed, JJ.*) MUNICIPAL COMMITTEE, AMRITSAR *v.* KANSHI RAM. **A.I.R. 1938 Lah. 267.**

———**Art. 115**—*Order for different machinery—Some of machinery delivered found to be of different make—All machinery delivered more than three years before suit—Part of engine delivered within three years—Suit for breach of contract—Limitation.*

Certain company *A* informed the firm *B* that they wished to erect a weaving shed and asked them to send a complete specification for the same. Specifications containing three estimates for different machines were covered by a single letter which gave a total price of all the machinery and stated that one-third of such total price should be paid in advance with the order. The order was placed and delivery taken, but it was found that some machinery was not of the same make as ordered. A suit was brought by company *A* against firm *B* for damages for breach of contract. Almost all the machinery including the subject-matter of the suit was delivered more than three years before the date of the suit but a part of an engine was delivered within three years. The trial Court dismissed the suit as time-barred holding that the order was an order for separate pieces of machinery and time ran from delivery of each machine.

Held, Art. 115, applied. The clause about payment conclusively showed that the order was regarded as a single whole and the time began to run from the date of the last delivery. The suit therefore was within time. (*Dalip Singh and Skemp, JJ.*) GOENKA COTTON SPINNING AND WEAVING MILLS, LTD. *v.* DUNCAN STRATTON & CO. **A.I.R. 1938 Lah. 277.**

———**Art. 116**—Applicability—Mortgage by Hindu father for antecedent debts and for fresh cash advances—Suit against son after death of father—Limitation. *See* HINDU LAW—DEBTS. **40 Bom.L.R. 381.**

———**Art. 120**—Applicability—Municipal license fee assessed under S. 180, Bihar and Orissa Municipal Act—Suit for—Limitation. *See* LIMITATION ACT, ARTS. 115 AND 120. **A.I.R. 1938 Pat. 192.**

———**Art. 120**—*Applicability—Representative suit for declaring certain land as graveyard and for injunction directing defendants to remove buildings erected thereon.*

Where certain Mahomedan residents bring a suit on behalf of all the Mahomedan residents for a declaration that certain property is a graveyard and for an injunction directing certain Mahomedans to remove the buildings erected by them on portions thereof, the suit is governed by Art. 120, as the acts of the defendants amount to ouster of the plaintiffs from the use of the common land which was reserved for specific purpose, *i.e.*, for graveyard. (*Bhide, J.*) MAHOMED DIN *v.* MAHOMED DIN. **A.I.R. 1938 Lah. 254.**

———**Art. 120**—*Declaratory suit—Cause of action—Plaintiff in possession.*

Proceedings for partition of shamilat land of certain village started in 1922. In that year a mutation was entered to the effect that the partition should be in accordance with the land revenue but this mutation was rejected by the revenue authorities in 1923. Thereafter the mode of partition was sanctioned in accordance with areas of khewat holdings but the proceedings then dragged on and the final order for partition was made in 1932. The revenue officer did not refer either party under S. 117, Punjab Land Revenue Act, to the Civil Courts for the decision of the question of title. The plaintiff who had all along been in possession brought a suit within six years of the final order for declaration that the partition should have been made according to the revenue assessed on the holdings.

Held, that the final order for partition of 1932 threatened the possession of the plaintiff and thus gave him a fresh cause of action. The suit brought within six years of that date was within time. (*Addison and Din Mahommad, JJ.*) DASONDHI KHAN *v.* JAN MOHAMMAD. **A.I.R. 1938 Lah. 318.**

———**Art. 132**—*Applicability — Part of mortgaged property acquired under Land Acquisition Act—Mortgagor withdrawing compensation money—Suit by mortgagee to enforce security—Starting point.*

Where a portion of the mortgaged property is acquired under the Land Acquisition Act and the mortgagor withdraws the compensation money, a suit filed by the mortgagee to enforce his security and claiming a simple money decree in respect of the compensation money withdrawn, is a suit 'to enforce payment of money charged upon immovable property' within the meaning of Art. 132 of the Limitation Act. The cause of action is not the withdrawal of the compensation money, but the non-payment of the mortgage debt. (*Iqbal Ahmad, Harries and Bajpai, JJ.*) GIRDHARLAL *v.* ALAY HASAN MUSANNA. **1938 O.W.N. 433 = 1938 A.W.R. (H.C.) 188 = 1938 A.L.J. 313 = A.I.R. 1938 All. 221 (F.B.).**

———**Arts. 137 and 142**—Starting point—Decree in suit by purchaser under O. 21, R. 103, C. P. Code—Delivery of possession—Application for re-issue of writ on ground of report by serving officer of writ of possession that well, house and trees not actually delivered—Decision holding that entire property actually delivered and possession by respondent originated out of dispossession subsequent thereto—Defendant alleging possession from date prior to suit under O. 21, R. 103—Fresh

LIMITATION ACT (1908), Art. 142.

suit for possession—Starting point of limitation. *See* LIMITATION ACT, S. 14. 19 Pat.L.T. 250.

——Art. 142—*Applicability—Parties to suit co-sharers—Plaintiff alleging that he was in possession of*

by the defendants, the case is governed by Art. 142 and it is necessary for the plaintiff to prove his possession within 12 years. The mere fact that the defendants have been held to be co-sharers cannot help the plaintiff when he himself alleges that he was in separate possession of property. In such case although partition pleaded by the defendants is not proved, the defendants cannot be held to be holding possession of the property in dispute on behalf of the plaintiff and the plaintiff cannot be held to have been even in constructive possession of the same. He must prove actual dispossession within 12 years. A.I.R. 1934 All. 993, Rel. on. (*Bhide, J.*) KARIM BAKHSH *v.* SHADI.
A.I.R. 1938 Lah. 241.

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—Subsequen
against seco
ACT, ART. 44. 1938 M.W.N. 403.

——Art. 144—Sarva *inam land — Alienation by holder—Suit by successor to set aside—Limitation—Starting point.*

A suit to set aside an alienation of *sarva* inam pro-

application for final decree in case of default in the payment of any instalment—Starting point f
for final decree.

Where a compromise decree in the forr
nary foreclosure decree provided for the
amount due in certain instalments and i
provided that in case of default in the payment of 'any one *kist*', the plaintiff shall have the option to obtain a final decree for the whole amount, there is nothing in the wording of the decree to restrict the right to apply for final decree to the first default only. It would arise, as well, on subsequent breaches of conditions of the compromise decree. (*Hamilton and Yorke, JJ.*) RAM DUTTA *v.* MAHPAL SINGH. 173 I.C. 956=
1938 O.L.R. 147=1938 O.A. 288=
1938 O.W.N. 360=A.I.R. 1938 Oudh 112.

——Art. 182—*Starting*
for partition—Order for
able—Execution of latter—I

Where an order or decree, separately executable, is passed at an earlier stage of a suit, limitation for applying for the execution of such decree or order runs from the date of the order or decree as the case may be. Where therefore the Court passes a preliminary decree for partition and along with it also passes a decree

tation. (*Mohamad Noor and Rowland, JJ.*) SHAIKH

MADRAS CIVIL RULES OF PRACTICE, R. 114.

SALAHUDDIN AHMAD *v.* IMAMUDDIN.
A.I.R. 1938 Pat. 188.

——Art. 182 (5)—*Step-in-aid—Application for substitution of name in decree.*

——Art. 182 (5)—*Step-in-aid—Application under O. 21, R. 22.*

An application under *O. 21, R. 22*, C. P. Code, praying for the issue of a notice to the judgment-debtors is a step-in-aid of execution and the order passed on such an application furnishes a staring point of limitation under Art. 182 (5) of the Limitation Act. (*Burn and Venkataramana Rao, JJ.*) SUBRAMANYAN TIRUMURUPU *v.* NARAINA TIRUMURUPU. 47 L.W. 538.

——Art. 182 (5)—*Step-in aid—Transferee of decree—Application by under O. 21, R. 16, C. P. Code—Dismissal for non-payment of process-fee—If step-in-aid.*

An application by the transferee of a decree for execu-
-in-aid of
Act, al-
payment of
process-fees and for failure to serve notices on the judgment-debtors. (*Divatia and Sen, JJ.*) DAYALBHAI *v.* DAYABHAI. 40 Bom.L.R. 411.

MADRAS BORSTAL SCHOOLS ACT (V OF 1926), S. 8—Consecutive sentences—Legality of. *See*

S. 365 (6) of the City Municipal Act is subject of Sub-S. (10) of S. 365, under which, if an applicant for
orporation
pplication
year for
lies for a
answer,
he cannot be convicted for doing business without a license. (*Horwill, J.*) ABDUL RAZACK SAHIB, *In re.* 47 L.W. 575.

MADRAS CIVIL RULES OF PRACTICE, Rr. 114 to 120—*Validity—Rules made under Code of 1882 and not re-enacted under Part X of New Code of 1908—Inconsistency with O. 20, R. 17—Effect of—If invalidates Rr. 114 to 120.*

The Civil Rules of Practice made under the C. P. Code of 1882, but not re-enacted and published in

of Practice are inconsistent with O. 20, R. 17, C.P. Code of 1908, in so far as the former require and insist that questions of irregularity or fraud should be raised and decided before the preliminary decree is passed and before the case is remitted to the Commissioner for
O. 20, R. 17 these ques-
the cases remitted to the
r. 114 to 120 of the Civil
(*Leach, C. J., Madhavan*
...thmana Rao and Stodart

L.W.
495

MAD. MARUMAKKATHAYAM ACT (1933), S. 43.

member of tarwad—Attachability in execution of decree for personal debt.

By virtue of S. 38 of the Marumakkathayam Act, the share of a junior member of a Malabar tarwad in the property of the tarwad can be attached and sold in execution of a decree against him for his personal debt. S. 38 of the Act confers in unmistakable terms upon a member who constitutes a tavazhi the right to demand partition and have his share in the joint estate converted into a separate estate, and a creditor is entitled to attach and sell his share. (*Burn and Venkataramana Rao, JJ.*) SUBRAMANYAM TIRUMURUPU *v* NARAINA TIRUMURUPU. 47 L.W. 538.

——S. 43—*Construction and scope—"At any time"—Attachment of share of member of tarwad in execution of decree—Subsequent application by other members of tarwad for registration as impartible—Order registering tarwad impartible—Effect—If precludes sale of attached share in execution.*

The share of a member of a Malabar tarwad is capable of attachment and sale in execution of a decree obtained on a personal debt incurred by the member. Where such share is attached by the decree-holder, the right which the attaching creditor acquires under the attachment is not a defeasible right, and no act of the judgment-debtor or any other member of the tarwad which brings about the termination of that interest of the member would operate to the prejudice of the right acquired by the attaching creditor. Where after such attachment but before the sale in execution, the tarwad is registered as impartible under S. 43 of the Marumakkathayam Act on the application of some other members of the tarwad such registration cannot render nugatory the legal consequences of the attachment effected before the application for registration. The property of the tarwad in the hands of the other members can only be held by the tarwad subject to the rights of the attaching creditor who has on the date of the registration, already acquired a right entitling him to bring the share of the judgment-debtor to sale. The expression "at any time" in S. 43 of the Act cannot be held to have a retrospective effect so as to defeat the rights of the attaching creditor. The said expression "at any time" and Cl. 4 of S. 43 must be so construed as not to defeat the right which third parties had acquired before the registration of the tarwad is effected at any rate before the application for registration is made. The subsequent registration of the tarwad as impartible does not consequently preclude the Court from proceeding with the execution and directing a sale of the attached share. (*Burn and Venkataramana Rao, JJ.*) KRISHNAN *v.* NARAYANAN NAYAR. 1938 M.W.N. 330.

MAHOMEDAN LAW—*Gift—Gift of properties to two brothers—Estate taken—Joint tenancy or tenancy-in-common.*

A gift of properties to two Mahomedan brothers makes them tenants-in-common and not joint tenants in the sense known to English law. That kind of joint tenancy is unknown to the Mahomedan Law and the creation of that kind of interest is not likely to be intended by a Mahomedan donor. (*Varadachariar and King, JJ.*) KASIM ALI *v.* RATNA MANIKKA MUDALIAR. 1938 M.W.N. 403.

——*Marriage—Option of puberty—Exercise of—Time limit—Effect of exercise of option.*

The rule of Mahomedan Law respecting the doctrine of the option of puberty is that a girl can, when she attains puberty, repudiate her marriage within a reasonable time after she comes to know of the existence of her right to do so. By the exercise of the option of puberty, the marriage ceases to be a marriage and must be

MALICIOUS PROSECUTION.

treated as having never taken place. (*Addison and Din Mohammad, JJ.*) MST. AISHAN *v.* JODHA RAM. 40 P.L.R. 305.

——*Wakf—Dedication—Burial ground — Inference from user.*

The fact that certain plots of land were described in the revenue records as graveyard and had been in existence and used from a very early time as kabaristan by the Mahomedan community, is by itself presumptive evidence that the land had been set apart for use as a burial ground and that by user, if not by dedication the land is wakf. The nature of wakf will not be altered by the fact that Mahomedan community had taken no objection to the original owner's taking reeds from the graveyard. (*Coldstream and Din Mahommad, JJ.*) IMAM BAKHSH MUNAWAR DIN *v.* NARASINGH PURI. A.I.R. 1938 Lah. 246.

——*Wakf—Dedication—Definite area of land dedicated for use as graveyard—Presumtion as to whole land.*

Once it is found that a certain definite area of land has been dedicated for use as a graveyard, it must be presumed, in the absence of any proof that the dedication was limited, that the whole of the land was set apart to be used solely for the purpose of burying the dead. (*Coldstream and Din Mahommd, JJ.*) IMAM BAKHSH MUNAWAR DIN *v.* NARASINGH PURI. A.I.R. 1938 Lah. 246.

——*Wakf—Dedication—Proof of intention.*

In determining whether a wakf was created or not the real point for determination is whether the man intended to dedicate his properties then absolutely and for ever. These are the essential requisites of a valid wakf. If the intention to make the wakf can be gathered from the declaration taken as a whole and the surrounding circumstances, the mere fact that the wakif does not subsequently act according to the terms of the wakf will not invalidate the wakf. Where the intention is clear from the surrounding circumstances it is unnecessary to look into the subsequent conduct to find out the intention. If however the intention of the person executing the document is not clear and the declaration and the surrounding circumstances are equivocal, subsequent acts and conduct, if they throw any light on the real intention, may be looked into. A document began with a declaration that the property was made wakf. It was then stated that wakif would have the right to cancel it during his lifetime if he would so desire. The wakf was never acted upon by the wakif during life time. Question was whether a valid wakf was created.

Held, when the declaration was conditional and it could be nullified by the wakif at his own sweet will, there was no real intention to dedicate. The document therefore did not show the intention of dedicating properties for ever as wakf. (*Nasim Ali and B. K. Mukerjea, JJ.*) JONABALI SARDAR *v.* SABHA KHATUN. A.I.R. 1938 Cal. 257.

MALICIOUS PROSECUTION—*Reasonable and probable cause—Proof.*

An honest belief in the guilt of the plaintiff based on reasonable ground is the very essence of the defence to a suit for malicious prosecution. The plaintiff sold certain land to the defendant. The plaintiff expressly refused to guarantee good title with regard to anything which might have happened before the land came into his possession. Before the actual date of transfer he had told the defendant to make his own enquiries, but the defendant failed to make any reasonable enquiries. Subsequently it was discovered that there was an encumbrance and the defendant suffered some loss in making over the land to the mortgagee. Before filing a criminal case for cheating against the plaintiff, the defendant

MARRIED WOMEN'S PROPERTY ACT (1874), S. 8.

demanded from the plaintiff the loss of
suffered. After the criminal case ter
favour, the plaintiff instituted an action
false and malicious prosecution,

Held, that it was difficult to say that defendant had honest belief in the plaintiff's guilt and that the prosecution was due to the malicious intention of the defendant and for some subsidiary purpose. (*Baguley, J.*) MAUNG OHU KIN *v.* PALANIYAPPA CHETTYAR.
A.I.R. 1938 Rang. 121.

MARRIED WOMEN'S PROPERTY ACT (III OF 1874) *Married woman—Liability on contract.*

Under S. 8 of the Married Women's Property Act, apart altogether from the proviso introduced by S. 2 of Act 21 of 1929, before a credit
against a married woman on h
has to be done than mere
breach. The question in each case is whether the contract of the m
operative par
MATTER OF

——S. 8, ... *settled upon married woman without power of anticipation before April*, 1930.

Under the proviso to S. 8 of the Married Women's Property Act, a contract entered into with a married woman after April, 1930, cannot operate against separate property settled upon her without power of anticipation, although such settlement was prior to April, 1930 (*Ameer Ali, J.*) IN THE MATTER OF GEORGE BRIDGE. **42 C.W.N. 577.**

——**S. 8, proviso**—*Effect of.*

The proviso added to S. 8 of the Married Women's Property Act by S. 2 of Act 21 of 1929 saves the effect of restraint. But the effective
have not been amended. (*Am*
MATTER OF GEORGE BRIDGE.

MASTER AND SERVANT—*Wrongful dismissal—Assessment of damages—Considerations—Dismissal of a secretary of a Board—Quantum of damages.*

In the case of a wrongful dismissal of a servant, a

held that the award of three months salary as damages was ample compensation. (*Harris and Rachhpal Singh, JJ.*) PRABHULAL UPADHYA *v.* DT. BOARD OF AGRA. **1938 A.W.R. (H.C.) 223.**

MAXIM—Actio Personalis moritur cum persona—*Suit against Court of Wards in respect of a personal claim for damages—Death of Ward—Suit, if abates.*

Where during the pending of a suit against the Court of Wards, in respect of a personal claim for damages against the ward, the ward dies, the suit does not thereby abate. The maxim *Actio personalis moritur cum persona* is by no means of universal application at the present day, having been whittled down by statute and otherwise. (*Collister, J.*) COURT OF WARDS MUZAFFARNAGAR *v.* AJODHIA PRASAD.
1938 A.W.R. (H.C.) 184 = 1938 A.L.J. 328.

——*Falsa demonstratio non nocet*—Applicability and value of. *See* DEED—CONSTRUCTION.
1938 M.W.N. 335.

MORTGAGE—*Equitable mortgage—Deposit of title of movable machinery—Machinery subsequently becoming immovable property by fixation—Scope of title deeds.*

In a suit on equitable mortgage, the pleadings must be fairly and strictly construed as it is easy to assert an equitable mortgage where none exists merely because some title deed or other has passed to the party asserting

MORTGAGE.

the equitable mortgage. The document of title of movе-
...s docu-
... in the
... fixation to the earth become immovable property. It is a well known principle that the scope of an equitable mortgage does not extend beyond the scope of the title deeds. (*Dalip Singh and Skemp, JJ.*) MADAN LAL *v.* GANGA BISHAN. **A.I.R. 1938 Lah. 255.**

——*Interest—Bond containing independent covenant to pay interest at regular intervals—Suit for personal decree on account of interest—If can be brought—Cause of action for limitation.*

Where a mortgage bond contains independent per-
... personally
mortgagee. Failure
action to the mort-
and a fresh period of
om the date of each breach. (*Spargo, J.*) MA SHWE TU *v.* MAUNG BA SAN. **A.I.R. 1938 Rang. 113.**

——*Keeping alive — Intention—Prior mortgagee purchasing property mortgaged to him—Rights of subsequent purchasers from him.*

It should always be presumed that in India, a purchaser of previous mortgagee rights intends to keep the mortgage alive for his benefit. Though the Transfer of Property Act is not in force in the Punjab, the general principles to be applied are those embodied in the Amended Act of 1929 which must be held to be more in accordance with the principles of justice, equity and
four houses mortgaged,
h the mortgage was one
delivering the mortgaged property to *K* executed a lease thereof in his favour. Afterwards *S* mortgaged all the four houses to *R*. Later on *K*'s grandson *Z* brought a suit against *S* for recovery of rent and in execution of the simple money decree
btor's property
redemption in
N. *R* brought
his mortgage money, by sale of the property mortgaged to him by *S*. *N* claimed priority over *R*'s mortgage in respect of the two houses purchased by him from *K*.

Held, that the principles contained in S. 101, Transfer of Property Act applied. That having purchased the rights of *Z*, *N* stepped into his shoes and was in relation to the property purchased by him, clothed with all the privileges which his vendor possessed. *N* was therefore entitled to subrogate and claim priority over *R* in respect of his own transaction and that *N* by reason of his holding the position of defendant in the suit could claim to retain possession of the mortgaged property until all his claims were satisfied although he might have lost his right by lapse of time. (*Addison and Din Mohammad, JJ.*) NIZAM DIN *v.* RAM SUKH DAS.
A.I.R. 1938 Lah. 288.

——*Redemption—Clog on—Mortgage for 10 years—Clause providing for payment of mortgage amount on expiry of term—Further clause that payment by mortgagor in any succeeding year should on a particular date of particular month—If clog on equity of redemption.*

A deed of mortgage provided, *inter alia*, that the mortgagee "will enjoy in lieu of interest for ten years after the expiration of the period ... deed of....all the profits accruing ... may

MORTGAGE.

the principal sum of Rs. 14000, on the expiry of the due date and redeem the mortgage... If in any year after the stipulated period I pay the amount, I shall pay it on the 30th of *Ani* and redeem the mortgage and take back the other deed."

Held, that the stipulation in the deed restricting the right of the mortgagor to redeem to a single day in each year, not only restricted but even imperilled the mortgagor's right to redeem and was so unfair and unreasonable as to amount to a clog on the equity of redemption. (*Venkatasubba Rao and Newsam, JJ.*) SUPPAN CHETTIAR *v.* RANGAN CHETTIAR.

(1938) M.W.N. 356=A.I.R. 1938 Mad. 405.

——*Substituted security—Mortgage of undivided share—Subsequent partition—Right of mortgage to proceed against property allotted at partition.*

Where a mortgagor mortgages part of his property from his undivided share, and after a partition he is given other property than that which was mortgaged, the mortgagee can follow that proportion of the property allotted to the mortgagor that would bear the same ratio to the property mortgaged and unmortgaged held by him before. (*Wort and Varma, JJ.*) BALAKRISHNA PRASAD *v.* APURBO KRISHNA.

A.I.R. 1938 Pat. 199.

——*Substituted security—Right of charge holder to follow.*

R obtained a money decree against *B* and attached in execution a decree for costs obtained by *B* against a certain deity. The attached decree was executed by *R* and the sale proceeds were kept in deposit in Court. Before the attachment of the decree for costs by *R*, *B* created a charge over that decree in favour of *X*. *X* instituted a suit to enforce that charge after the execution sale above referred to and before its confirmation. To this suit *R* was not made a party. In execution of the decree obtained on the basis of charge, *X* applied for the withdrawal of the amount in deposit in Court to the credit of *R*. The Court passed an order directing that the money should be paid neither to *X* nor to *R* until the question of title to the money was adjudicated upon in a Civil suit. Upholding that order on revision.

Held, that *X* had no right to withdraw the amount in Court and that the principle of substituted security and the right of the charge-holder to follow the subject of the pledge in the new form applied only to cases where the conversion of the security became binding on the charge-holder by operation of law.

Held further, that the decree obtained by *X* in the absence of *R* could not affect the right of *R* and no relief could, therefore, be given to *X* against *R* in execution of that decree. (*S. K. Ghose and Nasim Ali, JJ.*) KARNANI INDUSTRIAL BANK LTD. *v.* BARABANI COAL CONCERN LTD. 42 C.W.N. 523.

MOTOR VEHICLES ACT, (VIII OF 1914), S. 5—*Reckless driving—Facts to be proved.*

S. 5 of the Motor Vehicles Act has not specified the definition of reckless and negligent driving. Where there is nothing to show that at the time complained of, the traffic on the road was such that the speed at which the accused was driving the motor vehicle can be considered to be either negligent or reckless, a conviction under S. 5 of the Act cannot be sustained. (*Mohammad Noor, J.*) MUHAMMAD RAFIQ *v.* EMPEROR.

173 I.C. 860=4 B.R. 351.

——**Ss. 16 and 4 (c)**—*Nothing to show that driver knew of the accident—Failure to stop, if an offence.*

Where there was no evidence to show that the driver of a motor vehicle knew that an accident had as a matter of fact taken place or had reason to so believe, his failure to stop his vehicle cannot amount to an offence under S. 16 read with S. 4 (*c*) of the Act. (*Mohammad Noor, J.*) MUHAMMAD RAFIQ *v.* EMPEROR.

173 I.C. 860=4 B.R. 351.

MUSSALMAN WAKF VALIDATING ACT (VI OF 1913), S. 3—*Interpretation—Wakf excluding principal heir—Validity.*

A wakf which is against the Mahomedan Law of Inheritance and which excludes the principal heir is not invalid under S. 3 of the Mussalman Wakf Validating Act. The words "which in all other respects is in accordance with the provisions of Mussalman Law" in that section do not refer to the Law of Inheritance but the law of wakfs as governed by Mussalman Law. Further sub-cl. (*a*) allows a wakf for the maintenance and support wholly or partially of his family, children or descendants. The expression "family, children and descendants" does not mean the family or children or descendants as a class but may mean only some persons of a particular class. Under Mahomedan Law, a valid wakf can be created in favour only of some members of the family or some of the children or descendants, whether males or females, and to the exclusion of others. (*Addison and Abdul Rashid, JJ.*) MUBARAK JAN *v.* TAJ BEGUM. 40 P.L.R. 220.

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), S. 44—*Applicability—Successive renewals of prior handnotes—Notes reserving simple interest, but compound interest charged and renewed—Failure of consideration.*

Where the original handnote in which only simple interest was reserved, was renewed for the amount of the principal and interest calculated on the basis of compound interest, and the same method was adopted in respect of two later renewals, on a plea that the consideration for each renewal had failed to the extent of the difference between simple and compound interest.

Held, that the plea was unsustainable. The consideration for the renewals was the forbearance to sue and in return compound interest agreed to be paid. (*Wort and Manohar Lal, JJ.*) AJODHYA PRASAD SINGH *v.* RAMGULAM SAHU. 174 I.C. 197.

OUDH RENT ACT (XXII OF 1886). Ss. 33 and 35—*Scope of—Rent of holding governed by S. 79 of Land Revenue Act—Liability to enhancement.*

Where a holding is governed by S. 79 of the U. P. Land Revenue Act, the rent of such holding is not liable to enhancement by a suit under Ss. 33/35 of the Oudh Rent Act. (*Darling, S. M.*) LAL MAHENDRA PRATAP SINGH *v.* CHANDRA PAL.

1938 O.W.N. 451=1938 R.D. 403.

——**S. 67 (1) (b)**—*Under-proprietor, given a permanent lease after the coming into force of the amended Act—If protected from ejectment.*

Where on the date when the amended Act came into force, a person was an under-proprietor, he cannot acquire statutory rights in the village in which he has under-proprietary rights. Such a person though he is given a permanent lease by the Talukdar after such date, is a non-statutory tenant and is liable to ejectment. (*Darling, S. M.*) JAFAR *v* SURAJ PRASAD.

1938 O.W.N. 449=1938 R.D. 424.

——**S. 68-A**—*Suit to eject statutory tenant for illegal sub-letting—Death of tenant during pendency of suit—Adding of minor son—Suit, if can be decreed against him.*

Where in a suit to eject a statutory tenant on the ground that the holding had been illegally sub-let, the tenant dies during its pendency and his minor son, is substituted for him on the record, the suit cannot be decreed for the reason that the minor is not liable to ejectment merely for sub-letting by virtue of S. 68-A.

PARTITION.

of the Oudh Rent Act. (*Darling, S. M.*) BAJRANG BAHADUR SINGH SANTO PRASAD.
1938 O.W.N. 448 = 1938 R.D. 423.

PARTITION—*Declaration of acquisition of under-proprietary rights, by Civil Court—Names not recorded in khewat—Right to separate patti.*

Where the Civil Court had declared that certain persons have acquired under-proprietary rights by adverse possession in certain plots, these plot under proprietors are entitled to have their under-proprietary plots separated in a distinct patti. (*Darling, S. M. and Bomford, J. M.*) RAM BUX SINGH *v.* BALDEO SINGH.
1938 R.D. 426.

PARTNERSHIP—*Death of a partner—Rights of representative—His remedy.*

When a partner dies, his representative has an interest in and a lien upon the partnership assets and can claim a taking of accounts as upon caused by the death of the deceased. Where ing partners alienate any property, the prop of the personal representative of the deceased partner is

are completely settled, individual partners cannot sue for their share of any separate part of the partnership assets. Such suit will lie if the partnership has been completely wound up and the asset has become available to, the partnership thereafter. (*Addison and Abdul Rashid, JJ.*) SONUN RAM MUKHI LAL CHAND *v.* SEWA RAM. A.I.R. 1938 Lah. 259.

PASSING OFF—Action for—Passing
Cause of action. *See* TRADE NAME—P
4

PENAL CODE (XLV OF 1860), S.
for offences under Ss. 323 and 452—Sep
Legality.

Where a person is convicted for the offences under S. 323 and S. 452 committed on one and the same occasion he can be sentenced separately for each offence. (*Mackney, J.*) TAN AUNG BA *v.* THE KING.
A.I.R. 1938 Rang. 114.

———S. 100—*Right of private defence—Extent.*

A woman was being brutally
She rushed out of her room and
was sleeping near by to protect her. She was followed by her husband who said that he was going to continue the beating. He was a very brutal and dangerous man. The brother of the woman thereupon seized a hatchet and killed him. There was evidence that if he had not done so the deceased might have killed him.

Held, that under these circumstances the brother acted in the right of self-defence not only of his sister but of himself and he could not therefore be said to have committed any offence. Moreove self defence could not be said to have
(*Young, C.J. and Monroe, J.*) KARAM MULLA *v.* EMPEROR. A.I.R. 1

———S. 171 B—*Offence under—Candidate for election offering rival candidate money for withdrawal of his candidature.*

Where the accused, a candidate for an election, directs his agent to dissuade a rival candidate from standing for the election, by offering him money and the latter accordingly offers a large sum of money to the rival candidate provided he withdraws his candidature, the conduct of the accused comes within the definition of

PENAL CODE (1860), S. 299.

'bribery' contained in S. 171-B. (*Henderson, J.*) AHMED KABIR CHOWDHURY *v.* EMPEROR.
A.I.R. 1938 Cal. 274.

———S. 186—Offence—Officer entrusted with warrant of attachment by Panchayat Board—Obstruction to—Offence—Existence of legal warrant—If condition precedent. *See* PENAL CODE, S. 353.
1938 M.W.N. 418.

———S. 188—*Applicability—Order under S. 147 (2), Cr. P. Code*—Bona fide *reason to doubt if positive action is called for—No deliberate defiance—Offence, if made out.*

Where a person has good ground for questioning whether a Magistrate's order under S. 147 (2), Cr. P. Code, enforced positive action on his part, and his neglect to take that action does not appear to have been due to deliberate defiance, he cannot be prosecuted for an

Village Munsif of making false entry in suit register—judgment there-

ler S. 219, I. P.
eeding, that is a
nding, wherein a
invites the deci-
ad not a fictitious
one where there is no party litigating, and (2) the making of a real report or a real pronouncement of an order, verdict or decision. S. 219 cannot be applied where there is no such proceeding at all, and no making of a report nor pronouncement of an order, verdict or decision, but where everything is only a make-believe and there is only the making of an entry of such a pro-

manner which he knew to be incorrect, namely, by making an entry therein that a certain suit had been filed when it was not in fact so filed, and also by making an entry of a judgment purported to have been pronounced when in fact it was not pronounced.

Held, that the facts brought him directly under
could not be con-
nkataramana Rao,
J.
1938 M.W.N. 345.

———S. 228—Debt Conciliation Board—Power to punish for contempt. *See* CR. P. CODE, S. 480.
40 P.L.R. 218.

———S. 294-A—*Chit fund amounting to lottery—Person conducting—Liability to conviction—Government requiring conductor to wind up and repay subscriptions within certain time—If can be pleaded in defence as*

which is lottery is
the Penal Code
t the Government
subsequently requires him to wind up the transaction and to repay the subscriptions within a certain period does not amount to an authorisation of the lottery prior to that date and cannot be pleaded in defence to a charge under the section. (*Horwill, J.*) PUBLIC PROSECUTOR *v.* SOOSAI PILLAI. 1938 M.W.N. 431 = 47

———Ss. 299 and 300—*Construction*
Murder and culpable

PENAL CODE (1860), S. 304.

decide—Intention of accused—Material time to ascertain—Accused cutting old, and defenceless woman on head savagely and killing her—Offence—Penal Code, S. 304.

In deciding the question whether the particular act of the accused is an offence of murder or of culpable homicide not amounting to murder, the Court should not allow itself to be confused by over much analysis but must turn to the words of the law themselves. If the killing comes within any of the four clauses of S. 300, I.P. Code: the offence is, exceptions apart, murder. The third clause to S. 300 refers to a bodily injury *sufficient* in the ordinary course of nature to cause death, and S. 299, I.P. Code, refers to bodily injury *likely* to cause death. It is on account of the use of the word "*sufficient*" in S. 300, thirdly and "*likely*" in S. 299 that much of the difficulty in the interpretation of these sections arises. If Judges will, however, read carefully S. 300, and give to the words there used their ordinary grammatical meaning, no difficulty should arise. If on referring to S. 300, the Judge thinks that the killing does not come within one of the four clauses, than he can refers to S. 299. If the killing comes within the second part of S. 299, namely, that relating to the intention of causing a bodily injury likely to cause death, then it comes under S. 304, Part I; and if there is no intention, but only knowledge, that is to say, if there is no intention to cause death or a bodily injury likely to cause death, but only knowledge that death is likely is to be caused, the offence falls under S. 304. Part II. A reference to S. 304, I.P. Code, will show that in Part I, there is intention, while in Part II, intention is expressly excluded, and the latter part of S. 304 deals with only knowledge. Cases under the Exceptions to S. 300, I.P. Code, fall under S. 304, Part I. The words of S. 300 are plain and it is the duty of judges to read them carefully and intelligently. Where the accused cut a defenceless old woman savagely on the head with axes and kill her, the offence is murder and the conviction should be under S. 302, I.P. Code, and not S. 304, for culpable homicide. The intention to be looked at is the intention at the time that the accused strikes the victim, and not at the time when he leaves his house for the purpose he has on hand. The latter is not the material time. A man's intentions are to be judged by his acts in relation to the surrounding circumstances.

Lobo, J.—The test to be applied in any particular case of culpable homicide, apart from the exceptions to S. 300, I.P. Code, is whether the intention specified in Cl. 1 or 3 of S. 300, I.P. Code, is established on the evidence and circumstances. If it is, the offence is murder; if it is not, the offence is culpable homicide. (*Davis J.C. and Lobo, J.*) HAJI KHUDU *v.* EMPEROR. **32 S.L.R. 18.**

——**S. 304, Parts I and II**—Distinction—Intention and knowledge—Accused cutting old, defenceless woman on head and killing—Offence. *See* PENAL CODE, SS. 299 AND 300. **32 S.L.R. 18.**

——**S. 323**—*Some of assailants not actually striking victim—Whether can be convicted.*

Where a number of persons are attacking two or three it is not necessary for their conviction that every one of the assailants should actually strike the victims although they may be near enough themselves to receive injuries if the victims are lashing out in self-defence. (*Blacker, J.*) KISHNA *v.* EMPEROR. **40 P.L.R. 217.**

——**S. 353** — *Applicability — Panchayat Board—Warrant of attachment not regularly signed but bearing impression of facsimile rubber stamp of President —Legality—Obstruction to attachment—Hurt caused to*

POLICE ACT (1861), S. 7.

officer executing warrant — Offence—Madras Local Boards Act, S. 214 (2).

S. 353, I.P. Code (as well as S. 186, I. P. Code, the offence under which is included in the offence under S. 353) does not presuppose the existence of a legal warrant under which the public servant should act. If the public servant acts in good faith it is an offence to oppose him even though he were acting illegally. A warrant of attachment issued by a Panchayat Board which bears the facsimile stamp of the President attached to it but not his regular signature is perfectly valid, because S. 214 (2) of the Madras Local Boards Act applies also to a warrant. If therefore any person obstructs the bill-collector entrusted with the execution of such a warrant and causes hurt to the bill-collector, he is guilty of an offence under S. 353, I.P. Code, and is liable to conviction. (*Horwill, J.*) PEER MASTHAN ROWTHER *v.* EMPEROR. **1938 M.W.N. 418.**

——**S. 361**—*Applicability—Father of child deceitfully getting child from wife's custody to own custody—Offence.*

A person who is in fact the father of a child, and in law entitled to the lawful custody of the child cannot come within the scope of S. 361, I. P. Code, and his act in taking the child from the keeping of his mother cannot amount to an offence of kidnapping from lawful guardianship, in view of the exception to S. 361, I. P. Code. In the absence of proof of any unlawful or immoral purpose for which the act is alleged to be done, a father who by deceitful means gets the child from the keeping of his mother to his own is not guilty of an offence under S. 361, I. P. Code. (*Burn, J.*) CHOWDARAYYA *v.* KOTAYYA. **47 L.W. 568= 1938 M.W.N. 385=(1938) 1 M.L.J. 670.**

——**S. 405**—*Applicability — Accused hypothecating goods in his shop as collateral security against advance and agreeing to hold goods and proceeds thereof in trust for another—Dealing with proceeds in violation of terms—Offence.*

It cannot be broadly stated that a person cannot commit criminal breach of trust of his own property and that in order to bring a case within S. 405 there must be actual delivery by the owner. Where a person hypothecates goods in his shop as a collateral security against an advance and agrees to hold the goods and the proceeds thereof in trust and to pay the proceeds received by him, that person, by this trust receipt, gives a beneficial interest in the goods to another and holds the goods, with which he is entrusted as legal owner, in trust for another. Hence if he deals with the proceeds in violation of the terms of the trust, he commits an offence under S. 405 provided he has the necessary criminal intention. (*Davis, J.C.*) GOBINDRAM *v.* EMPEROR. **A.I.R. 1938 Sind 73.**

——**S. 408**—*Employee taking away his security deposit before adjustment of accounts—If guilty of offence.*

An employee is not entitled to take away from his employer in a surreptitious manner the money deposited by him as security, until he receives his discharge after the adjustment of his accounts in the ordinary course. If he does so, there is at least a temporary misappropriation in respect of the amount so taken, although there is no evidence that any money beyond that amount is due from him to his employer. (*Jack and Khundkar, JJ.*) SURENDRA NATH BASU *v.* EMPEROR, **42 C. W. N. 618.**

POLICE ACT (V OF 1861), S. 7—*Appointment of Sub-Inspectors—Power conferred on designated officers —Government, if can delegate disciplinary powers to them—Burma Police Department Notification 44 of*

POSSESSION.

1937—*If* ultra vires—*Prosecution of Sub-Inspector—Previous sanction of Government—If necessary—Cr. P. Code, S.* 197 (1).

It is conceivable that the Local Government might order such officers to exercise their disciplinary powers subject to its control or approval, but it cannot powers to be exercised on the Local behalf. Consequently, Police Departme No. 44 of 1937 in so far as it does not of punishment of Sub Inspectors to th whom the appointment was made b *delegate* to certain specified authorities punishment including dismissal, is *ul.* Local Government. Where, therefore, a Sub-Inspector of Police who was appointed by the Deputy Inspector-General of Police is prosecuted for an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, the previous sanction of the Local Government is not required under S. 197 (1), Cr. P. Code, for his prosecution. Notification No. 44 of 1937 delegates the punishment of Sub-Inspectors to the District tendent of Police and constitutes the Deputy General of Police as the appellate authority. (*Mosely, J.*) TUN YA *v.* THE KING. (1938) Rang. L R. 104= A.I.R. 1938 Rang. 181.

POSSESSION—*Person with title to major portion—If can maintain suit for possession of whole.*

Where a plaintiff has not only possession but has also a clear title to the major portion of the land, and whose possession is interfered with by one with no title and who has been dispossessed in part by such person, can maintain a suit to recover the whole land from the trespasser. (*Yorke, J.*) JAFAR ALI KHAN *v.* QAMARUNNISSA. 1938 O.W.N. 454=1938 O.

PRACTICE—*Appeal—Document translated—High Court to rely on translation on record.*

The High Court in appeal when considering ment which has been translated must relay on the translation appearing in the record of the case. (*Wort*

ACT, S. 5. 19 P.L.T. 309.

——*Appeal—New plea—Point of law arising upon construction of document or upon facts admitted or proved—Plea that stipulation in mortgage deed amounts to clog on redemption—If can be raised for first time in appeal.*

Even when a question of law, is raised for the first time in appeal upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. A plea that a stipulation in a mortgage deed amounts to a clog on the equity of redemption may be allowed for the first time in appeal, when it is unnecessary to go into any question of fact to decide the point. (*Venkatasubba Rao and Newsam, JJ.*) SUPPAN CHETTIAR *v.* RANGAN CHETTI. (1938) M.W.N. 356= A.I.R. 1938 Mad. 405.

——*Duty of Court—Appealable cases—Duty of lower Courts to give findings on all important points.*

The lower Courts in appealable cases should, as far as may be practicable, pronounce their opinion on all important points. Their failure to do not infrequently

PRACTICE.

obliges the superior the Courts to remand a case which may otherwise be fully settled on appeal. (*Dhavle and Manohar Lal, JJ.*) NRISINGHA CHARAN NANDY *v.* UNAND JHA. 19 P.L.T. 309.

——*Duty of Court—Hearing of case at end of work-our after pleader has left Court—Propriety—al irregularity.*

Pending execution of a decree, the judgment-debtor filed an objection under S. 47, C. P. Code, alleging that

At that time the pleader of the decree-holder had left the Court on the understanding that no new case would be taken up. The Court heard the objection *ex parte* and allowed it.

Held, that even if the pleader was not told by the Court that no new case would be taken up, he was no new case acted with *ex parte* at

Held further that as the decree holder had filed hazri on several occasions showing that he was going to contest the adjustment, mere failure to file hazri on a particular date did not show that he was in any way negligent. (*Mohamad Noor, J.*) SURAJMAL BADRI DAS *v.* MANBODH BHAGAT LALL CHAND RAM. A.I.R. 1938 Pat. 204.

——*Evidence—Appreciation of—Mode.*

The evidence on record has to be appreciated with reference to the pleas and previous statements and conduct of parties and not in ignorance of the same and t has failed to do at a finding of ourt. (*Puranik,* A.I.R. 1938 Nag. 204.

——*Evidence—Plea as to insanity of person giving*

o a suit is adjudged to be sane at nd he has not challenged that finding litigation as sane it is not open to him to argue that he is an alleged lunatic at the stage when evidence was to be given. (*Puranik, J.*) MST. HAZRABI *v.* MST. FATMABI. A.I.R. 1938 Nag. 204.

——*Judgment—Hotly contested suit—Duty of the Judge.*

In a hotly contested case the trial Judge did not deal with the facts and evidence on record elaborately nor did he arrive at proper finding on issues; the documents placed on record by either side were not exhibited as required by the circulars so that it was difficult to understand which of them could be treated as proved or admitted.

Held that the judgment amounted to summary disposal of the case and was not justified. (*Puranik, J.*) MST. HAZRA BI *v.* MST. FATMABI. A.I.R. 1938 Nag. 204.

——*Pleadings—Amendment—Powers of Court—Effect of amendment on limitation.*

The circumstances plaint may have the the the benefit of the plea one stances, and a

considered by a Court before permitting an amendment of the plaint. It is only in exceptional cases that the Court will allow the plaintiff to amend his plaint in such a way as to deprive the defendant of the plea of limitation, but when once the Court has exercised its discretion judicially, and the amendment has been allowed, the amendment dates back to the presentation of the plaint, and if that date is within the period of limitation prescribed for the particular relief which the plaintiff seeks by his amendment, the suit must be held to be within time. (*Agarwala and Rowland, JJ*) KESHO DAS *v.* HARI KISHUN DAS. **A.I.R. 1938 Pat. 205.**

——*Pleadings—Suit for ejectment and suit for recovery of possession—Nature of pleadings in both.*

In a suit for ejectment all that the plaintiff has got to do is to prove that the defendant has attorned to him as lessee or licensee of certain land, that he is the owner of the land in question and that the lease or license has been properly determined or otherwise put an end to. In a suit for recovery of possession, the plaintiff has got to prove that he has a good title to the land and that the suit is not barred by limitation in any way. (*Baguley, J.*) AHPO *v.* MAUNG PAN.

A.I.R. 1938 Rang. 124.

——*Pleadings—Suit for money advanced under hand note—Reference to loan and prayer for recovery of same—Absence of express alternative claim in basis of loan—Right to decree on loan.*

Where a person distinctly set out in his plaint that the debtor had borrowed money from him and it is to recover that money that the suit is instituted although he does not alternatively make a claim that he is entitled to recover the money as well on the original loan as on the basis of the handnote, that is not fatal to the suit, as all the facts necessary to a claim on the loan are alleged and proved. (*Agarwala and Rowland, JJ.*) KESHO DAS *v.* HARI KISHUN DAS. **A.I.R. 1938 Pat. 205.**

——*Procedure—Suit to declare decree not binding—No prayer for setting aside—Court returning plaint for "necessary amendments" on ground that plaintiff should ask for cancellation of decree—Propriety—Proper Course—Duty of Court—Power to direct amendment of plaint necessitating payment of additional Court-fee.*

Petitioner filed a suit for a declaration that a certain decree was not binding on him and paid a Court fee of Rs. 471-7-0. The plaint was returned to him with an endorsement stating, *inter alia* that since the plaintiff was a party to the decree sught to be declared not binding, the suit should be valued under S. 7 (IV-A) of the Court Fees Act, and the requisite Court fee paid. The plaint was re-presented with a statement that it was not necessary for the plaintiff to sue for cancellation or setting aside of the decree and that the Court-fee paid already was sufficient. The Court after bearing arguments passed an order that the plaintiff should sue for cancellation of the decree, and subsequently the plaint was returned to the petitioner "for necessary amendments", giving him 7 days time. There was no order by the Court rejecting the plaint for non-payment of the deficit Court-fee.

Held, in revision, that the procedure adopted by the Court was not fair to the litigant, in that the order returning the plaint "for necessary amendments" compelled the party to accept the view of the Court as to the Court-fee payable, if he did not so accept it he lost his right of appeal. The proper course was to require payment of deficit Court-fee within a particular time, and, if such payment was not made, to reject the plaint, thus giving the plaintiff right to appeal against the order of rejection of the plaint. There being no prayer in the plaint for setting aside any decree but only for a declaration in respect of the decree for which the requisite Court-fee had been paid, it was not right on the part of the Court to insist on the plaintiff making amendments necessitating the payment of additional Court-fee. The Court's power to direct amendment of plaints should not be exercised for the purpose of imposing a burden on the plaintiff which he is not willing to accept. (*Pandrang Row, J.*) RACHAPPA, *In re.* **47 L.W. 523.**

——*Relief—Plaintiff not proving facts constituting his cause of action—Decree on proof of different set of facts—Permissibility.*

It is incumbent on the plaintiff to state precisely in the plaint all the facts that constitute his cause of action. If he fails to establish the facts that constitute his cause of action his suit must fail on that ground alone. On his failure to establish the facts which form the basis of his suit, he cannot contend that he is entitled to a decree all the same on proof of a different set of facts which the defendant had no opportunity to controvert, and which did not form the subject matter of any issue in the trial Court. The plaintiffs came to Court for a perpetual injunction to the effect that the defendant had no right to build on the land in dispute on the sole ground that the land in dispute had been reserved for public purposes, and that by taking possession of this land the defendant was depriving them of the use of land on the occasions of marriages and deaths. This fact was denied by the defendant, and it was stated that another piece of land had been reserved for common purposes for use on the occasions of marriages and deaths. The defendant produced evidence to show that another piece of land had been reserved for use for public purposes. The land was found to be part of shamilat abadi and the plaintiffs were granted the injunction.

Held, that if the plaintiffs had stated in the plaint that they were entitled to a permanent injunction on the ground that they were proprietors in the village and that none of the proprietors could do anything which altered the condition of the joint property without the consent of all the co-sharers it would have been open to the defendant to plead that there was a custom in the village allowing a proprietor to make exclusive use of a part of the shamilat abadi land so long as the area of land appropriated by him did not exceed the area that would fall to his share on partition. As the only ground of attack urged by the plaintiffs was the reservation of the land in dispute for public purposes the defendant was never called upon to plead custom in his favour. In view of the pleadings of the parties no question of special damage arose in the peculiar circumstances of the case and the plaintiffs' suit for injunction should be dismissed. (*Coldstream, Monroe and Abdul Rashid, JJ.*) INDER SINGH *v.* BHANA.

A.I.R. 1938 Lah. 296 (S.B.).

——*Relief—Possession—Suit for—Decree for joint possession—Whether can be granted.*

Where an owner of a house brings a suit for possession of the house and it turns out that one of the opposite parties is owner of certain share in the house, a decree for joint possession can be granted. In such case the fact that plaint asks for possession and the Court does not see fit to pass the decree asked for in the plaintiff's prayer does not necessarily involve the plaint being dismissed. A decree for joint possession is of the same nature as a decree for possession but, of course, of lesser extent and there will be no harm in giving a decree other than the one asked for if it is of the same nature. In granting a decree for joint possession, considerations such as the danger of a riot or criminal proceedings have really nothing to do with the rights and

PRE-EMPTION.

loan—Right to decree.

A person is entitled to recover his claim on the original loan when the suit on the handnote fails either because the payee is not mentioned or because the handnote is not admissible in evidence, provided that a proper case has been made out in the plaint or the plaint has been amended to state the facts necessary in support of the claim. (*Agarwala and Rowland, JJ.*) KESHO DAS *v.* HARI KISHUN DAS. A.I.R. 1938 Pat. 205.

——*Relief—Tank in estate held by plaintiff and claimed by defendant—Defendant cutting earth from bank of tank—If dispossession of plaintiff—Remedy of plaintiff—Trespass—Suit for possession—Propriety.*

The fact that the defendants cuts earth bank of a tank in an estate held by the plaint is the subject-matter of a tenure claimed by does not amount to dispossession giving rise to an action by the plaintiff for possession: action in trespass against the plaintiff can recover damages of title can be gone into. Th not a decree for possession. (*W* *v.* BAIKUNATH SINGH. 174 [illegible] 19 P.L.T. 246.

——*Stay of suit—Adjournment of proceedings—Vacating of stay—Duty of parties—Failure to appear*

effective and the trial Court on [illegible] appear on such a date, the Court will be justified in proceeding [illegible] against such party. (*Stone,* ABDUL RASHID ABDULLA HASAN.

PRE-EMPTION—*Right of—Vendee acquiring equal status pending suit—Effect of.*

If a vendee, the sale to whom is otherwise open to attack, is able to defeat the ing the defect *pendente lite* a status equal to that of the pre the decision of the pre emptor's suit, the pre-emptor has *no preferential* right at the time of the passing of the decree and his suit cannot succeed. The fact that the vendee acquires such status after more than one year from the date of the sale which the plaintiff seeks to pre-empt is immaterial. 16 Lah. 921, foll. (*Coldstream and Din Mohammad, JJ.*)

PRESIDENCY SMALL

(XV OF 1882), S. 6—*High Court's powers of superintendence.*

There can be no doubt that both the Supreme Court and the High Court have always exercised powers of superintendence over the Presidency Small Cause Court. But these powers are not denied from any of the sources mentioned in S. 6 of the Presidency Small Cause Courts Act, and apart from that section; it is doubtful whether the High Court was intended to have any power of judicial superintendence over the Presidency Small

PRINCIPAL LAND AGENT.

(*Lort Williams, J.*) MAHOMED YUSUF AJID. 42 C.W.N. 602.

CY TOWNS INSOLVENCY ACT (III OF 1909), S. 17—*Applicability—Suit to enforce personal claim against insolvent—Leave of Court—Necessity.*

There is no warrant for holding that S. 17 of the Presidency Towns Insolvency Act applies only to proceedings against the property of the insolvent and that therefore no leave of the Court is necessary for commencing a suit to enforce a personal remedy against an insolvent. There is no doubt a distinction between the language employed in the section on the one hand, and that employed in the corresponding sections of the English Bankruptcy Act and the Provincial Insolvency Act on the other, refers only to insolvent, while the property or portion of S. 17 relating to "suit and proceedings" [illegible]

insolvency. It was not intended that the insolvent should be sued in a Court of law in respect of any claim provable in insolvency. (*Varadachariar and JJ.*) NARAYANA AIYAR *v.* MOORTHI 47 L.W. 532=(1938) M.W.N. 364=(1938) 1 M.L.J. 462.

AND AGENT—*Relationship—Firm A machinery from firm B—Firm B supplied machinery with prices fixed but rest subject of prices and its commission on actual selling all machinery to company G under contract with firm B—Firm B informed accordingly—Subsequent changes in constitution of firm B—If affect its liability to G.*

A, a firm ordered certain machinery from the firm *B* nd estimates submitted invoices, the firm was to their own stock with the rest of the machinery were made subject to fluctuations in them and the firm *B* was to charge five percent as their commission upon actual prices. For certain other purposes such as insur- *B* acted as the firm *A* informed the firm *B* to credit all advances made by firm *A* to the name of company *G* who also confirmed this and asked the firm *B* to correspond and to draw upon them in future. There were also changes in the firm *B*. S who was sole proprietor of the firm when order was placed took some other people into partnership but these partners gradual-

firm *B* as their agents had charged far in excess of the price actually paid to the suppliers,

Held, that the firm *B* acted as an agent with regard to the machinery the price of which were made subject to the fluctuations and acted as principal with respect to the machinery the prices of which were fixed.

Held further, that the change in the firm *B* did not affect this relationship in the absence of notice to those dealing with it as the firm is an existi- proprietor was therefore liable to

PRIVY COUNCIL.

Held also that the firm *B* was also an agent of the company *G* as the firm *A* had not only transferred the machinery bought from firm *B* to company *G* but also the entire rights under the contract. The firm *B* therefore was liable to render accounts to firm *G* for the items for which they acted as agents. (*Dalip Singh and Skemp, JJ.*) GOENKA COTTON SPINNING AND WEAVING MILLS LTD., *v.* DUNCAN STRATTON & CO.
A.I.R. 1938 Lah 277.

PRIVY COUNCIL—*Criminal appeal—Leave granted on certain ground—Other grounds, if can be argued.*

In a criminal appeal to the Privy Council merely because special leave is granted on a certain ground, it cannot be said that the ordinary rules limiting the exercise of jurisdiction in criminal matters cease to apply; and hence other grounds cannot be argued, for the Judicial Committee is not a Court of criminal appeal. (*Lord Wright.*) BABU LAL CHOUKANI *v.* EMPEROR.
42 C.W.N. 621=1938 A.Cr.C. 27=1938 O.W.N. 416=1938 A.L.J. 382=174 I.C. 1=1938 A.W.R. 116=1938 P.W.N. 320=A.I.R. 1938 P.C. 130=(1938) 1 M.L.J. 647 (P.C).

PROVINCIAL INSOLVENCY ACT (V OF 1920), Ss. 4 and 24—*Finding in enquiry under S. 24 that debt is fictitious—If* res judicata.

The summary enquiry under S. 24 of the Provincial Insolvency Act as to whether a debtor is entitled to present a petition has nothing to do with S. 4 of the Act, which section only comes into play after adjudication in disputes between the debtor's estate represented by a receiver and the claims of one or all of his creditors. Consequently, a finding in an enquiry under S. 24 that a certain debt is fictitious is not final and does not operate as *res judicata* under S. 4 of the Act. (*Addison and Abdul Rashid, JJ.*) SADHU RAM *v.* KISHORI LAL.
40 P.L.R. 316.

———**S. 24**—Enquiry under—Finding that debt is fictitious—If *Res judicata. See* PROVINCIAL INSOLVENCY ACT, SS. 4 AND 24. **40 P.L.R. 316.**

———**S. 27**—*Time fixed for application for discharge—Power of Court to extend.*

A Court has jurisdiction to extend the time originally fixed under S. 27 of the Provincial Insolvency Act for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under S. 43 of that Act. (*Thomas, C.J. Zai-ul-Hasan and Yorke, JJ.*) FAZAL AZIM *v.* UMANATH BAKHSH SINGH. **1938 O.W.N. 377=1938 O.A. 262 (F.B.)**

———**S. 28**—*Applicability—Arrears of income-tax due by insolvent—Right of Crown to recover—Procedure—Crown if a creditor.*

On the wording of S. 28 of the Provincial Insolvency Act it is clear that the Crown is included among creditors. Where the Crown has to recover arrears of incometax due from the insolvent, it being a creditor, can only recover it by applying to the Court or Receiver in whom all the property of the insolvent is vested. It cannot by virtue of the certificate issued under S. 46 (2) of the Income-tax Act recover it by sale under the Land Revenue Act. (*N.J. Roughton, F.C.*) KIALCHAND DEVCHAND & CO LTD., *v.* DHUNDIRAJ GANESH.
1938 N.L.J. 128.

———**S. 28 (5)**—*Order of adjudication on 3rd April 1937—Salary of insolvent to what extent excluded from being vested in receiver—C. P. Code, S. 60.*

The test for determining whether or not the salary which has been ordered to vest in the receiver is excluded by the terms of sub-s. (5) of S. 28, will be whether or not on the date the order of adjudication was made, the salary was liable to attachment and sale in execution of a decree assumed to subsist on that date. Where therefore an order of adjudication was made on 3rd April 1937, the extent of the salary to be excluded from vesting in the receiver will be determined according to the Civil Procedure Code, S. 60, as existing on that date and not according to S. 2 of the Civil Procedure Code Amendment Act, (9 of 1937). (*Mukherjea and Biswas, JJ.*) JNANENDRA KUMAR *v.* AKASH CHANDRA.
A.I.R. 1938 Cal. 325.

———**S. 43**—*Annulment of adjudication—Order of Court—If necessary.*

Per *Thomas C.J.*:—Though the provisions of S. 43 of the Provincial Insolvency Act are mandatory, still the annulment of adjudication does not occur as a matter of course, but has to be the subject of a specific order of the Court; in other words it does not operate as an automatic annulment on the failure of the debtor to apply for a discharge. (*Thomas, C.J. Zia-ul-Hasan and Yorke, JJ*) FAZAL AZIM *v.* UMANATH BAKHSH SINGH. **1938 O.W.N. 377=1938 O.A. 262 (F.B.).**

———**S. 53**—*Duty of Court.*

In an action to set aside a sale under S. 53, it is not enough to pick out a few circumstances and to find explanations for them and then deduce therefrom that the creditor has discharged his burden of proof. But it is essentially necessary that the Court should consider all the facts in relation to each other and weigh them as a whole and then come to a conclusion. (*Cornish, J.*) KANDASWAMI GOUNDAN *v.* RANGASWAMI GOUNDAN.
A.I.R. 1938 Mad. 370.

———**S. 53**—*Duty of Court—Fraudulent transaction—Reliance upon circumstantial evidence.*

The fraudulent nature of the transaction in insolvency cases can scarcely ever be proved by direct evidence. The petitioning creditor or the receiver has to rely on circumstantial evidence in most cases, and usually that is to be found only in the conduct of the parties. It is therefore more than ever the duty of the Court carefully to examine all the surrounding circumstances, and in any case if a Judge considers that the burden of proof lies on a particular party it is incumbent on him at least to examine the facts on which that party's case is based. (*Bose, J.*) KISANGOPAL *v.* UMRAO KESHEO RAO.
A.I.R. 1938 Nag. 216.

———**S. 53**—*Protection of purchaser or incumbrancer—Good faith on part of transfer—If necessary.*

To enjoy the protection under S. 53 of the Provincial Insolvency Act, the purchaser or an incumbrancer must not only show that the transfer was for valuable consideration but it must also be proved that it was made in good faith. Good faith is necessary only on the part of the transferee. It is not required that the transferor should act in good faith also. (*Derbyshire C. J. and Mukherji, J.*) RAMANANDA PAL *v.* PANKAJ KUMAR GHOSH. **42 C.W.N. 554.**

———**S. 53**—*Scope—Transfer not* bona fide—*Subsequent transfers—If affected.*

Where a transfer by an insolvent is not *bona fide*, the subsequent transfers by the transferees also fall. (*Cornish, J.*) KANDASWAMI GOUNDAN *v.* RANGASWAMI GOUNDAN. **A.I.R. 1938 Mad. 370.**

———**S. 54**—*Limitation—Commencement — Period of three months—Date of execution or date of registration.*

The date of commencement of the period of three months under S. 54 of the Prov. Insol. Act is the date of the execution of the deed of transfer sought to be avoided, and not the date of its registration. (*Derbyshire, C.J. and Mukherjea, J.*) RAMANANDA PAL *v.* PANKAJ KUMAR GHOSE. **42 C.W.N. 554.**

PROV. INSOLV. ACT (1920), S. 54.

——S. 54—*Undue preference—Inference of—When can be drawn.*

Per *Mukherjea, J.*—Obiter: The question whether the transfer in favour of a creditor was made by the debtor with a view to give him an undue preference over his other creditors, must be decided with reference to the dominant intention of the debtor. If a debtor transfers a valuable property on the eve of insolvency to a creditor of his, the consideration being the past debt due to the creditor, an inference of undue preference can legitimately be drawn. But if the debtor approaches a creditor for a loan and substantial advance is made by the latter who insists, as a part of the same bargain,

J.) RAMANANDA PAL *v.* PANKAJ KUMAR GHOSH. 42 C.W.N. 554.

——S. 59—*Estate vesting in Official Receiver—Other receivers appointed to help Official Receiver—Official Receiver, if can by himself maintain suits.*

Where the Insolvency Court vests the estate of an insolvent in the Official Receiver and later on appoints two other persons as additional receivers to administer the estate, without vacating the order vesting the estate

BASHESHAR NATH GOELA *v.* BAIJ NATH. A.I.R. 1938 Lah. 264.

——S. 75 (3) —*"Person aggrieved"— aggrieved by order of District Court—Appea. Court without first applying to Official*

can be agitated in the High

the Official Receiver to take steps. Such a creditor therefore may appeal with the leave of the High Court under S. 75 (3) without first applying to the Official Receiver to appeal and getting a refusal from him. (*Cornish, J.*) KANDASWAMI GOUNDAN *v.* RANGASWAMI GOUNDAN. A.I.R. 1938 Mad. 370.

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The fact that parties did not take the objection as regards the absence of jurisdiction, might in certain circumstances incline the Court of revision to refuse to exercise its discretion in favour of the petitioners. But in a case where it is so clear as to show that the Judge in any event, had no jurisdiction that principle has no application. (*Wort, J.*) RAMJI MAHTON *v.* GOPAL MAHTON. 4 B.R. 385=174 I.C. 144.

——Sch. II, Art. 35 (j)—*Applicability—Suit to recover interest on amount deposited by successful plaintiff in suit under O. 21, R. 63, C. P. Code—Maintainability.*

Where a successful plaintiff in a suit under O. 21, R. 63, C. P. Code, sues to recover interest on amount which he was forced to deposit pending the disposal of his claim suit, the action is in the nature

MAHTON. 4 B.R. 385=174 I.C. 144.

——Sch. II, Art. 41—*Applicability—Existence of common liability—Necessity.*

PUNJAB EXCISE ACT (1914), S. 58.

Common liability is the essence of the right to contribution where income-tax in respect of joint family property is wrongly recovered from the father alone who had separated from his son already, and in spite of his protest, the payment of the tax was not a common liability when it was made, and so a suit to recover from the son his proportionate share is not strictly a suit for contribution as contemplated by Art. 41 of Provincial Small Cause Courts Act and hence is cognizable by the Small Cause Court. (*M. B. Niyogi, J.*) JAGAN SETIA *v.* SOMA. 1938 N.L.J. 125.

PUNJAB COLONIZATION OF GOVERNMENT LANDS ACT (V OF 1912), Ss. 3 and 19—*'Collector'—If includes Settlement Officer having [powers of C]ollector.*

Where the Commissioner by letter empowered 'the Collector of the Lyallpur District' to sanction sales under S. 19.

Held, that the words 'the Collector of the Lyallpur District' did not include the Settlement Officer having powers of Collector. (*Dalip Singh and Skemp, JJ.*) HAKAM ALI *v.* HASHU A.I.R. 1938 Lah. 244.

——S. 18—*Decree against occupancy tenant—Execution—Appointment of receiver—Permissibility.*

in a fit and proper case an occupancy tenant, [la]nds cannot be attached Punjab Act V of 1912. (*Addison and Din Mohammad, JJ.*) MOHAMMAD-SHARIF *v.* MRS. BOUGHTON. 40 P.L.R. 303.

A.I.R. 1937 Lah. 642, Rel. on. (*Abdul Rashid, J.*) PAHLAD SINGH *v.* SUKH DEV SINGH. 40 P.L.R. 272.

——S. 41 (3)—*Question of custom not arising—Mere grant of certificate—If confers jurisdiction on High Court.*

The fact that the District Judge discussed a custom which was not before him and gave a certificate under S. 41 (3) that a question of custom arose cannot confer jurisdiction on the High Court to decide it. (*Young, C.J. Monroe and Din Mohammad, JJ.*) KISHAN SINGH *v.* MST. SANTI. A.I.R. 1938 Lah. 299 (F.B.).

PUNJAB DEBTORS PROTECTION ACT (II OF 1936), S. 12—*Mortgage deed—Acknowledgment of receipt of consideration in handwriting of mortgagor—Absence of consideration—Onus—Auction-purchaser of equity of redemption—Position of.*

Where a mortgage deed contains an acknowledgment of the receipt of the consideration in the handwriting of the mortgagor, this is strong *prima facie* evidence that the consideration has been actually received not only against the mortgagor but also against the purchaser of [th]e. The burden the transaction *J.)* NARANJAN 40 P.L.R. 313.

, S. 58 (2) (d) *[R]ule of Revenue [...] transporting foreign liquor—If* ultra vires.

By R. 3 framed by the Local [Government of the C.] P. Provinces and published

Exc. dated 13th November 1916, the transport of foreign liquor from one place to another in N. W. F. Provinces has been free of all restrictions. Hence R. 3 framed by Revenue Commissioner under Notification No. 4, Exc. dated 5th January, 1917, placing restrictions on the transport of foreign liquor is *ultra vires* and therefore the breach of this rule cannot be punished. (*Almond, J.C. and Mir Ahmad, J.*) BILLA RAM *v.* EMPEROR.
A.I.R. 1938 Pesh. 21.

——S. 58 (2) (d)—*Rules under, framed by Local Government of N.W.F.P., R. 50—Form L.17—License, when liable to put labels on bottles.*

The license in Form L. 17 granted by the Collector under R. 50 of Notification under S. 58 (2) (*d*) deals only with the sale of denatured spirit in the premises which is specified in it. It therefore follows that the bottles when exposed for sale on the premises are required to bear the prescribed labels. There is nothing in the Rules to indicate that a licensee is bound to put the labels on the bottles when they are in transit, *viz.*, when he sends them from one place to another or when they are kept in quarters behind the shop. (*Almond, J.C. and Mir Ahmad, J.*) BILLA RAM *v.* EMPEROR.
A.I.R. 1938 Pesh. 21.

——S. 58 (2) (d)—*Rules under, framed by N.W.F. P., R. 30—Entry of bottles in register—Duty of licensee.*

Under R. 30 the entry of bottles in the register may be made at any time during the day. Hence where bottles have arrived at 10 o'clock the entry need not be made immediately but may be made at any time during the day. (*Almond, J.C. and Mir Ahmad, J.*) BILLA RAM *v.* EMPEROR. **A.I.R. 1938 Pesh. 21.**

——S. 61—*Accused having licensed liquor shop at G—His son having grocer's shop at D—Order for liquor placed with his son—Son getting liquor from G and delivering it at D—Money paid to accused at D—Accused, if guilty of offence.*

The accused had a shop at *G* duly licensed for the sale of liquor. His son had an ordinary grocer's shop with no license to sell liquor at *D*. One *H* placed an order for a bottle of whisky with the accused's son at *D*. The latter went to *G*, got the liquor from his father's shop, where he signed a cash memo. for it in the name of *H*, brought it back, paid octroi for it at *D* and kept it in his shop pending the taking of delivery by *H*. The liquior was delivered to *H* at the shop at *D* where money was paid to the accused.

Held, that the accused's son was merely acting as the agent of *H* for the purchase of liquor from the accused at *G*, that the only sale that took place was at *G* where the accused was fully entitled to do so by his license, that the mere fact that the delivery by the agent to his principal took place at *D* and that the money was paid to the vendor at *D* did not mean that the sale took place there, and that, therefore, the accused could not be convicted under S. 61 of the Punjab Excise Act. (*Blacker, J.*). MITHU LAL *v.* EMPEROR. **40 P.L.R. 226.**

PUNJAB LAND REVENUE ACT (XVII OF 1887), S. 61—*Liability of lessee for land revenue.*

S. 61 of the Land Revenue Act only permits recovery of land revenue from a landowner. Contracts are frequently made, especially in colony districts, between landowners and lessees for a cash payment on the understanding that the tenant pays all government charges (*i.e.*) *abiana*, cesses and land revenue. This system does not, however, in any way diminish the owner's sole liability for the payment of land revenue. Arrears of land revenue cannot, therefore, be recovered by attachment of the property of the lessee. (*Dobson, F. C.*) KALA SINGH *v.* ABDUL RAHIM. **17 Lah.L.T. 8.**

PUNJAB MUNICIPAL ACCOUNT CODE—*Provident fund—Right of person appointed on probation.*

Under the Punjab Municipal Account Code, every servant who holds a substantive appointment is entitled to the benefit of the provident fund, and every person who holds a substantive appointment comes within the letter of that rule even though he is appointed on probation. (*Addison and Din Mahomed, JJ.*) SECRETARY OF STATE *v.* B. A. MALAK. **A.I.R. 1938 Lah. 282.**

PUNJAB MUNICIPAL ACT (III OF 1911), S. 41—*Removal of municipal employee—Power of Executive Officer or President of Committee.*

There is no provision in the Punjab Municipal Act or in the Executive Officers Act nor in any rule or bye-law made under these enactments which can authorize the Executive Officer or the President of the Municipal Committee to arrogate to themselves the powers of removing a municipal employee. (*Addison and Din Mahomed, JJ.*) SECRETARY OF STATE *v.* B. A. MALAK.
A.I.R. 1938 Lah. 282.

——S. 41—*Word "unfit"—Meaning.*

The word "unfit" in S. 41 does not refer to the absence of professional qualifications. (*Addison and Din Mahomed, JJ.*) SECRETARY OF STATE *v.* B. A. MALAK. **A.I.R. 1938 Lah. 282.**

——S. 195—*Action under—When can be taken.*

Action under S. 195 of the Municipal Act can be taken only if notice is delivered within six months of the date of completion of the unauthorised structure. (*Tek Chand, J.*) BUDHA RAM *v.* THE MUNICIPAL COMMITTEE, DELHI. **40 P.L.R. 278.**

PUNJAP MUNICIPAL WORKS RULES (1925), R. 11—*"Professional standing"—Meaning.*

The words "professional standing" in R. 11 are too vague to be properly defined and the mere fact that a person obtains his degree from a University in a certain year does not necessarily exclude the possibility of having a professional standing prior to that period. (*Addison and Din Mahomed, JJ.*) SECRETARY OF STATE v. B. A MALAK. **A.I.R. 1938 Lah. 282.**

PUNJAB RELIEF OF INDEBTEDNESS ACT (VII OF 1934), S. 22—*Scope—Debt Conciliation Board passing order of fine for contempt of Court—Appeal—Revision.*

S. 22 of the Punjab Relief of Indebtedness Act refers only to orders passed in pursuance of the Act. Where a Debt Conciliation Board passes an order of fine for contempt ofCourt, no appeal, no doubt, lies from that order but it is subject to revision by the High Court under S. 439, Cr. P. Code. (*Skemp, J.*) BUDHU *v.* EMPEROR.
40 P.L.R. 218.

——S. 36—*Applicability—Adjustment taking place before Act coming into force.*

S. 36 of the Punjab Relief of Indebtedness Act is applicable although the compromise between the parties embodying an adjustment took place, and the limitation for having the adjustment certified had expired, before the Act came into force. It is, therefore, open to the judgment-debtor to plead in execution of the decree such an adjustment, although it is not certified. (*Abdul Rashid, J.*) DARU MAL *v.* TODAR. **40 P.L.R. 264.**

PUNJAB SIKH GURDWARAS ACT (VIII OF 1925), S. 142—*Member of Gurdwara acquitted of charge of negligence—Award of costs—Duty of commission.*

Where the Judicial Commission acquits a member of the Committee of Management of a Gurdwara of charges of negligence, etc. it should award him his costs. (*Jai Lal and Dalip Singh, JJ.*) SOHAN SINGH *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR. **A.I.R. 1938 Lah. 272.**

PUNJAB TAHSILDARS' RULES—*Police raid—Recovery statement—Tahsildar signing it knowing it to be inexact—Liability to departmental punishment.*

A Tahsildar who joined a raiding party in which a house of a suspected counterfeit coiner was raided by the police and signed a recovery statement knowing it to be inexact, lays himself open to suspicion. He cannot excuse himself on the ground that he was not act-

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(*Dobson, F.C.*) ABDUL MALIK *v.* EMPEROR.
17 Lah.L.T. 5.

PUNJAB TENANCY ACT (XVI OF 1887), S. 9—*Scope—Mortgage of occupancy rights with landlord's consent—Mortgage not redeemed within limitation—Occupancy rights, if vest in mortgagee—Position of*

provisions of Art. 148 and S. 28 of the Limitation Act. Where, therefore, the occupancy rights were mortgaged

to the mortgagee on the expiry of limitation is binding on the landlord. (*Bhide, J.*) DEVI DAWALA *v.* COURT OF WARDS. 40 P.L.R. 240.

——**S. 59**—*Tenancy jointly acquired—Succession—Reversion to landlord.*

S. 59 of the Punjab Tenancy Act is not exhaustive and if a tenancy is jointly acquired, the heirs of all the joint tenants succeed by survivorship. It is obvious that until all the descendants of the joint tenants have become extinct, the tenancy does not revert to the landlords. (*Abdul Rashid, J.*) MT. INDO *v.* JAGTA.
40 P.L.R. 292.

——**S. 59 proviso**—*"Occupied"—Interpretation.*

The word 'occupied' in the proviso to S. 59 of the Tenancy Act implies some control over the land by whatever name it may be expressed in law. It may not necessarily be actual possession. It may be in some cases constructive possession. But where a person has neither physical control over the property nor is in a position to exercise any dominion over the property through his tenants or servants nor in a position to assume physical control over it, he cannot be said to be in occupation of the land. The mere mention of the name of a co-owner in the column of owners in relation to land which is in the cultivating possession of somebody else who does not hold the land under the co-

no title to property standing in his name—'Declare', meaning of.

Where a document declared that the executant had no title to the plots transfered to him and standing in his name and that the title rested with somebody else for whom the executant was only a benamidar, it is not a document which creates a title but it only acknowledges that the executant never did have any title. The word 'declare' in S. 17 of the Registration Act is to be taken in the same sense as 'create' 'assign' used in the section. It implies a definite change in the legal relation to the property. (*Yorke, J.*) JAFAR ALI KHAN *v.* QAMARUNNISSA. 1938 O.W.N. 454=1938 O.A. 346.

REGISTRATION ACT (1908), S. 17.

——**S. 17 (1) (b)**—*Applicability — Dispute between tenants as to possession of land—Proceedings under Ss. 145 and 146, Cr. P. Code—Compromise limiting and defining interests—Registration.*

A dispute regarding possession of certain area of land having arisen among some tenants, action was taken under Ss. 145 and 146, Cr. P. Code, and the land was attached. After the order of attachment a compromise was arrived at among the parties limiting and defining for the future the interests of various tenants concerned who at one time had been holding the land as tenants-in-common or as joint tenants. The interest created was exclusive of other parties and no party was to have
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(*b*) was essential. (*Dhavle, J.*) GHAMANDI MISSER *v.* JAGARNATH MISSER. A.I.R. 1938 Pat. 212.

——S. 17 (1) (b)—*Award recognising absence of interest in portion of mortgaged property—Registration.*

[illegible] which only recognises the fact that the mortgagee never had any interest in a portion of the mortgaged property for the simple reason that the mortgagor had also no interest in that property, does not create, or extinguish or limit any right, and therefore does not need registration. (*Dalip Singh, J.*) MST. PARBATI *v.* GOPAL DAS. 40 P.L.R. 291.

——**S. 17 (1) (b)**—*Mortgage-deed—Award altering rate of interest in—Registration, if necessary.*

An award altering the rate of interest in a mortgage deed does not require registration, as a change in the rate of interest is not a change in the mortgagee's interest in the property. (*Dalip Singh, J.*) MST. PARBATI *v.* GOPAL DAS. 40 P.L.R. 291.

——**Ss. 17 (1) (b) and 49**—*Unregistered usufructuary mortgage—Suit if can be based upon.*

Where a usufructuary mortgage is unregistered but reduced to writing, no suit could be based on that document by reason of Ss. 17 (*b*) and 49 of the Registration Act. (*Bose, J.*) HINDUSINGH *v.* KHETSINGH.
1938 N.L.J. 123.

——**S. 17 (2) (vi)**—*Applicability — Compromise in course of proceedings under S. 145, Cr. P. Code—Charge created by compromise on property in dispute in proceedings—Court accepting compromise and passing order "lodged"—Effect—Order creating charge—Exemption from registration.*

P. Code, a compromise is filed by the parties creating a charge on immovable property which was the subject-matter of the proceedings, and the Court passes an order on the compromise, merely stating "lodged", the order must be taken to convey a good deal more than a mere order of dismissal; such an order is meant to incorporate the statements made by the parties in the compromise and to convey that in view of those statements it was unnecessary to proceed with the case any further; the charge created by the compromise "lodged" by the Court falls under S. 17 (2) (*vi*) of the Registration Act. (*Venkatasubba Rao and Abdur Rahman, JJ.*)) PICHAI PILLAI UDAYAN *v.*

REGISTRATION ACT (1908), S. 32.

SUBBARAYA PILLAI. 47 L.W. 435= 1938 M.W.N. 394=(1938)1 M.L.J. 536.

——Ss. 32 and 33—*Power of Attorney—Construction—Power given to carry on proceedings in Court etc.—If confers power to present document before Sub-Registrar.*

The Registration Act being a technical measure, must be strictly complied with and it is well settled law that a power of attorney must be strictly construed and limited to the exact words contained therein. The word "etc." used in power of attorney must therefore be construed as *eiusdem generis* with the rest of the document. A Sub-Registrar or a Registrar is not a Court and therefore a document empowering a person to carry on proceedings in a Court, etc., cannot be construed as conferring power on such person to present the document before a Sub-Registrar or a Registrar. (*Dalip Singh and Skemp, JJ.*) MADAN LAL *v.* GANGA BISHAN.

A.I.R. 1938 Lah. 255.

——S. 35, Cl. 3 (b)—*Registration endorsements—Value—Plea of insanity of executant.*

Registration is a solemn act and if there is a registration endorsement it shows that necessary formalities required by law have been complied with. Consequently where the effect of a document registered is sought to be avoided by the party executing the same by pleading insanity at the time of the execution of the same, the registration endorsement cannot be discarded or ignored in deciding the issue about the mental condition of the party when the deed was executed. The decision in ignorance of or discarding same will not bind the second Appellate Court. (*Puranik, J.*) MST. HAZRABI *v* MST. FATMABI. A.I.R. 1938 Nag. 204.

——S. 49—*Deed of exchange of land unregistered—Admissibility—Right of party to recover his land.*

An unregistered deed of exchange of land is inadmissible in evidence. But the inadmissible deed cannot deprive a party to it from claiming possession of land which admittedly belonged to him before the date of the deed. He can treat the other party who has taken possession of the land under the inadmissible deed as a trespasser. (*Abdul Rashid, J.*) SAID HASSAN *v.* QALANDAR. 40 P.L.R. 224.

——S. 49—*Partition lists unregistered—Admissibility to prove partition already effected before.*

Where unregistered partition lists are sought to be put in for the purpose of proving a partition between the parties, the question which the Court has to decide is whether those documents constituted the bargain between the parties or whether they were merely the record of an already completed transaction. The question in such a case is whether there is sufficient dissociation of the transaction from the documents. The matter cannot depend on the interval of time, though, where the interval is long, the dissociation may be more readily inferred. (*Venkatasubba Rao and Abdur Rahman, JJ.*) BAPAYYA *v.* RAMAKRISHNAYYA.

1938 M.W.N. 354=47 L.W. 477= (1938) 1 M.L.J. 582.

——S. 51—*Document entered in wrong register—Validity of registration.*

Where a document is intended to be registered as a partnership deed under the order of the Registrar but is by mistake entered in the book pertaining to alienations, the document is not validly registered as an alienation but is only validly registered as a partnership deed. (*Dalip Singh and Skemp, JJ.*) MADAN LAL *v.* GANGA BISHAN. A.I.R. 1938 Lah. 255.

——S. 75 (2)—*Presentation under—If can take place of presentation under S.* 34.

Obiter:—A presentation of documents under S. 75 (2), does not take the place of a presentation under S. 34. The procedure to be followed after presentation under S. 75 (2) is different from the procedure to be followed after a presentation under S. 34 and this might make a vital difference in a particular case. (*Dalip Singh and Skemp, JJ.*) MADAN LAL *v.* GANGA BISHAN.

A.I.R. 1938 Lah. 255.

——S. 77—*Suit under—Proof required of plaintiff.*

It is settled law that in a suit under S. 77 of the Registration Act all that is required to be shown by the plaintiff is whether the document was executed or not, (or also in some cases whether certain requirements of the law as to presentation for registration have been complied with). In such a suit, the Court is concerned not with the validity but with the genuineness of the document sought to be registered, that is, whether the document has been executed by the person by whom it is alleged to have been executed. (*Mosely, J.*) U TE ZEIN *v.* DAW THAUNG. 1938 Rang.L.R. 102= A.I.R. 1938 Rang. 176.

RELIGIOUS ENDOWMENTS ACT (XX OF 1863), S. 14—*Applicability—Suit against trespassers—Maintainability.*

S. 14 of the Religious Endowments Act that in a suit under that section the Court has not to pass any order against a person who is alleged to have intruded into management without authority, but that the only question to be considered is whether a person in whom property has vested should be removed for misfeasance or malfeasance etc. A suit under the section can lie only against those persons in whom the property has been vested or to whom certain funds are confided. No suit can lie against a person who is a mere trespasser. (*Divatia and Sen, JJ.*) NAGAPPA *v.* SANTAPPA.

40 Bom.L.R. 365.

RELIGIOUS OFFICE—*Transfer—Office of temple trustee—Transfer for monetary consideration—Legality.*

A transfer of the office of trustee of a temple for a monetary consideration is opposed to public policy and cannot be recognised as being in accordance with law. (*Pandrang Row and King, JJ.*) A. L. S. P. P. L. SUBRAMANIAM CHETTIAR *v.* NATESA GURUKKAL.

47 L.W. 529=(1938) M.W.N. 393= (1938) 1 M.L.J. 517.

SEA CUSTOMS ACT (VIII OF 1878), S. 188—*Jurisdiction of Civil Court—Decision or order of customs officer—Finality—Conditions of—Order imposing higher customs duty on wrong interpretation of Act—Suit in Civil Court—If barred.*

There are two distinct classes of cases contemplated by the Sea customs Act, namely, those in which in respect of offences referred to in the Act, the customs officers are given a kind of magisterial jurisdiction, and those in which in the ordinary discharge of their duty as executive officers, they assess and collect duty on goods under the Act. It is only in the former class of cases that their orders can be spoken as "decisions" in the true sense, under S. 188 of the Act, so as to preclude the Civil Court from questioning them. Adjudications by customs officers dealing with an offence committed under S. 182 of the Act have *prima facies* to be regarded as adjudications by a special tribunal, and as such are not examinable by a Civil Court except when they have acted without jurisdiction or in contravention of fundamental principles of judicial procedure. The finality attaching to decisions or orders of customs officers, enacted by the last clause of S. 188, is not limited to decisions or orders passed by customs authorities when acting under S. 182 and the succeeding sections; but that finality should not

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be interpreted to take away the jurisdiction of Civil Courts in which the customs authorities act on a wrong interpretation of the Sea Customs Act or the Tariff Act and impose a higher customs duty. It is too much to contend that every order of a customs offi[illegible] Act in whatever connection passed must [illegible] In the nature of an adjudication by a tribu[illegible] *chariar and Pandrang Row, JJ.*) MA[illegible] SECRETARY OF STATE. (1938) M[illegible]
47 L.W. 605.

SIR—*See* LANDLORD AND TENANT—SIR LAND.

STAMP ACT (II OF 1899), S. 35—*Document not duly stamped—One of defendants admitting its execution—Document, if can be rejected as against him.*

Where the execution of a document which is [illegible] stamped is admitted by one of the defendants, [illegible]cument cannot be rejected as against him [illegible] *J.*) DULI CHAND MAIDHAN *v.* PANTHI.
40 P.L.R. 231.

——**S. 35 and (Limitation Act, 1908 S. 19)**—*Scope and applicability of S. 35—Insufficiently stamped pro-note—Admissibility—Extent and limits—Use of, to extend limitation.*

Where an insufficiently stamped promissory note contains an admission of a liability, its admission is not precluded by S. 35 of the Stamp Act, if it is merely intended to prove that the debtor made an admission of liability to pay on that date. S. 35 would come into play only if it were used as containing within itself any matter which would extend the creditor's right to recover the money. But if the creditor derives his right not from the document itself but from the Limitation Act in [illegible] ing limitation under S. 19 of the Limitation Act. A document relevant for this purpose need not be an instrument under S. 2 (14) of the Stamp Act. (*Niyogi, J.*) SUDAMSA *v.* KISANRAO. 1938 N.L.J. 145.

——**S. 36**—*Objection subsequent to admission of document—Entertainability.*

It is not open to a Court to entertain an objection to the admissibility of a document on the ground that it is not duly stamped, after it has once been admitted in evidence. (*Jai Lal, J.*) DULICHAND MAIDHAN *v.* PANTHI. 40 P.L.R. 231.

——**Sch. I, Arts. 1 and 5**—*Balance struck in account book—If acknowledgment or agreement.*

In a suit based on a balance struck in the account book of the plaintiff, the phraseology of the account was "baqi rehe lene lekha ker ke char so tees rapia." This was signed by the defendants.

Held that the document in suit was an agreement and not a mere acknowledgment as it contained a promise to pay. (*Jai Lal, J.*) DULICHAND MAIDHAN *v.* PANTHI. 40 P.L.R. 231.

——**Sch. I, Art. 35 (a) (iv)**—*Applicability—Lease—Monthly tenancy—No definite term provided.*

Where a lease of a house only provided that a month's notice was to be given, in case it was required to be vacated, though it is a monthly tenancy within the meaning of S. 106 of the T. P. Act, it does not follow from that the document is a lease for less than one year. The lease is for an indefinite period and as such is to be stamped as required by Art. 35 (a) (iv) of the Stamp Act. (*Collister and Bajpai, JJ.*) MANGAL PURI *v.* BALDEO PURI. 1938 A.W.R. (H.C.) 195 = 1938 A.L.J. 324.

SUCCESSION ACT (XXXIX OF 1925), S. 218—*Enquiry under—Nature of—Assumption regarding religion of testator—If raises a presumption.*

TELEGRAPHS ACT (1885), S. 27.

Questions whether the testator is Mahomedan or Christian, his relationship and his disposing power over the subject-matter of the will are irrelevant in probate proceedings. If in fact on such a contest, the Court [illegible] estator was either [illegible] was in a particular [illegible]ch assumptions do [illegible] presumption there-[illegible] (*Stone, C.J. and Puranik, J.*) ABDUL RASHID ABDULLA KHAN *v.* MINHAZUL HASAN. A.I.R. 1938 Nag. 173.

——**S. 218**—*Mahomedan disposing of entire property by will—Probate—Duty of Court.*

A Mahomedan will can be admitted to probate [illegible] tion of the executor with regard to the excess will be different in kind from what it would be if the testator had power to dispose of the whole. The Court of probate has no jurisdiction to determine any such question or any other question of title. (*Stone C.J. and Puranik, J.*) ABDUL RASHID ABDULLA KHAN *v.* MINHAZUL HASAN. A.I.R. 1938 Nag. 173.

——**Ss. 307 to 315**—*Scope and effect of—Widow with life estate and daughter having absolute estate under will—Powers of alienation as administrators.*

S. 307 and the succeeding sections of the Succession Act make provisions for the powers of an administrator and deal with the powers of the administrator as such, and in no way govern the powers of persons with life or [illegible] estate has such powers as given her by the Succession Act. The daughter as an administrator is limited to the powers granted to her under the Act, but her powers as having an absolute estate would be different. The same has to be said of a widow. (*Wort and Varma, JJ.*) MANKI KUAR *v.* HANSRAJ SINGH. 173 I.C. 983 = 4 B.R. 370 = 19 Pat L.T. 231.

SUITS VALUATION ACT (VII OF 1887)—*Partition suit—Valuation.*

The value of the share claimed and not the value of the entire property is the value for the purpose of jurisdiction in a suit for partition where the plaintiff claims partition and separate possession of his share. (*Stone, C.J. and Puranik, J.*) J. COOK *v.* G. H. BOOK. A.I.R. 1938 Nag. 140.

TELEGRAPHS ACT (XIII OF 1885), S. 27—*Applicability—Charges for messages not payable before their transmission.*

Section 27 is intended only to apply to those cases in which the charge prescribed is recoverable before transmission of the message. The section contemplates that the defrauding should be the result of the transmission of the message without recovering the prescribed charge. Where the charges for the messages are not payable before the transmission of the messages according to the rules but it is to be recovered from the telephone owners by submitting monthly bills to them for the calls made by them and the head operator of the telephone exchange transmits a certain message on behalf of the telephone owner without recovering the charge for the message beforehand, the head operator cannot be said to have committed an offence under S. 27 of the Act, although he prepares false memoranda so as to furnish the basis for the monthly bills in order to defraud Government. (*Jai Lal and Bhide, JJ.*) EMPEROR *v.* JAGIRI LAL. A.I.R. 1938 Lah. 251.

U. P. ENCUMB. EST. ACT (1934), S. 4.

of the Encumbered Estates Act. (*Darling, S. M.*) RAM BETI *v.* SULTAN SINGH. **1938 R.D. 450.**

———**Ss. 4 and** 9—*Issue of notice under S. 9—Creditor's objection as to non-disclosure of existence of sons —Application, if to be rejected.*

Where a creditor, after the issue of notice under S. 9 of the U. P. Encumbered Estates Act, raises an objection as to the non-disclosure of the existence of sons of one of the applicants, which is not denied, the order inadvertently passed under S. 6 should be cancelled and the application rejected. (*Darling S.M. and Bomford, J.M.*) HAR MOHAN SINGH *v.* HARBAKHSH. **1938 R.D. 428.**

———**S. 4**—*Joint application—One of applicants not a landlord—Liability joint with others—Joint application, if proper.*

Where, though one of applicants in a joint application under S. 4 of the U.P. Encumbered Estates Act, is not a landlord, yet, if in regard to his liabilities he is associated with the other applicants, who are landlords, their joint application is a valid one under S. 4. (*Darling S.M. and Bomford, J.M.*) ILTIFAT AHAMAD *v.* FARID-UDDIN AHAMAD. **1938 R. D. 447.**

———**Ss. 6 and 46**—*Order under S. 6—Considered wrong—Procedure to be followed.*

The S. D. O. has no authority to cancel an order once passed under S. 6 of the U.P. Encumbered Estates Act. He should, if he finds that a mistake has been made, submit the case to the Board in revision under S 46, with his recommendation. (*Darling, S.M. and Bomford, J.M.*) ILTIFAT AHAMAD *v.* FARID-UDDIN AHAMAD. **1938 R.D. 447.**

———**S. 7**—*Order under S. 6—Stay of execution—Subsequent appointment of receiver—Legality.*

Where on the passing of an order under S. 6 of the U.P. Encumbered Estates Act, the Judgment-debtor applied and got an order staying the execution proceedings, the subsequent appointment of a receiver to such Judgment-debtor's property is contrary not only to the prior order staying execution but also to S. 7 of the Act, for the appointment of a receiver is only a process for enforcement of execution. (*Srivastava, C.J. and Madeley, J.*) LAL NAREDNRA BAHADUR SINGH *v.* BRINDRABAN. **1938 O.A. 335 = 1938 R.D. 433 = 1938 O.W.N. 359.**

U. P. LAND REVENUE ACT (III OF 1901), S. 23—*Scope of—Transfer of patwari on ground of illicit cultivation — Propriety — Procedure to be followed.*

The transfer of a patwari under S. 23 of the U. P. Land Revenue Act, cannot be used as a punishment. Where a patwari is alleged to have carried on illicit cultivation, the proper procedure is to have framed charges and the patwari called on to show cause why he should not be punished even if need be by dismissal. Transfer is not a recognized form of punishment. (*Darling, S.M. and Bomford, J.M.*) MASHUQ ALI *v.* OUDH NARAIN. **1938 R.D 437.**

———**S. 34**—*Mutation on strength of family settlement —Dispute as to settlement—Declaration from Civil— Necessity.*

Where an applicant for mutation relies upon a family settlement, but has no separate possession of his share, it cannot be ordered unless and until he gets an order from the Civil Court giving him possession over the area in dispute as against the other members. (*Darling, S. M. and Bomford, J.M.*) LACHHMAN PATHAK *v.* LAKHPAT PATHAK. **1938 R.D. 451.**

———**S. 34, Expl.**—*Family settlement, meaning of—Appointment of arbitrators to settle shares of members—Taking of respective shares by members, as settled in*

U. P. REG. OF SALES ACT (1934), S. 5.

Award—Application for mutation—Absence of formal 'dakhal' by Civil Court in favour of applicant—If renders application incompetant.

As the word 'family settlement' occuring in the Expl. to S. 34 of the U.P. Land Revenue Act has not been defined in the Act, it is permissible to interpret it widely. Where parties appointed arbitrators, after deciding to break up the family, to settle the shares of parties and each one took his share as settled by the award, such an arrangement is a family settlement. Where one of the members applies for mutation under S. 34 of the Act, the point for consideration is whether the award has been acted upon. The finding of the High Court, that members of the family are in possession in pursuance of the award renders a formal '*dakhal*' by Civil Court to an individual member unnecessary for the purposes of an application under S. 34. (*Darling, S.M. and Bomford, J.M.*) LACHHMI SEWAK SAHU *v.* GAYA PRASAD. **1938 R.D. 443.**

———**S. 43**—*Scope of—Correction of rent—Duty of collector.*

Sec. 43 of the U.P. Land Revenue Act does not lay down the procedure to be followed where there is a dispute, but merely states, that if there is a dispute about the entry to be recorded, the collector shall not decide it but continue to record the rent payable in the previous year, unless of course there has been formal enhancement or abatement in accordance with the law. (*Darling, S. M. and Bomford, J.M.*) GANPAT RAI *v.* DULLE. **1938 A.L.J. (Supp.) 35.**

———**S. 79**—Holding governed by—Rent, if liable to enhancement by suit under Ss. 33 and 35 of Oudh Rent Act. *See* OUDH RENT ACT, SS. 33 AND 35. **1938 R.D. 403.**

U. P. REGULATION OF SALES ACT (XXVI OF 1934), S. 3—*Failure of Judgment-debtor to contest valuation—Chance to reopen it in revision.*

Where a Judgment-debtor had a chance to contest the valuation and against which he could have appealed, does not avail himself of that, he should not be given a chance of reopening it in revision, and particularly so in a case where the valuation has been made according to the rules. (*Darling S. M. and Bomford, J. M.*) BHAROSA MAL *v.* JOKHA MAL. **1938 R.D. 425.**

———**Ss. 3 and 4**—*Valuation made—No bid—Amendment of decree by Civil Court—Forwarding of decree to collector—Regulation of Sales Act no longer in force —Old valuation if could be retained.*

Where a valuation was made under the Regulation of Sales Act and as there was no bid the file was returned to the Civil Court, and where the decree was subsequently amended and sent to the collector once again for execution, the proceedings are to all intents the same proceedings as those commenced earlier. So though the Regulation of Sales Act was not in existence, the valuation originally made under the old Act is the one which should govern. The calculation cannot be made under the ordinary rules. (*Darling, S. M. and Bomford, J.M.*) SHIB NANDAN *v.* UDEY RAM. **1938 R.D. 453.**

———**S. 3 (4)**—*Valuation by Assistant Collector—Appeal—Forum.*

Where the Assistant Collector makes a valuation under the Regulation of Sales Act, under S. 3 (4) of the Act an appeal against it lies to the Board of Revenue and not to the Collector. (*Darling, S.M. and Bomford, J.M.*) SHIB NANDAN *v.* UDEY RAM. **1938 R.D. 453.**

———**S. 5**—*Simple and later mortgage decree against same Judgment-debtor—Preference in order of sale, if exists—Decree on mortgage subsequent to sale under*

U. P. REG. OF SALES ACT (1934), S. 10.

simple money decree—Postponement of sale—Transfer to mortgage decree-holder without notice to prior decree-holder—Validity—Proper procedure.

Where after the postponement of a sale under a simple money decree, a decree on a mortgage is passed against the same Judgment debtor, the property once sold cannot be transfered to the later decree-holder without notice to the prior decree holder. The second decree-holder cannot have preference in the order of sale, though there might have t
property in his favour.—If the
decrees are to be taken together,
holder ought to be given notice ... proceedings thereon.—Otherwise the person first in the field is entitled to have his decree dealt with by the ordinary sale procedure. (*Darling, S.M. and Bomford, J.M.*) SAHEBZADA MAL *v.* KAULBAN MAL.
1938 R.D. 433 (2).

——**S. 10**—*Applicability—Absence of explicit provision for discharge by the subsequent mortgagee.*

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Regulat ... in
which ... uent
mortgagee discharging the first mortgage. (*Darling, S.M. and Bomford, J.M.*) SAHEBZADA MAL *v.* KAULBAN MAL. **1938 R.D. 433 (2).**

USURIOUS LOANS ACT (X OF 1918), S 3—*'Ex-*

...

(*Wort and Manohar Lal, JJ.*) AJODHYA PRASAD SINGH *v.* RAMGULAM SAHU.

...

the assets) of the deceased. In case of there being no wedded wife his relations and other persons having a right will get property."

Held, that no mention having been made of daughters, daughters were meant to be altogether excluded from inheritance and that they were not included in "relations and other persons having a right." (*Thomas, C.J. and Zia ul-Hasan, J.*) JODHWATI *v.* RAM SINGH.
173 I.C. 972=1938 O.W.N. 338=
1938 O.L.R. 162=1938 R.D. 410=
1938 O.A. 251.

——*Construction—Rules of—Construction consistent with personal law.*

...

good purposes or good religious purposes as the trustees think fit void for uncertainty.

A bequest in a will of money for religious gifts, directing that the money is to be applied in a good way, in gifts bringing religious merit or for good purposes (in a good way) and providing that the trustees should apply the residue of the estate for good religious purposes "as they think fit," is void for uncertainty. If the language of a will makes it clear that the money has to be spent on objects which the law recognises as charitable and on no other objects, the selection of the particular objects may be left to the trustees or executors. But where the language used in the will is wide enough
... hich the
... it in the
... ects, the
... DAHYABHAI *v.* CHAMANLAL. **40 Bom.L.R. 418.**

——*Construction—Estate settled upon unmarried daughter "during her life for her separate use without power of anticipation"—Restraint clause, if operates upon marriage.*

Under a will, a certain share of the testator's estate was settled upon his daughter (she being then unmarried) during "her life for her separate use without power of anticipation."

Held, that the restraint clause must be read as intended to operate upon the marriage of the beneficiary to which extent the restraint is valid in law. (*Ameer Ali, J.*) *In the matter of*, GEORGE BRIDGE.
42 C.W.N. 577.

... *ction—Vested interest—Devise to wife for ... her death to son in absolute right—Son, if ... rest.*

... tator by his will gave all his properties to ... ienation and ... There were ... get the properties in case the son predeceased the testator or his wife. It was contended that these provisions indicated ... remainder ... but only ... the son ... Overruling

... son got a ... th of the testator. (*S.K. Ghose and Nasim Ali, JJ.*) SISIR CHANDRA MAITRA *v.* AJIT KISHORE MAITRA.
42 C.W.N. 605.

WORDS AND PHRASES—*"Hasab rasad khewat"—Meaning of.*

The phrase "hasab rasad khewat" when used in a revenue record in reference to a partition of the shamilat area, and when revenue was not fluctuating but fixed, means "according to the revenue assessed on the holding' and not 'according to the area of the khewat holding. (*Addison and Din Mohammad, JJ.*) DASONDHI KHAN *v.* JAN MOHAMMAD.
A.I.R. 1938 Lah. 310.

...

THE KHULNA ELECTRIC SUPPLY CORPORATION LTD., *v.* BAHADUR SARDAR. **42 C.W.N. 516.**

——**S. 2 (1) (d) (ii)**—*Partial dependency of father and mother—Question of fact.*

WORKMEN'S COMPENSATION ACT (1923), S. 2.

The question whether the father and the mother were at the time of the deceased workman's death "in part dependent" on his earnings, is a question of fact in each case. Where the deceased and his father paid their wages or used their wages to maintain themselves and some of their relatives in one common establishment, each was to some extent dependent on the earnings of the father. Consequently the father and the mother are dependants and entitled to some portion of the compensation money payable under the Act. (*Derbyshire, C.J. and Mukherjea, J.*) THE KHULNA ELECTRIC SUPPLY CORPORATION LTD. *v.* BAHADUR SARDAR. **42 C.W.N. 516.**

——**S. 2 (1) (n)**—*Person employed casually—If a workman.*

A person who was employed in the trade or business of the employer does not cease to be a workman within the meaning of the definition, even though the employment was of a casual nature. In order to be excluded from that definition, the workman must both have employment of a casual nature and be employed otherwise than for the purposes of the employer's trade or business. (*Derbyshire, C.J. and Mukherjea, J.*) THE KHULNA ELECTRIC SUPPLY CORPORATION, LTD. *v.* BAHADUR SARDAR. **42 C.W.N. 516.**

ZAILDAR.

ZAILDAR—*Appointment of—Non-lambardar claimant who is not an approved candidate—Right to appeal to commissioner.*

The commissioner can, in his discretion entertain an appeal of a non-lambardar claimant in a *Zaildari* or *sufed poshi* case, not approved as a candidate by the commissioner. (*Dobson, F.C.*) KARTAR SINGH *v.* LACHMAN SINGH. **17 L.L.T. 12.**

II—SELECT ENGLISH CASES.

COAL MINES ACT (1911), Ss. 55, 102 sub-S. (8) — ... *Unfenced—Repairs to machi-*

remove the guard protecting the cl
fixed the pulley he set the machine
running and in order to observe its
and could not replace the guard r
Meantime the respondent came on th
was being done and when getting ba
slipped on the pavement and his rig
put out to save himself, was caught
socket gearing and was injured.

from liability under S. 102, sub-S. (8). COLTNESS IRON COMPANY, LIMITED *v.* SHARP. (1938) A.C 90.

CONTRACT—*Breach of—Damages—Agreement not to disclose statement by party confessing offences committed by him and others—If valid—Public policy—Disclosure of statement to trade union—Expulsion of party making the statement from the union—Damages if to be nominal or substantial.*

The plaintiff *H* was a
and was a member of the
Bookbinding and Paper
trade. It comprises in
engaged in those works
of two papers. They ha... cross-word puzzle competitions. Up to some date in 1932 they had employed the plaintiff *H* as a sorter in their

CONTRACT,

competition department. The post of sorter gave an opportunity to them to be fraudulent and dishonest, if they were so inclined to be, by cheating their employers and the real winners of the competition by putting among the letters to be sorted a letter containing the correct solution, after they had ascertained what the correct solution was. One *C*, acting on behalf of the defendants, came to know that the plaintiff could assist him to discover the swindlers in the defendant's staff. The plaintiff *H* gave some information and on Mr. *C* agreeing to keep the matter secret put the information into writing and made statements also implicating himself in the

...laintiff's own wrongful act, namely, ...acted to the detriment of the trade ...ans of the damage ...mbership and the *causa sine qua non*, ... nominal damages. ... K. B. 520, (1920) A. C. 956, Appl. HOWARD *v.* ODHAMS PRESS, LIMITED. (1938) 1 K.B. 1.

———*Breach of promise to marry—Promise to marry a third person made by a husband against whom a decree* nisi *for divorce was made, marriage to be after decree absolute—If a valid contract—Public policy, limits of.*

In 1930 the plaintiff, a young nurse, met the defendant, who was, to her knowledge, a married man. In ...

marry the plaintiff after ... made absolute. Somet... the decree *nisi* was made ...

The question whether the father and the mother were at the time of the deceased workman's death "in part dependent" on his earnings, is a question of fact in each case. Where the deceased and his father paid their wages or used their wages to maintain themselves and some of their relatives in one common establishment, each was to some extent dependent on the earnings of the father. Consequently the father and the mother are dependants and entitled to some portion of the compensation money payable under the Act. (*Derbyshire, C.J. and Mukherjea, J.*) THE KHULNA ELECTRIC SUPPLY CORPORATION LTD. *v.* BAHADUR SARDAR. **42 C.W.N. 516.**

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II—SELECT ENGLISH CASES.

oy
sus-
... osed
and dangerous part of the machinery used in the mine which was not at the time securely fenced. Under S. 55 of the Coal Mines Act, 1911, it is provided that "every

for damages as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach." The machine was not working properly and therefore a mechanical engineer employed at the colliery examined the machine the day before the accident and made certain adjustments and repairs to the machine. The next morning he had to fix a pulley on to the machine and to enable him to do so he had to stop the machine and remove the guard protecting the chain, etc. Having fixed the pulley he set the machine in motion to test its running and in order to observe it[illegible]
and could not replace the guard [illegible]
Meantime the respondent came on t[illegible]
was being done and when getting b[illegible]
slipped on the pavement and his ri[illegible]
put out to save himself, was caught
socket gearing and was injured.

... COLTNESS IRON COMPANY, LIMITED *v.* SHARP.
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CONTRACT—*Breach of—Damages—Agreement not to disclose statement by party confessing offences committed by him and others—If valid—Public policy—Disclosure of statement to trade union—Expulsion of party making the statement from the union—Damages if to be nominal or substantial.*

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cross-word puzzle competitions. Up to some date in 1932 they had employed the plaintiff *H* as a sorter in their

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implicating himself in the
Mr. *C* on behalf of the
...se the written statement to
H and not to divulge it to
a third party. Mr. *C* was not however satisfied that *H* had divulged everything and therefore gave to the Secretary of the trade union a copy of the written statement of *H*. The plaintiff *H* was then expelled from the union and lost several benefits thereby, for example, unemployment benefit, etc. Thereupon the plaintiff brought this suit for damages for breach of contract of secrecy which was broken by *C*.

Held, that the document in question revealed a crime and the Court will not allow as legal any agreement which has the effect of withdrawing from the ordinary course of justice a prosecution when it is for an act

...laintiff's own wrongful act, namely,
...ment of the trade
...*ans* of the damage
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In 1930 the plaintiff, a young nurse, met the defendant, who was, to her knowledge, a married man. In 1932 sexual intercourse began to take place between
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...ant
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I—INDIAN DECISIONS.

ADJUSTMENT. *See* C. P. CODE, O. 23, R. 3.

it vests in the Almighty. This feature of 'wakf' or dedicated property is not peculiar to Mahomedan Law and the position as regards dedicated property is practically the same under Hindu Law. But this does not mean that no one can acquire a valid title to dedicated property by adverse possession over twelve years. The title of a person claiming such adverse possession over dedicated property rests not on Maho-

COMMITTEE, AMRITSAR. 40 P.L.R 319= A.I.R. 1938 Lah. 369 (F.B.).

AGRA TENANCY ACT (III OF 1926), S. 24—*Succession to occupancy holding—Chela's right to succeed a mahant.*

A chela has no right whatever to succeed to the occupancy rights of a mahant, whatever his rights may be in connection with the math. (*Bomford, J.M.*) HAR NANDAN GIR *v.* BAWAN SINGH. 1938 R. D. 456.

——S. 24—*Succession to occupancy holding—Rights of daughter.*

It is clear that a daughter cannot succeed to the occupancy rights of her father. (*Darling, S.M. and Bomford, J.M.*) MOHAMMAD SIDDIQ *v.* AISHA BIBI 1938 R D. 480.

——Ss. 44 and 86—*Applicability—No exproprietary rights claimed on mortgage of* sir—*Suit to eject non-occupancy tenant in* sir—*Section applicable.*

Where no ex proprietary rights are claimed on the mortgage of *sir* land, the non-occupancy tenant in *sir* continues to be non occupancy tenant and a suit to eject him should be brought under S. 86 and not S. 44 of the Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) BALDEO PRASAD PANDE *v.* LALTA. 1938 R D. 519.

——S. 44—*Liability to ejectment—Person not a planting trees without permission.*

be a grove, without the owner of the trees holder. If such person plants without ...ains a trespasser on the land and he ... under S. 44 of the Tenancy ...*M. and Bomford, J.M.*) RAM

AGRA TENANCY ACT (1926), S. 99.

...AM RAN BIJAI PRASAD SINGH, 1938 R D. 545.

—*Order under—Time for carrying*

...ision in the Agra Tenancy Act for ... within which, an order of ejectment ...ed the decree-holder must apply for possession. But there is no doubt that it is undesirable that a decree holder should delay his application for taking formal possession. (*Darling, S.M. and Bomford, J.M.*) SHEO PRASAD GUPTA *v.* MANDIL SINGH. 1938 R.D. 541.

——S. 86—*Applicability—Tenant of Zamindar's grove—Ejectment—Forum.*

In the case of a tenant paying *sayar*, and not rent in ... can be ejected only by a Civil ... payable could be collected by ... *Bomford, J.M. and Darling, S.M.*) ... THAKUR GOPAL LALJI. 1938 A.L J. (Supp) 58.

——Ss 86 and 92—*Suit to eject as heirs of statutory tenant—Father treated as non occupancy tenant—Suit, if maintainable—Fresh suit to eject, if lies.*

Where the defendants are sued under Ss. 86/92 of the Agra Tenancy Act as heirs of a statutory tenant, if it is found that the father was rightly or wrongly treated as a non-occupancy tenant, then the suit has to be dismissed. The Zamindar cannot ascribe superior rights to the father after his death merely to enable him to eject the sons. The Zamindar can bring a fresh suit to eject them as non occupancy tenants. It would be equally open to the tenants defendants to plead acquisition of statutory right and fresh admission. (*Darling, S.M. and Marsh, J.M.*) BHAGWAT SARAN *v.* MOHAMMAD YAR KHAN. 1938 R.D. 547.

——S. 99—*Right of suit—Conditions to be complied with*

If a tenant pleads that he has been dispossessed by a fraudulent abuse of legal process, he has a right to come under S. 99 of the Tenancy Act, provided he has not availed himself of the other remedies open to him, by way of review and appeal. In default of a definite finding that the decree holders were guilty of fraud the suit was not maintainable. (*Darling, S.M. and Bomford, J.M.*) SHEO PRASAD GUPTA *v.* MANDIL SINGH. 1938 R D. 541.

——S. 99—*Right of suit under—Ejectment for arrears of rent—Proof of fraud—Effect.*

Where in a suit for ejectment for arrears of rent, there has been fraud and a tenant has thereby been ejected, the ejectment is not in accordance with the

AGRA TENANCY ACT (1926), S. 99.

provisions of the Act and such a tenant has a right to bring a suit under S. 99 of the Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) RAM PRASAD PANDE *v.* JAI BAHADUR SINGH. **1938 R.D. 469.**

———S. 99—Suit under—Time spent in futile application for review—Benefit of S. 14 of Limitation Act if available. *See* LIMITATION ACT, S. 14—BENEFIT OF. **1938 R.D. 469.**

———S. 121—*Declaratory suit—Absentee tenant claiming share in tenancy—Disentitling circumstances.*

Where a tenant who has been absent for a long time, claims a share in the tenancy, he would be entitled to a declaration of co-terancy excepting in a case where it is proved that the plaintiff gave up his share in the joint family property or where it is proved that the defendants have perfected their rights by adverse possession for the required period. (*Darling, S.M. and Bomford, J.M.*) GANGA PANDE *v.* SHEONET PANDE.
1938 A.L.J. (Supp.) 50 = 1938 R.D. 539.

———Ss. 123 and 44—*Plaintiff not in possession—Remedy.*

A plaintiff not being in possession cannot sue under S. 123 of the Agra Tenaucy Act. It is his duty to sue under S. 44 to get the ejectment of the defendants. (*Darling, S.M. and Bomford, J.M.*) MAHANGOO GOND *v.* SHEO NATH GOND. **1938 R.D. 474.**

———S. 184—*Rent-free grant—What amounts to—Mere non-collection of rent—Effect.*

S. 184 of the Aga Tenancy Act lays down that land held rent-free in respect of which no liability to rent is recorded in the annual registers shall in the absence of evidence to the contrary be presumed to be held under a rent-free grant. Where the liability to pay rent is recorded but land is held rent-free with the consent of the landlord, it does not mean that it is held in virtue of a rent-free grant. (*Darling, S.M. and Bomford, J.M.*) BALDEO PRASAD PANDE *v.* LALTA. **1938 R.D. 549.**

———S. 230—*Bar under—Suit by a tenant against his co-tenant for profits—Jurisdiction of Court of Small Causes to try.*

Where the plaintiffs claim profits in proportion to their share in the holding on the allegation that they were co-tenants with the defendants, of certain land which was exclusively in the cultivation of the defendants, the suit is exclusively cognizable by Civil Court. The bar provided by S. 230 of the Agra Tenancy Act will be effective only if the suit is of the nature specified in Sch. 4 to the Act. The mere fact that the defendants alleged that the plaintiffs were not the tenants of the holding would not oust the jurisdiction of the Civil Court. (*Niamatullah and Ismail, JJ.*) DATA RAM *v.* DHARA. **1938 A.W.R. (H.C.) 326 = 1938 A.L.J. 519.**

———S. 238—*Assistant Collector not empowered under to carry on sales—Proceedings before such officer, if null and void.*

Where an Assistant Collector is not duly empowered under S. 238 of the Agra Tenancy Act with the powers of a Collector for the purpose of carrying out sale of landed property, all the proceedings in his Court, in execution of a decree for arrears of land revenue, are *ab initio* null and void. (*Darling, S.M. and Marsh, J.M.*) RAM RAKSHPAL *v.* RAM SARUP. **1938 R.D. 557.**

APPEAL—*Letters Patent appeal—Memorandum of appeal not mentioning names of all parties—If complete.*

No memorandum of appeal, whether in a Letters Patent appeal or in any other appeal can be considered to be complete unless it mentions the names of all the parties against whom relief is sought. There is no

BENG. MUNICIPAL ACT (1932), S. 39-B.

reason for distinction in this respect between a Letters Patent appeal or any other appeal. (*Young, C.J. and Monroe, J.*) RAMESHWAR DAS *v.* OFFICIAL RECEIVER, DELHI. **A.I.R. 1938 Lah. 325.**

ARBITRATION—*Award—Setting aside—Terms of reference directing physical partition—Award ordering sale of premises and dividing sale proceeds—Award—If should be set aside.*

Where the terms of the order of reference direct the arbitrators to decide on the mode of partition of the premises, and to partition the premises with the assistance of an engineer if necessary on the basis that each party is entitled to one-third share therein, the jurisdiction of the arbitrators is limited to effecting a physical partition. If they direct the sale of the premises and divide the sale proceeds among the parties according to their shares, the award goes beyond the terms of reference and must be set aside. (*Panckridge, J.*) DIBOPRAKASH GANGULY *v.* SUPROKOSH GANGULY. **A.I.R. 1938 Cal 341.**

BENGAL CESS ACT (IX OF 1880), S. 93—*Scope—Jurisdiction of Civil Court—Suit questioning valuation by cess department on ground that it is wrong—Bar of.*

The Civil Court has jurisdiction to grant relief in a case where the cess department has acted *ultra vires* and imposed liability for cess on income which is not subject to cess. S. 93 of the Cess Act is no bar to such a suit. The section does not bar a suit to establish that the amounts on which a person has been assessed is not subject to the Cess Act; but it does bar a suit in which the contention is not that the cess department has acted *ultra vires*, but merely that its decision is wrong. (*Agarwala and Varma, JJ.*) BRAJA BEHARI DASS *v.* RAM NARAYAN RAI. **174 I.C. 752 = 19 P.L.T. 352.**

BENGAL FOOD ADULTERATION ACT (VI OF 1919), S. 13 (2)—*Some out of several tins seized from accused found to contain adulterated ghee—Order of forfeiture in respect of all tins—Appellate Court setting aside that order and directing samples from rest of tins to be sent to Public Analyst—Legality.*

Fifteen tins of ghee were seized from the accused and the ghee in two of them was found to be adulterated. The Magistrate convicted the accused under S. 21-6 (1) of the Bengal Food Adulteration Act and passed an order under S. 13 (2) of that Act, directing that all the 15 tins of ghee should be forfeited. On appeal, the Sessions Judge upheld that conviction but set aside the order of forfeiture in respect of 13 tins. He then ordered that samples should be taken from them and sent to the Public Analyst after which those found to be adulterated ghee would be destroyed.

Held, that when the Sessions Judge set aside the order passed with regard to 13 tins of ghee, he should have made a direction to return the tins to the accused. (*Henderson, J.*) BENARASI LAL *v.* CHAIRMAN, ASANSOL MUNICIPALITY. **42 C.W.N. 731.**

BENGAL MUNICIPAL ACT (XV OF 1932), Ss. 39 B and 43—*Order deciding application under S. 36—Revision—Power of High Court—C. P. Code, S. 115.*

In view of the provisions laid down in Ss. 39-B and 43 of the Bengal Municipal Act, the High Court has no power under S. 115, C. P. Code, to revise an order of the District Judge deciding an application contesting an election under S. 36 of the Act. (*S.K. Ghose and Nasim Ali, JJ.*) RADHA NATH SAHA *v.* HARE MOHAN SAHA. **42 C.W.N. 647.**

fashion, whether the circumstances are such that the purchaser can justly have a proclamation issued in his favour. (*Costello, A C.J. and Edgley, J.*) BYOM KESH MUKHERJI v. NIRENDRA NARAYAN BAGCHI.

BENGAL SUPPRESSION ... OUTRAGES ACT (XII OF ...

Scope and effect

S. 38 of the Suppression of Terrorist Outrages Act

the substantive offence. When, therefore, it is established that a person has in his possession any document of the nature defined in S. 36, that person is liable to conviction unless he proves the circumstances indicated in sub S. (*b*) (*i*) or (*b*) (*ii*) of S. 36 of the Act. (*M. C. Ghose and Bartley, JJ*) SASANKA GHOSAL v. EMPEROR. 42 C.W.N. 732

BENGAL TENANCY ACT (VIII OF 1885), S. 5 (4)—*Status of lessee—Raiyat or tenure-holder—Test to decide.*

Where the object of the lease is that the lessee should

THAKUR v. GANESH PRASAD. A I.R. 1938 Pat. 235

——S 26-F—*Holding purchased by decree holder in execution for less than decretal a... landlord for pre-emption—Sale ... and so pre-emption application ... again restored on decree holder ... judgment-debtor from entire ... right to pre-empt—Deposit necessary.*

In execution of a money decree, an occupancy holding belonging to the judgment-debtor was sold for less than the decretal amount and purchased by the decree holder, and the sale was confirmed. The landlord thereupon applied for pre-emption under S. 26-F of the B. T. Act

for setting aside the *ex parte* order by which the sale was set aside. The decree-holder and the judgment-debtor entered into a compromise by which the decree-

firming the sale was to restore the order for pre-emption previously made and that, therefore, the application of the landlord must be allowed

Held also, that the landlord was bound to deposit only the amount for which the holding was originally

BENG. TENANCY ACT (1885), S. 50.

sold and not the entire decretal amount. (*Nasim Ali, J.*) CHAND MIA v. MAHARAJA BIR VIKRAMKISHORE MANIKYA BAHADUR. 42 C.W.N. 644.

——S. 26 F—*Proceeding under—Objection regarding nature of holding raised at late stage, disallowed by lower Court—Interference in revision*

Where in a proceeding under S. 26-F of the B. T. Act an objection regarding the nature of the holding which ... allowed by the lower ... revision will not inter... *J.*) KALI MOHAN

67 C.L J. 5.

... *Applicability—Tenure holder—Right to*

... T. Act applies only to an occupancy ... ant cannot invoke it to his aid unless it is clearly established by him that he is an occupancy tenant. A tenant who is only a tenure-holder cannot get the benefit of the section. (*Terrel, C.J. and Fazl Ali, J*) SOMESHWAR NATH SINGH v. RAGHUBANSH LAL. 1938 P.W N. 411.

——S. 38—*Right to abatement—"Deterioration"—Nature of—Omission of landlord to keep irrigation system in order—Effect—Right of tenant to abatement in suit for rent—Pleadings.*

The deterioration contemplated by S. 38 of the B. T. Act is a deterioration of the soil which must be more

entitle the tenant to an abatement of rent. If, however, it is shown that as a result of some local custom or contract the landlord is not entitled to receive the full rent unless he maintained the irrigation system in good ... the tenant even in ... for this to be done, ... or contract, must be ... and supported by ... counter-claim for damages when he has sustained any loss owing to the omission on the part of the landlord to carry out his obligation to him or to the tenants in general (*Terrell, C J. and Fazl Ali, J.*) SOMESHWAR NATH SINGH v. RAGHUBANSH LAL. 1938 P.W.N. 411.

... *under—Applicability—*

... er S. 50 of the B. T. Act ... amalgamation of separate ... *J*) LILABATI DASI v. ... D. 42 C.W N 637.

... *der—Right to—Plaintiff entering possession of holding by virtue of purchase—Landlord not recognising purchase and not taking rent from plaintiff—Right of latter to tack on his period of*

The plaintiff during the period of his possession did not pay rent to the landlord on account of the latter's unwillingness to receive rent from him. It was proved that during the period of possession of the plaintiff's vendor within the 20 y...

tution of the suit by the plaintiff under S. 106 of the B. T. Act, the rate of rent in respect of the holding remained unchanged.

Held, that the plaintiff must be regarded as having stepped into the shoes of his vendor who must be regarded as his predecessor in interest within the meaning of S. 50 (2) of the B. T. Act and that the plaintiff was entitled to tack on his period of possession to that of his vendor in order to obtain the benefit of the presumption under that section.

Held, further, that the plaintiff had succeeded in establishing that the rate of rent had not been changed during the 20 years before suit and that the mere fact that the landlord did not accept rent from the plaintiff during the period of his possession could not be of any advantage to the landlord. (*Edgley, J.*) LILABATI DASI *v.* GHITPUR GOLABARI CO., LTD.
42 C.W.N. 637.

——S. 106—*Suit under—Parties—Transferee of interest of plaintiff pending suit not made party—Effect of.*

The trial of a suit under S. 106 of the B. T. Act cannot be arrested merely by reason of the transfer of the interest of the plaintiff pending suit. The transferee may, if he chooses, obtain leave of the Court under O. 22, R. 10, C. P. Code, to continue the suit, but if he does not do so, the original plaintiff may continue the suit, and the transferee will be bound by the result of the litigation. (*Edgley, J.*) LILABATI DASI *v.* GHITPUR GOLABARI CO., LTD. 42 C.W.N. 637.

——S. 106—*Suit under—Parties—Transferee of interest of tenant who was made* pro forma *defendant, not made party—Suit, if maintainable.*

The fact that in a suit under S. 106 of the B. T. Act the transferee of the interest of a tenant who was impleaded as a *pro forma* defendant was not made a party, does not render the suit non-maintainable on account of the defect of parties. (*Edgley, J.*) LILABATI DASI *v.* GHITPUR GOLABARI CO., LTD. 42 C.W.N. 637.

——S. 106—*Suit under—Transposition of co-sharer defendant as plaintiff after limitation—Jurisdiction of Court—C. P. Code, O. 1, R. 10—Limitation Act, S. 22*).

n a suit under S. 106 of the B. T. Act, a co-sharer *o forma* defendant can be transferred to the category the plaintiff, although a period of four months has elapsed since the final publication of the record of rights, and a decree can be passed in his favour. The Court clearly has jurisdiction to order the transfer under O. 1, R. 10, C. P. Code, and having regard to the provisions of S. 22 (2) of the Limitation Act no question of limitation can arise. (*Edgley, J.*) LILABATI DASI *v.* GHITPUR GOLABARI CO., LTD. 42 C.W.N. 637.

——S. 115-C—*Proceeding under S. 105—Second appeal.*

In a proceeding under S 105 of the B. T. Act for settlement of fair and equitable rent of certain holding on the ground of rise in the price of staple food crops and of increase in area on the basis of certain stipulations in the lease by which the tenancy is created, a second appeal is not barred under S. 115-C of the B. T. Act. (*Guha and Nazim Ali, JJ.*) THE CHANDRA SEKHAR ZEMINDARY CO. *v.* RADHA GOBINDA KOER.
67 C.L.J. 2.

——S. 174 (5)—*Appeal filed within limitation but deposit made only after limitation—Appeal, if competent.*

Under S. 174 (5) of the B. T. Act, the deposit must be made before the appeal could be entertained at all Consequently an appeal, though filed on the last date of limitation, is not competent, if the deposit is made only subsequently after the period of limitation. (*S. K. Ghose,*

J.) DAKHAJA MOHAN ROY CHOWDHURY *v.* MATIAR RAHMAN. 42 C.W.N. 646.

BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT (IV OF 1914), S. 25—*Scope—Certificate—Effect of—Validity and finality of—Decision on claim preferred—If can be challenged or ignored in suit under S. 25—Plea raised and raised in suit—If can be abandoned in appeal.*

The Certificate (Public Demands Recovery) Act has a procedure of its own according to which as soon as a certificate is signed by the certificate officer, it becomes a decree, and then may follow certain enquiries as a result of which the decree may either be cancelled, varied or may be proceeded with. The decree may be varied or cancelled under S. 10 of the Act on objection by the certificate debtor, or under S. 11 it may, subject to the law of limitation, be amended at any time by the addition, omission or substitution of the name of any certificate-holder or certificate debtor or by the alteration of the amount claimed therein. But a party who prefers a claim to the certificate Court and gets a decision pronounced upon it cannot challenge it in a separate Civil Court and cannot ask the Civil Court to ignore the decision of the certificate Court on the ground that that Court had no jurisdiction to decide that question. Where defeated claim raises in a suit under S. 25 a plea which is outside the scope of such a suit, and the parties go to trial and adduce upon that issue, he cannot be allowed at the appellate suit to ask the Court to dismiss that issue from consideration. (*Courtney Terrell, C.J., Fazl Ali and James, JJ.*) BINDESHWARI PRASAD *v.* SHIVA DUTT SINGH. 1938 P.W.N. 329= 19 P.L.T. 328 (S.B.).

BIHAR AND ORISSA SUGAR-CANE RULES (1934), R. 15 (d) (e) and (f)—*Object and scope of—Purchasing agent—Liability for infringement of rule by weighment clerk.*

Rule 15 of the Sugar-cane Rules distinctly makes the purchasing agent liable if it is found that the weighment clerk acting on his behalf is guilty, unless he shows that he has used all due diligence to enforce the observance of the rules and that the offence was committed without his knowledge or consent. The object of the rule is to protect the cultivators who are not always educated from the wiles of persons dealing with them on behalf of the purchasing agent and hence rule 15 makes the latter himself liable along with the person acting on his behalf unless he shows that he was not negligent in his duties. Such cases are not likely to be detected easily, and when detected should not be dealt with leniently. A purchasing agent who merely says that he was not present at the time of the offence, and that he never used to go to the weighment clerk who used to remain at the weighbridge cannot be absolved from liability under R. 15. (*Varma, J.*) BALA BUX *v.* EMPEROR. 19 P.L.T. 395.

BIHAR TENANCY ACT, S. 148—*Scope—Non-compliance—Effect—Suit for rent—Defect in frame of plaint—Omission to mention all plots in holding—Effect—Right to decree—Admission by defendant—Effect of.*

A suit for arrears of rent is a suit of a double nature. It is ordinarily a suit to enforce the charge upon the holding which is created by S. 65 of the Bihar Tenancy Act, but a decree enforcing this charge can only be made when the plaint is framed so as to exactly comply with S. 148 of the Act. The suit, however, does not necessarily fail because a decree cannot be made enforcing the charge in such a manner as to entitle the purchaser at the execution sale to annul all incumbrances. The suit being also one to enforce the personal liability of the

BIRBHUM GHATWALI REG. (1814), S. 5.

tenant to pay a sum of money to the landlord, a decree enforcing this personal liability may be made even

certain plots forming part of the tenant's holding, a money decree may properly be given against the tenant, especially when the latter admits that an amount of rent is due from him to the landlord. When the tenant is in possession of the area which he claims and there has been no ejectment by the landlord, the latter ought not to be deprived of the whole of the rent which the tenant admits to be payable. The landlord must in such cases pay to the tenant the costs of the contest which he has forced upon the tenant, and if it appears that he has not been willing to give a quittance in the manner

OF 1814), S. 5—*Dismissal of Ghat*

The Ghatwal is not liable to be under the provisions of S. 5 of the non-payment of choukidari dues therefore have no right to dismiss the Ghatwal acting under the provisions of S. 5 (2) in cases where he is in arrears for the payment of the choukidari dues. power to dismiss a Ghatwal then for non payment choukidari dues must be found, if at all, elsewh

Chatterjee, JJ.) JOGENDRA NARAIN *v.* RADHA PRASAD. A.I.R. 1938 Pat. 245.

——— S. 5—*Ghatwal—Power of Government to dismiss and to forfeit tenure.*

Per *Chatterjee, J.*—S. 5 gives in clear terms to the Government full power to forfeit the tenure of the defaulting Ghatwal and to make it over to any person whom it may approve or otherwise to dispose of it in such manner as it may think proper. It is thus evident that notwithstanding the hereditary character of the Ghatwali tenure the Government in case of breach of the condition to pay rent is at liberty to forfeit the tenure and to take it away from the family of the de-

right of the Government was recognised by legislative enactment. When for breach of the conditions on which he holds the tenure the Ghatwal is dismissed from his office by the Government his tenure is forfeited and the Government has a right to make a new grant to any person whom it may consider forfeited the right of the Governm any new Ghatwal whom it may Ordinarily the Government should the hereditary claim of the next Ghatwal but he cannot force such ment. (*Manohar Lal and Chatterjee, JJ.*) JOGENDRA NARAIN *v.* RADHA PRASAD. A.I.R. 1938 Pat. 245.

——— S. 5—*Scope—If incorporated in S. 8 (2), Santhal Parganas Rural Police Regulation.*

S. 5 of the Regulation of 1814 is not by necessary implication incorporated in S. 8 (2) of the Regulation of 1910 for the simple reason that if that was the intention

CANTONMENTS ACT (1924), S. 210.

of the Legislature they could easily have said so. (*Manohar Lal and Chatterjee, JJ.*) JOGENDRA NARAIN *v.* RADHA PRASAD. A.I.R. 1938 Pat. 245.

BOMBAY ABKARI ACT (V OF 1878), S. 43 (h)—*Burden of proof—Shifting of.*

The burden of proof on prosecution which shifts under proceedings under the Abkari Act, does not shift until the factum of possession is proved. (*Davis, J. C. and Lobo, J.*) EMPEROR *v.* HAJI GHULAB SHAH. A.I.R. 1938 Sind 80.

BUDDHIST LAW (Burmese)—*Marriage—Dissolution by desertion—Allegation of adultery on part of wife—Wife, if forfeits her share in lettetpwa property.*

Under Burmese Buddhist law divorce is essentially a personal action and the penalties for adultery can be only enforced by the husband. When a marriage is dis- she does not lose her he marriage, and even against the wife, the the footing that the y desertion, unless the y in a suit for divorce

———(Burmese)—*Succession—Full and half blood—Preference—Limits of rule that inheritance should not*

tions. It cannot be said that the should not ascend when it can in competition between relations se of the half blood of the same to the deceased. (*Mya Bu, Offg. C. J. and Mackney, J.*) MRS. KIRKWOOD *v.* MAUNG SIN. 174 I.C. 603 = A.I.R. 1938 Rang. 74.

BURDEN OF PROOF—*Receipt executed by illiterate woman—Plea of ignorance of contents—Onus.*

Where an illiterate woman who usually conducts her own business pleads that a receipt to which she had affixed her thumb impression, contained terms of which she was not aware, the onus is on her to show that it was executed under fraud or misrepresentation. (*Yorke, J.*) MAHDEI *v.* ISHWARI. 1938 O.W.N. 531 = 1938 O.L.R. 228 = 1938 O.A. 393.

CANTONMENTS ACT (II OF 1924), Ss. 210 (1)

paying prescribed fee—No license issued—Summary trial and conviction—Legality.

A person was served with a notice by the Cantonment Authority prohibiting him from selling fruit in his shop. The person represented to the authority that he had been

in revision as under the circumstances the person could not take advantage of S. 210 (3) owing to his own conduct in applying for license and not taking it out subsequently.

Held, further, that the case should not have been tried summarily as the question of compensation might have arisen under certain circumstances. (*Jai Lal, J.*)

C. P. DEBT CONCIL. ACT (1933), S. 9.

NARU RAM *v.* EXECUTIVE OFFICER, CANTONMENT BOARD, MULTAN CANTONMENT.

A.I.R. 1938 Lah. 427.

C P. DEBT CONCILIATION ACT (II OF 1933), S. 9 (3)—*Order under—Effect of.*

The effect of an order under S. 9 (3), is not to invalidate the transaction but merely to shut out certain documents from evidence. Where therefore an order is made under S. 9 (3) excluding a mortgage deed from evidence in any suit by the creditor, the order though effectually precludes a suit on mortgage does not invalidate the mortgage but keeps it alive. Hence the creditor cannot fall back upon original consideration and sue on that cause of action so long as the mortgage is alive. (*Vivian Bose, J.*) RATILAL *v.* RAJARAM.

A.I.R. 1938 Nag. 251.

C. P. LAND REVENUE ACT (III OF 1917), Ss. 169 (1) (b), 220 (n)—*Order to file civil suit within six months—Suit filed beyond that period—If entertainable.*

Where under an order under S. 169 (1) (*b*) of the C. P. Land Revenue Act a party is asked to file a civil suit within six months but he fails to do so and files it beyond that period the Civil Court cannot entertain the suit, it being barred under S. 220 (*n*). Such party has to face the consequences under S. 169 (2) (*b*) and take his chance before Revenue Court. (*Stone, C. J. and Puranik, J.*) MADHORAO DINKARRAO *v.* LAXMIBAI. **A.I.R. 1938 Nag. 241.**

———**S. 169 (1) and (b)**—*Partition—Party asked to file civil suit within six months—Case kept pending—Order sent to Deputy Commissioner for information—Order of Deputy Commissioner asking case to be filed—Which is the operative order.*

In a partition proceeding before a competent Sub-divisional Officer, he passed an order under S. 169 (1)(*b*) as follows: "*A* is asked to establish his rights in Civil Court by filing suits within six months from this date. Till then the case be kept pending. Record forwarded to Deputy Commissioner for information." Deputy Commissioner endorsed on this as follows: "Case need not be kept pending so long. It be filed. Parties can re-open it in due course." Question was if Deputy Commissioner's order was final or that of the Sub-divisional Officer'sand did the superior officer's endorsement convert Sub-divisional Officer's order from S. 169 (1) (*b*) to 169 (1) (*a*).

Held, that the order of the Sub-divisional Officer under S. 169 (1) (*b*) was final and that the Deputy Commissioner to whom the order was sent for information had no right to vary it in any way so as to bring it under S. 169 (1) (*a*), as the order was sent to him not by way of appeal or revision but in his administrative capacity only for information and the endorsement by Deputy Commissioner was his administrative act. (*Stone. C.J. and Puranik, J.*) MADHORAO DINKARRAO *v.* LAXMIBAI. **A.I.R. 1938 Nag. 241.**

CENTRAL PROVINCES TENANCY ACT (I OF 1920), S. 5—*Devise in contravention of—Devisee taking possession—Dispute between co-devisees—Validity of will, if can be raised.*

A will violating the provisions of S. 5 of the C. P. Tenancy Act though is void in law, yet if a devisee has taken possession under the will and has acted under the will, he cannot in a suit by a co-devisee to enforce the will plead the invalidity of the will. (*Pollock, J.*) NAROTTAMDAS *v.* GURUPRASAD. **1938 N.L.J. 181.**

———**S 6 (5)**—*Deposit in Court of pre emption price—Charge for rental arrears—Mode of realisation.*

Where there is a deposit in Court of amount fixed as the pre-emption price, though it is charged with the rental arrears the landlord could not proceed against the money simply by obtaining an order from the Revenue Court to hand it over to him. He must first execute the decree for arrears already obtained and should obtain a decree for arrears for which no decree had been obtained. He must proceed to enforce his rights against the money in the same way as he would enforce them against the land. (*Roughton, F.C.*) TODAR *v.* RAMBHADRA. **1938 N.L.J. 164.**

CHARITABLE AND RELIGIOUS TRUSTS ACT (XIV OF 1920), S. 3, Cl. (2)—*Audit of accounts—Power of Court to direct.*

Under Cl. 2 to S. 3, the Court is enabled to direct the examination and audit of the accounts in whosoever's hands the funds or the properties of the trust may be, quite apart from whether he is a trustee or not. (*Agarwala and Varma, JJ.*) RAMSAROOP DAS *v.* RAMESHWAR DAS. **A.I.R. 1938 Pat. 280.**

CHILD MARRIAGE RESTRAINT ACT, (XIX OF 1929), S. 9—*'Complaint'—Meaning of—Anonymous petition forwarded by District Magistrate to Police Officer—Proceedings originated on letter from Police Officer—Legality.*

As the word 'complaint' is not defined in the Child Marriage Restraint Act, the definition of 'complaint' given in S. 4, Cr. P. Code, must be applied. Where an anonymous petition sent to a District Magistrate stating that an offence under S. 5 of the Child Marriage Restraint Act was going to take place, was forwarded by him to the Assistant Superintendent of Police who thereupon wrote a letter to the District Magistrate embodying his report, the letter is a 'Police report' and not a 'complaint'. Proceedings originating on such a letter are consequently bad by virtue of S. 9 of the Child Marriage Restraint Act. (*Baguley, J.*) JAGDEO PANDAY *v.* N. C. HILL. **1938 Rang.L.R. 150.**

CHIT FUND—Stakeholder taking mortgage security bond from successful bidders—Effect of—Trust—Insolvency of stakeholder and sale of his properties by Receiver—Suit by purchaser on security bonds—Maintainability. *See* TRUSTS ACT S. 59.

1938 M.W.N. 523.

CHOTA NAGPUR ENCUMBERED ESTATES ACT (VI OF 1876), S. 12 A—*Applicability—Execution sale—Sanction of Commisisoner—Necessity.*

A sale in execution of a decree is an alienation within the meaning of S. 12-A of the Chota Nagpur Encumbered Estates Act and an execution sale held without the sanction of the Commissioner is void. (*Wort and Agarwala, JJ.*) MAHADEO PRASAD *v.* BHAGWAT NARAIN. **1938 P.W.N. 400.**

CIVIL PROCEDURE CODE (V OF 1908), S. 2 (2)—*'Decree'—Order discharging defendants—Appealability.*

A lambardar brought a suit against certain persons for recovery of the amount of revenue paid by him to the Government and for a charge on the property in their hands. The Court found that there could be no charge on the property in the hands of some of them and therefore discharged them from the suit.

Held, that the order discharging the defendants from the suit was a final adjudication of the most important point of issue between the parties and therefore amounted to a decree within the meaning of S. 2 (2) and was appealable. (*Vivian Bose, J.*) CHETANLAL PURSHOTTAM *v.* G.S. GUPTA. **A.I.R. 1938 Nag. 233.**

———**S. 2 (11)**—*Legal representative—Mere intermeddling with estate—Sufficiency.*

Mere intermeddling with the estate of a deceased person would not give the intermeddler the status of a legal representative. (*Pollock, J.*) BALKISAN *v.* MST. JATNABAI. **1938 N.L.J. 168.**

——S. 11—*Applicability—Issues.*

Per *Bhide, J.*—S. 11, C. P. Code, applies not only to the final decision but also to issues. (I . . . *and Din Mohammad, JJ.*) MASJID . . . SHIROMANI GURDWARA PARBANDI . . . AMRITSAR. 40 P.L.R. 319 = A.I.R. 1938 Lah. 369 (F.B.).

——S. 11—*Applicability—Previous suit tried according to summary procedure then in force.*

Per *Bhide, J.*—Where the previous suit was tried according to the procedure then in force, the mere fact that the procedure then in force was of summary character is immaterial for the purposes of S. 11, C. P. Code. (*Young, C.J. Bhide and Din Mohammad, JJ.*) MASJID SHAHID GANJ *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR.

——S. 11 . . .
Rent suit . . .
fixed res . . .
Subsequent . . .
Res judicata.

If the matter in issue was directly and substantially in issue between the parties in the former suit and actually formed the basis of the decision in the former suit, the decision in the former suit would operate as *res judicata* in the subsequent suit. In a suit for produce rent for the area contained in two khatians instituted by certain landlords, the tenants defendants raised the plea that their holding included a further area of $1\frac{1}{2}$ acres of another plot settled with them and that they occupied a holding of 9 bighas at a cash rent of Rs. 42-14-0. The finding was in favour of the defendants and the suit for produce rent was dismissed. The landlords again instituted another suit for recovery of rent of the same two khatian numbers and the defendants again resisted the suit on the ground that their holding included a further area of $1\frac{1}{2}$ acres, and that the same had been settled with them at a total rent of Rs. 42-14-0.

Held, that the decision in the for . . . extent and area of the holding was . . . later suit. (*Courtney Terrell C.J. Mohammad Noor, James and Ma* . . .) JEONANDAN SINGH *v.* JANKI SINGH . . .
1938 P.W.N. 379 = 19 Pat.L.T. 325 (S.B.).

. . . the decree holder for attachment of that house in the hands of the legal representatives of the deceased judgment-debtor. (*Addison and Din Mohammad, JJ.*) GURPARSHAD DEWAT RAM *v.* KISHEN CHAND.

——S. 11—*Heard* . . .
suit—Person holding . . .
impleaded as puisne . . .
derogation of priority . . .
cating on priority—Subsequent suit on prior mortgage—If barred—Res judicata.

The appellant had a usufructuary mortgage dated 30—11—1910, and had also a simple mortgage dated 29—10—1919 over the same property. The respondents had obtained a simple mortgage over the same property on 12—5—1913 and in 1926 they brought an action on that mortgage impleading the appellant as a puisne mortgage, but no relief was claimed against the appellant in his capacity as a prior mortgagee under the mortgage of . . .

. . . and there was no adjudication about his claim as a prior mortgagee. The property was sold in execution and purchased by the respondents. Subsequently the appellant brought a suit on his usufructuary mortgage claiming possession of the property. He claimed that the respondents were liable to pay the amount due to him under the mortgage of 1910. The decree in the former suit was pleaded in bar of the appellant's claim on the ground of *res judicata*.

Held, that the claim was not barred on the principle of *res judicata*, and that in order to sustain the plea of . . .

. . . invoke the principle of *res judicata*. (*Wort and Varma, JJ.*) SHAIKH TAHIR HUSSAIN *v.* SYED BASIRUL HAQUE. 17 Pat. 180.

——S. 11—*Miscellaneous proceedings—Berar Patels and Patwaris Law—Proceedings in respect of appointment of patel—Finding not based on full and fair enquiry—Subsequent vacancy—Prior finding, if* res judicata.

Where in respect of the appointment of a Patel, in a previous proceeding, a finding against a system of rotation of the office is given without a full and proper enquiry and in ignorance of the amended law on the subject, it cannot operate as *res judicata*, when on a subsequent vacancy the question of rotation is once again raised. (*Roughton, F.C.*) SAKHARAM DATTAJI *v.* WAMAN RAMACHANDRA. 1938 N.L.J. 171.

——S. 11, Expl. IV—*Applicability—Execution proceedings—Omission to raise point decided in suit—Point* . . .

. . . the defendant does not raise the point in execution, it . . . med . . . d, it . . . the . . . 47, . . . tion . . . *ata*, . . . *Vort* . . . NAT NARAIN. 1938 P.W.N. 400.

——S. 11, Expl. IV—*Might and ought—Alternative claim—Prior suit on title for possession—Defendants pleading possession as heirs—Dismissal of suit—Later* . . .

. . . to a second suit, for joint possession with the defendants, as he ought to have asserted this right in the earlier suit in answer to the defendants' exclusive claim. Not having done so, he is barred from raising it afresh by Expl. IV to S. 11, C P. Code. (*Puranik, J.*) ABDUL MAJID KHAN *v.* ABDUL ALIM KHAN. 174 I.C. 777.

——S. 35-A—*Applicability—Revision.*

S. 35-A, C. P. Code, does not apply to "Revision". It looks as if the power conferred by that section is intend-

C. P. CODE (1908), S. 47.

ed to be confined to the original hearing of suits and proceedings. Consequently the High Court as a Court of revision has no power to award compensation in respect of the proceedings before it. (*Ameer Ali, J.*) M. S. COHEN *v.* SIRDAR SAHEB IQBAL SINGH.

42 C.W.N. 658.

——**S. 47**—*Scope of—Execution struck off, decree having been fully satisfied—Reopening—Permissibility.*

Where an execution case was struck off at the request of the decree-holder, as the decree was fully satisfied, and a subsequent application is made questioning the propriety of the satisfaction, on a question whether the executing Court can reopen execution proceedings after they were struck off,

Held, that the wording of S. 47, C. P. Code, was comprehensive enough to include a case where an objection is raised to the order regarding satisfaction of decree and striking off the execution proceedings. An application made after decree is satisfied is as much an application under S. 47 as it is when made, before it. (*Niyogi, J.*) KACHRU *v.* LAXMAN.

1938 N.L.J. 162.

——**S. 50**—*Legal representative—Alienee from legal representative—Liability to be proceeded against in execution.*

A mere alienee from a legal representative is not a legal representative for purposes of execution, though such alienee may have intermeddled with the property. The question of liability of property transferred to a stranger cannot be decided in execution. (*Horwill, J.*) THIAGARAJA IYER *v.* NARAYANASWAMI PILLAI.

47 L.W. 782=(1938) M.W.N. 518=(1938) 1 M.L.J. 867.

——**Ss. 51 (e) and 72**—*Execution of decree—Powers of Civil Court—Sale of land prohibited by S. 16 of the Bundelkhand Land Alienation Act—If could be leased.*

Where the lands of the judgment-debtor were prohibited from being sold by S. 16 of the Bundelkhand Land Alienation Act, on a question whether a Civil Court can in execution of a simple money decree, lease such property,

Held, that an executing Court is bound by the methods laid down in S. 51, C. P. Code and those methods were subject to conditions and limitations prescribed by the rules under the Code and by the Code. S. 51 does not authorise a Civil Court to grant lease. Sub-section (*e*) of S. 51 does not mean anything than a reference to the particular method of execution which a particular relief granted requires. S. 72 could not apply as it comes into operation only after an order for sale has been made and no notification has been made under S. 68. It applies only to property which could be sold in execution of a decree. (*Bennet, Iqbal Ahmad and Allsop, JJ.*) BHAGWATI SINGH *v.* KASHI NARAIN. **1938 A.W.R. (H.C.) 310=1938 A.L.J. 444=A.I.R. 1938 All. 290 (F.B.).**

——**S. 52**—*Decree against legal representative—Substitution of his legal representative on his death—Liability for decree—Test—Possession of assets.*

Where on the death of a legal representative against whom a decree has been passed to the extent of the assets of the deceased in his hands, his legal representative is added, he cannot escape the liability for the decree so long as the assets are in his hands. (*Stone, C.J. and Bose, J.*) JAGDISH *v.* PUNAMCHAND.

1938 N.L.J. 176.

——**S. 52**—*Scope—Property transferred by legal representative to stranger—Right of creditor to proceed against execution—Limits to.*

S. 52 (1), C. P. Code, gives a creditor a right to proceed against the property of the deceased in the hands

C. P. CODE (1908), S. 86.

of a legal representative and sub-S. (2) of that section gives the creditor the right to proceed personally against the legal representative if the latter cannot satisfy the Court that he has properly accounted for the property in his hands. It does not give the creditor a right to proceed against property which is no longer in the hands of the judgment-debtor. To proceed against such a transferee, the creditor must establish his equitable right to do so in a separate suit. It would not be competent to an executing Court to attach the property of a stranger on purely equitable considerations. But any interest which the legal representative has in such property, such as an equity of redemption can be attached by the creditor. (*Horwill, J.*) THIAGARAJA IYER *v.* NARAYANASWAMI PILLAI. **47 L.W. 782=(1938) M.W.N. 518=(1938) 1 M.L.J. 867.**

——**S. 60**—*Partial redemption—Property owned jointly by two tarwards—Separate mortgage by each of undivided share to same mortgagee—Suit for redemption by one tarwad alone without claiming partition—Maintainability.*

A Malabar tarwad became divided into two tarwads. Each of them possessed an undivided moiety in certain properties and each of them separately mortgaged its undivided half to the same person. One of the tarwads sought to redeem its half share without suing for partition.

Held, that it was not open to the mortgagee to resist redemption and the plaintiff tarwad was entitled to redemption of the undivided half mortgaged by it. (*Pandrang Row and Venkataramana Rao, JJ.*) KAMMARAN NAMBIAR *v.* KOMAN. **47 L.W. 686=(1938) M.W.N. 78.**

——**S. 60 (1) proviso, cl. (c)**—*Property exempt from attachment in hands of judgment-debtor—If also immnue from attachment in hands of his legal representatives.*

Under cl. (*c*) of the proviso to sub-S. (1) of S. 60, C.P. Code, exemption attaches to the property itself and not to the person holding the property for the time being. Consequently if a property is exempt from attachment under the said clause in the hands of the judgment-debtor, it is also immune from attachment in the hands of his legal representatives, although they are not agriculturists. (*Addison and Din Mohammad, JJ.*) GURPARSHAD DEWAT RAM *v.* KISHEN CHAND.

40 P.L.R. 409.

——**S. 72**—Applicability—Land prohibited from sale by S. 16 of Bundelkhand Land Alienation Act. *See* C. P. C., Ss. 51 (*e*), & 72. **1938 A.L.J. 444 (F.B.).**

——**Ss. 86 and 87**—*Scope of—Suit in reality though not in form against sovereign prince—Absence of certificate—Effect—Waiver, if possible.*

Ss. 86 and 87, C. P. Code, relate to an important matter of public policy in India and the express provisions contained therein are imperative and must be observed. Where a suit was brought against the Gaekwar Baroda State Railway through the Manager and Engineer in Chief'—and the plaintiff admitted that it was owned and managed by His Highness the Gaekwar and where no certificate under S. 86, C. P. Code, was obtained and the suit was decreed on the ground that the Railway was a corporation capable of being sued, it was held that there was no evidence on record to support the contention that the Railway was a corporation and that it was directly contrary to the admission of the plaintiff. It was further held that the suit was in reality though not in form, a suit against His Highness the Gaekwar and if the Judgment of the High Court was allowed to stand it might have far reaching results and might have the effect of nullifying

C. P. CODE (1908), S. 92.

the provisions of Ss. 86 and 87 of the C. P. Code. The fact that the Railway was allowed [illegible] suit on the merits could not amount to [illegible] privilege as the provisions of Ss. 86 and [illegible] are imperative, and having regard to [illegible] which they serve, they could not be wa[illegible]

[illegible]

42 C.W.N. 705=1938 O.L.R. 218=47 L.W. 753= 1938 A.W.R. (P.C.) 123= A.I.R. 1938 P.C. 165 (P.C.).

——S. 92—*Removal of mutawalli—Discretion of* [illegible]

[illegible]

acquitted only on a technical ground. He had disobeyed [illegible]

[illegible]

specified by the donor and yet the charities had not received their dues under the trust deed for many years [illegible]

[illegible]

Held, that the mutawalli had shown by his conduct to be entirely unfit to administer wakf and should be removed. The discretion of lower Court not being influenced by sound reasoning or exercised judicially, could be interfered with by the High Court. (*Mosely and Dunkley, JJ.*) U MYE DIN *v.* U MYA.

A.I.R. 1938 Rang. 166.

——S. 100—*Finding of fact—Question whether execution of document is genuine.*

It is true that a document is said to be executed only if it is proved to have been consciously signed or thumb-marked after the alleged executant had become aware of its contents and that the mere presence of a signature or a thumb-mark on a document may not in certain cases in itself amount to a proof of its execution. But [illegible]

[illegible]

conclusions that execution of document is genuine, his decision cannot be interfered with in second appeal. (*Addison and Din Mohammad, JJ.*) HUKAM CHAND *v.* RAMJI DAS. A.I.R. 1938 Lah. 357.

——S. 110—*Affirming decree—Variation of decree in favour of applicant—Right of appeal.*

Where the High Court on appeal enhances the amount decreed by the trial Court to the applicant for leave to appeal, the variation of the trial Court's decree is no doubt all in favour of the applicant, and he cannot have any appealable grievance against such variation, but nonetheless, the decree of the High Court is not one of affirmance. The applicant is, therefore, entitled to appeal to the Privy Council as of right with [illegible] law is [illegible] M RAI [illegible] R 329.

——S. 110—*Affirming judgment—Leave—Grounds.*

Even if the decree of the High Court affirms the decree of the Subordinate Judge, where the appeal involves substantial questions of law and the value of the subject-matter of the suit and of the appeal is above [illegible]

1938 A.L.J. 488=42 C.W.N. 705= 1938 O.L.R. 218=1938 A.W.R. (P.C.) 123= 47 L.W. 753=A.I.R. 1938 P.C. 165 (P.C.).

C. P. CODE (1908), S. 149.

——S. 115—*Error of law.*

A revision petition is incompetent if the question involved is one of law and not of jurisdiction. (*Addison and Abdul Rashid, JJ.*) MAHABIR SINGH *v.* JAGAT SINGH. 40 P.L.R. 461.

[illegible] ourt has committed an [illegible] presumptions and in [illegible] would not afford any [illegible] *Din Mohammad, JJ.*) HUKAM CHAND *v.* RAMJI DAS.

A.I.R. 1938 Lah. 357.

——S. 116—Interlocutory order—Order refusing commission to examine witness under O. 26, R. 5—Interference. *See* C. P. CODE, O. 26, RR. 4 AND 5.

(1938) 1 M.L.J. 769.

——S. 135 (2)—*Scope and object of—Reasonable time—Wide interpretation of section if justified.*

[illegible] 135 (2) of C. P. Code [illegible] under civil process is [illegible] a party, witness, etc., in going to or attending or in returning from the tribunal mentioned in the clause. As to what is a reasonable time, it is a question of fact and must depend on the circumstances of each case. S. 135 has been enacted in public interest with a view to ensure smooth and speedy administration of justice and so cannot be given a wide interpretation to help a judgment debtor who has deliberately managed to avoid execution of the decree. (*Iqbal Ahmad and Harries, JJ.*) ACHUTA NAND *v.* MAHABIR PRASAD. 1938 A.W.R. (H.C.) 317= 1938 A.L.J. 500.

——S. 144—*Restitution—Right to apply—Preliminary mortgage decree—Amendment—Revision—Final decree during pendency of—Possession obtained—Amendment set aside—Application under S. 144, C.* [illegible]

[illegible] eferred against the [illegible] in a suit for fore[illegible] inal decree in terms of the amended preliminary decree is passed and possession obtained in execution thereof, and subsequently the revision is allowed and the amendment set aside, it is competent to the judgment-debtor to apply under S. 144, C. P. Code, for restitution. (*Collister and Bajpai, JJ.*) GOBIND BEHARI *v.* SHUJAAT-MAND KHAN.

1938 A.L.J. 477=1938 A.W.R. (H.C.) 304.

——S. 149—*Discretion of Court—Exercise of—Principles.*

The discretion conferred on the Court by S. 149, C.P.Code, is normally expected to be exercised in favour of the litigant except in cases of contumacy or positive *mala fides* or reasons of a similar kind. The question of *bona fides* in this connection should be construed in the sense that the word is used in the General Causes Act and not as used in the Limitation Act. A thing should be presumed to be done *bona fide*, if it is done honestly whether it is done negligently or not for the purposes of judging whether the discretion under S. 149 should or should not be exercised in favour of the litigant. (*Dalip Singh, Monroe and Din* [illegible] GAT RAM

v. KHARAITI RAM. 40 P.L.R. 413 = A.I.R. 1938 Lah. 361 (F.B.).

——S. 151—*Stay of suit—Court in United Provinces—If can issue stay order to a Court in another province.*

A Court in the United Provinces is not competent under S. 151, C. P. Code, to issue a stay order to a Court in another province. (*Collister and Bajpai, JJ.*) DARBAR PATIALA *v* NARAIN DAS GULAB SINGH.

1938 A.L.J. 481 = 1938 A.W.R. (H.C.) 313.

——O. 1, R. 3—*Joinder of defendants—Suit for damages for breach of contract against one defendant and for damages in tort against another.*

A decree for damages for breach of contract against one defendant and a decree for damages in tort against another defendant in respect of damages arising out of the same transaction can be passed in the same action. Defendants against whom damage is claimed on these two causes of action can be joined in the same suit. O. 1, R. 3 covers such a case and there is no misjoinder of defendants. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) P. B. BOSE *v.* M. R. N. CHETTIAR FIRM.

A.I.R. 1938 Rang. 185 (S.B.).

——O. 6, R. 17—*Powers of Court—Amendment of plaint in appeal—Propriety.*

An amendment of the plaint may be allowed even at the appellate stage. It is for the Court to consider whether the amendment should be allowed under the circumstances of the case; and if it comes to the conclusion that the amendment sought does not alter the substance or nature of the suit, but merely its form, the Court cannot be said to act erroneously if it allows the amendment even in appeal. (*Wort, J.*) MATHURA SAO *v.* RAM LAL JUGAL KISHORE.

1938 P.W.N. 398.

——O. 7, R. 14 (2)—List filed under—Right to inspect—Limits. *See* C. P. CODE, O. 11, RR 15 AND 18. A.I.R. 1938 Nag. 239.

——O. 11, Rr. 15 and 18—*Application under—When to be made—Right of inspection—Limits.*

Whether a party proceeds under O. 11, R. 15 or under O. 11, R. 18 (2) he must act promptly, and delay in itself may be a good ground for refusing to grant time for the filing of the written statement until after the inspection has been made. Where the documents of which inspection is sought have not been referred to in the pleadings or affidavits of the plaintiff and appear only in the list filed under O. 7, R. 14 (2) the defendant, unless he proceeds under O. 11, R. 18 (2), cannot insist that he has a right to inspect these documents before he can be called upon to file his written statement. (*Vivian Bose, J.*) NAGPUR GLASS WORKS CO., LTD. *v.* ONAMA GLASS WORKS CO.

A. I. R. 1938 Nag. 239.

——O. 17, R. 1—*Power of Court under—Costs of adjournment—Costs of the day or whole costs incurred up to date—Proper order.*

O. 17, R. 1, C. P. Code, gives the Court power to make an order as to costs only in respect of the costs occasioned by the adjournment and nor the costs of the suit generally. The rule does not entitle the Court to demand payment of the entire costs of the suit incurred up to the date on which the adjournment is asked for. What can be allowed is only the costs of the day including a reasonable fee to the legal practitioner engaged by the opposite party, which in a Subordinate Judge's Court is Rs. 20. (*Pandrang Row, J.*) S.A. RAMANATHAN CHETTIAR *v.* S.N. ALAGAPPA CHETTIAR.

47 L.W. 780 = (1938) M.W.N 502 = (1938) 1 M.L.J. 793.

——O. 18, R. 18—*Observations of Judge made as result of local inspection—Value of.*

Observations by a Judge in the course of his local inspection cannot be substituted for the evidence of witnesses examined on the subject. It is obvious that in the case of a Judge's observations, the parties never get a chance of either cross-examining him on the various points raised or setting right his views if they are found to be erroneous. (*Varma, J.*) HARI PRASAD SAHU *v.* ROPNA KHARIA. A.I.R. 1938 Pat. 288.

——O 21, R. 2—*Adjustment—Contract that judgment-debtor will do something in future.*

A promise to do something in future is legal consideration, and if the decree-holder chooses to accept such a promise by the judgment-debtor there is nothing in law to prevent him from doing so, and such a promise by the judgment-debtor and acceptance thereof by the decree-holder is a legal adjustment of the decree. Thus if *A* holds a decree against *B* and *B* offers to transfer certain property to *A*, and *A* accepts that promise to transfer in whole or part satisfaction of his decree, that is a binding contract which constitutes an adjustment of the decree in whole or in part and can be pleaded by *B* in bar of execution. But if *A*, as is usually the case, agrees to accept the transfer of the property in whole or part satisfaction of his decree, at that stage there is no concluded agreement between the parties, but *A* has really made a counter-offer which can be accepted by *B* only by performance, *i.e.*, by the actual transfer of the property. In this latter case there is no adjustment until the property has been actually transferred. (*Roberts, C.J., Dunkley and Braund, JJ.*) ARUNACHALAM CHETTYAR *v.* V.M.R.P. FIRM.

A.I.R. 1938 Rang. 202 (F.B.).

——O. 21, R. 16—*Applicability — Preliminary decree for mesne profits—Application for ascertainment—Assignment pending inquiry—Assignee brought on record and final decree passed—Application for execution—If falls under O. 21, R. 16.*

O. 21, R. 16, C. P. Code. is primarily intended for those cases where the name of the applicant for execution of the decree does not appear as a decree-holder in the decree but in which he bases his claim to execute on the ground that he is an assignee or transferee of one or more decree holders. Where a preliminary decree for mesne profits is assigned pending an inquiry into the mesne profits, and the assignee is substituted and gets a final decree passed, an application by him to execute that final decree is not governed by O. 21, R. 16 or the provisos thereto. (*Fazl Ali and Agarwala, JJ.*) NAND KISHORE LALL *v.* CHANDRIKA PRASAD SINGH. 17 Pat. 206.

——O. 21, R. 16—*Second proviso—Applicability—Conditions—Decree for mesne profits—If money decree before ascertainment of amount.*

Before the second proviso to O. 21, R. 16, C.P. Code, can apply, it must be shown that that the decree transferred, is a money decree and that the transfer took place after the decree sought to be executed was passed.

Quære, whether a decree for mesne profits, before the amount is ascertained, can be regarded as a money decree. (*Fazl Ali and Agarwala, JJ.*) NAND KISHORE LALL *v.* CHANDRIKA PRASAD SINGH.

17 Pat. 206.

——O. 21. R. 35 (2)—*Joint undivided property—Mode of delivery of possession.*

Where the property covered by the decree is joint undivided property, the proper mode of delivery of possession in execution proceedings is in the manner provided by O. 21, R. 35 (2), C. P Code. (*Guha and Mitter, JJ.*) DWARIKA NATH MONDAL *v.* RAM NATH BARMAN 67 C.L.J. 39.

C. P. CODE (1908), O. 21, R. 57.

——O. 21, R. 57—*Execution application consigned to record room at request of* ... *tion of attachment.*

Where at the request of the ... cuting Court consigned his application for execution to the record room but maintained the attachment,

Held, that the application for execution was dismissed by the executing Court, that the attachment terminated with the dismissal of the application and that it was not possible to revive that application. (*Abdul Rashid, J.*) NANU MAL *v.* AMAR NATH.

40 P.L.R. 473.

——O. 21, R. 63—*Frame of suit—Mere declaration—If sufficient—Prayer for consequential relief—Necessity—Specific Relief Act, S. 42, Proviso.*

A plaintiff suing under O 21, R. 63, C. P. Code, is only required to obtain a declaration of his rights or title in so far as it is affected by the order which he seeks to impeach. He is not bound to ask for a consequential relief. The proviso to S. 42 ... Relief Act does not operate to take w... against whom an adverse order is ... petition the special right conferred by ... sue for a declaration. (*Leach, C.J., and Lakshmana Rao, J.*) NARAYANA SINGH *v.* BATCHA SAHEB.

47 L.W. 724=(1938) M.W.N. 514=(1938) 1 M.L.J. 803.

...

ing the transfer to allege either that the transfer was a sham transaction executed without consideration and not intended to take effect or that it was a transaction executed for a consideration and intended to take effect, but made with a view to defraud the creditors of the transferor by removing the property out of their reach. (*Pollock, J.*) MOTILAL *v.* KASHIBAI.

174 I.C. 398=A.I.R. 1938 Nag. 249

——O. 21, R. 66—*Duty of Court under—Settlement of sale proclamation—Procedure.*

The oblig... rests on the ... see that all ... are given pr... know exac... desirable th... The Court v... and convenient lots after notice to the parties and settle the sale proclamation with proper upset prices and have the properties sold. (*Venkataramana Rao and Stodart, JJ.*) RANGASWAMI AYYANGAR *v.* MARUDANAYAGAM PILLAI.

47 L.W. 773=(1938) M.W.N. 524.

——O. 21, R. 66 (2)—*Specification of particulars—* ...

C. P. CODE (1908), O. 22, R. 10.

Where a decree holder was given leave to bid on ... for any amount less than ... matter of fact bids for a ... bid is accepted, the sale cannot be allowed to stand. To do so would be to deprive R. 72 (1) of its value. The conditions cannot be disregarded. (*Roughton, F. C.*) MST. SAWANABAI *v.* KRISHNAJI.

1938 N.L.J. 180.

——O. 21, R. 89—*Right to make deposit under.*

Although O 21, R. 89 speaks of any person, either owning such property or holding an interest therein by virtue of a title acquired by such sale, it does not confer the right to make a deposit on a person who had purchased the property so far back from the date of the sale and the execution proceedings that his interest was not affected by the sale. (*Dhavle, J.*) RAMANAND LAL *v.* BARHAMDUTT MISSIR. A.I.R. 1938 Pat 233.

——O 21, R. 90—*Material irregularity—Absence of notice under O. 21, R. 22—Effect on sale.*

... no objection as ... en in the first ... execution pro... 21, R. 66. The objection was taken for the first time in the course of argument in the Appellate Court.

Held, that the absence of notice was not fatal and did not invalidate the sale. (*Wort J.*) SUNDER RAM ...

...

are grossly low, and the prices fetched at the sale for the lots are far below their actual market-value and the judgment-debtor suffers substantial injury by reason of such gross under-valuation, the sale can properly be set aside. (*Venkataramana Rao and Stodart, JJ.*) RANGASWAMI AYYANGAR *v.* MARUDANAYAGAM PILLAI.

47 L.W. 773=(1938) M.W.N. 524.

... (Calcutta High ... *sale proclamation* ...

... *rjea, J.*—O. 21, R. 90, proviso (*ii*), C. P. ... plicable if the particular defect in the sale ... that is complained of is no part of the ... Court in drawing up the sale proclamation ... a place in the sale proclamation that is ... d despite the direction of the Court to the ... (*Derbyshire, C.J. and Mukherjea, J.*) KANGAL CHANDRA MONDAL *v.* BEJOY CHAND MAHTAB.

42 C.W.N. 661.

——O. 21, R. 103—*Scope—Suit under—Enquiry—If limited to possession on date of adverse order—Duty of plaintiff.*

It is not correct to hold that in a suit under O. 21, R 103, C. P Code, the Court has merely to ascertain ...

C. P. CODE (1908), O. 23, R. 3.

the parties to come on record and to continue or defend appeal.

Suit in O. 22, R. 10, C. P. Code, means also an appeal and a second appeal, and a second appeal may be continued by or against a person who has acquired the interest of one of the parties to the appeal in the subject-matter of the suit, though the original parties to the appeal have compromised the matter, when the party seeking to come on record has a substantial interest which is in danger of being injured by the proposed compromise. (*Stodart, J.*) ALAGAR RAJA *v.* NARAYANA RAJA. **47 L.W. 728=(1938) M.W.N. 516=(1938) 1 M.L.J. 882.**

——**O. 23, R. 3**—*Adjustment—Agreement to abide by statement of plaintiff—Statement by plaintiff—Effect of.*

Where a defendant offers to bind himself by the statement of the plaintiff and the plaintiff makes the statement, it follows that the Court is entitled to decree the claim against the defendant, as the only condition laid down by him has been fulfilled. The statement of the plaintiff has to be accepted as an adjustment of the claim and a decree passed accordingly. (*Ismail, J.*) NARAIN DAS *v.* GHAZI RAM GOJAR MAL. **1938 A.L.J. 449=1938 A.W.R. (H.C.) 294.**

——**O. 26, Rr. 4 and 5**—*Duty of Court—Witnesses resident in Bangalore in Mysore State—Application for commission to examine—Refusal—Propriety—Revision—Interference.*

An application for the issue of a commission to examine the applicant's witnesses residing in Bangalore in the Native State of Mysore falls within the ambit of R. 5 of O. 26, C. P. Code. O. 26, R. 4 has no application to such a case. If the Court thinks that the evidence of those witnesses is necessary, it has no further discretion in the matter, it must order the commission to issue, as a matter of course. If the Court in such a case refuses to issue a commission, the High Court would, under S. 115, C. P. Code, interfere with the order in revision. (*Abdur Rahman, J.*) M. J. SHETH & CO. *v.* RAMIZA BIBI. **47 L.W. 656=(1938) 1 M.L.J. 769.**

——**O. 30**—*Applicability—Joint Hindu family firm.*

There is no rule of law which lays down that a suit brought in the name of a joint Hindu family business should be brought in the name of the firm. O. 30, C. P. Code, does not apply to a joint Hindu family firm as the rights and liabilities of such a firm are not exclusively ... ted by the Contract Act. Such a firm must sue ... be sued in the name of its members. (*Tek Chand, J.*) DEBI SAHAI *v.* GILLU MALL. **40 P.L.R. 456.**

——**O. 30, R. 1**—*Applicability to business of joint Hindu family.*

O. 30 does not apply to the business of a joint Hindu family. In the plaint in a suit the plaintiffs were described as "firm *K* through *B*".

Held, that this was nothing more than *B* bringing an action on behalf of *K*. In the circumstances it was not a case in which a joint Hindu family sued in the firm's name. (*Wort and Manohar Lall, JJ.*) LAKHAN SAO *v.* KANI RAM. **A.I.R. 1938 Pat. 270.**

——**O. 32, R. 3**—*Guardian* ad litem—*Absence of formal order appointing him—Validity of proceedings.*

Where a person acts as the *de facto* guardian *ad litem* of a minor defendant, the mere absence of an order formally appointing him as guardian *ad litem* is not fatal to the validity of the proceedings. (*Tek Chand and Abdul Rashid, JJ.*) KARAM CHAND *v.* NARINJAN SINGH. **40 P.L.R. 403.**

——**O. 32, R. 7**—*Compromise decree against minor—R. 7 not complied with—Suit for declaration by minor—Form of decree.*

C.P. CODE (1908), O. 34, R. 1.

In a suit by the plaintiff on attaining majority for a declaration that a compromise decree passed against him is not binding on him on the ground that the provisions of O. 32, R. 7, C. P. Code, had not been complied with, the granting of a declaration *simpliciter* is incomplete. It should further be ordered that the proceedings in the original suit be revived from the stage at which they were when the irregularity above-mentioned was committed. (*Tek Chand and Abdul Rashid, JJ.*) KARAM CHAND *v.* NARINJAN SINGH. **40 P.L.R. 403.**

——**O. 32, R. 7**—*Compromise decree against minor—Sanction not expressly recorded—Compromise signed by minor—Decree, if binding.*

Where no application for sanction to enter into a compromise was filed by the guardian *ad litem* of a minor defendant and there was no order expressly recorded by the Court granting such sanction and there is nothing to indicate that when the terms of the compromise were placed before the Court and accepted by it, it applied its mind to the question that the compromise was for the benefit of the minor, the provisions of O. 32, R. 7, C. P. Code, are not complied with and the compromise and the decree passed thereon are not binding on the minor. The fact that the minor himself has signed the statement embodying the terms of the compromise is of no avail. (*Tek Chand and Abdul Rashid, JJ.*) KARAM CHAND *v.* NARINJAN SINGH. **40 P.L.R. 403.**

——**O. 32, R. 7 (1) and Madras R. 7 (1-A)**—*Scope and effect—Decree in favour of Hindu minor—Transfer by guardian—Sanction of Court—Necessity.*

Leave of the Court is not necessary under R. 7 of O. 32, C. P. Code, before a decree passed in favour of a Hindu minor plaintiff can be assigned or transferred by his guardian. O. 32, R. 7 does not affect the rights of a natural guardian or a legal guardian who also happens to be the next friend in the matter of dealing with a decree as part of the property belonging to the minor. The scope of R. 7 has not been extended by R. 7 (1-A) added by the Madras High Court. Though the minor may challenge the validity of the transfer made by the guardian, that cannot make the judgment debtor who has paid to the assignee-decree-holder liable to pay the amount again. Payment made in accordance with the Court's order would protect him. (*Leach, C.J., Varadachariar and Lakshmana Rao, JJ.*) VENKATAKRISHNAYYA *v.* CHINA KANAKAYYA. **(1938) M.W.N. 537=47 L.W. 696=(1938) 1 M.L.J. 775 (F.B.).**

——**O. 33**—*Applicability—Application for probate or letters of administration in* forma pauperis*—Competency—Power of Court to exempt from payment of fees under S. 19-I, Court-Fees Act—Procedure.*

An application for the grant of probate or letters of administration, which is clearly a proceeding in a Court of civil jurisdiction, is subject to the provisions of O. 33, C. P. Code, and the rules of that order are therefore applicable to such an application. The mandatory language of S. 19-I of the Court-Fees Act is subject to the provisions of O. 33, C. P. Code. The Court has power to order letters of administration or probate to issue in *forma pauperis* making the fees payable to Government under S. 19-I, Court-Fees Act and any other court-fees payable as a first charge upon the subject-matter of the grant pursuant to O. 33, R. 10, C. P. Code. (*Gentle, J.*) PALANI GRAMANI *v.* MANICKAMMAL. **47 L.W. 731=A.I.R. 1938 Mad. 486.**

——**O. 34, R. 1**—*Non-joinder—Omission to implead purchaser of part of equity of redemption—Purchaser at execution sale—Rights of.*

If the ownership of the equity of redemption is completely represented in the mortgage suit, the purchaser

C. P. CODE (1908), O. 34, R. 6.

at the mortgage sale acquires the entire equity of redemption together with the lien of the mortgagee which he may use, if necessary, for his protection. If however the equity of redemption is wholly unrepresented in the action, the *purchaser at the mortgage sale* acquires nothing. He does not get the equity of redemption which [illegible] mortgaged property. [illegible] not transferred to hi[illegible] to satisfy his debt, [illegible] the mortgaged prop[illegible] if, in fact, he sells nothing and the sale is liable to be set aside, because the mortgagor had no property to sell, the mortgagor's lien cannot pass to the purchaser. In [illegible] it remains in the mortgagee. But where [illegible] can use it for his own protection [illegible] not compel a purchaser of a part of the equity of redemption who has not been impleaded in the mortgage suit to redeem him, after the right to enforce the mortgage has become barred by limitation. (*S.K. Ghose and Nasim Ali, JJ.*) DHAPUBAI *v.* CHANDRA NATH CHAKRABARTY. 42 C.W.N. 721.

———O. 34, R. 6—*Right to personal decree—Conditions—Properties directed to be sold ceasing to be available—Application for final decree without sale of properties—Competency.*

Upon a true reading of R. 6 of O. 34, C. P. Code, the conditions under which a personal decree against the mortgagor may be asked are equally satisfied if the properties directed by the mortgage decree to be sold are no long[illegible] to go[illegible] they ha[illegible] apply[illegible] Chatter[illegible]

———O. 40, R. 1—*Partition suit—Receiver—Appointment of—Justification.*

In a suit by a minor for partition [illegible] perties, it was found that he was enti[illegible] in the properties, that the quar[illegible] and the conduct of the defendant [illegible] for the plaintiff to get his fair share [illegible] it also appeared that so long as the [illegible] with the defendant the plaintiff wc[illegible] secure his fair share of the income. The lower Court appointed a receiver to harvest the crops.

Held, that the circumstances of the case justified the appointment of a receiver. (*Horwill, J.*) SARAVANA MUDALIAR *v.* SINGARAVELU MUDALIAR.

(1938) M.W.N. 515=(1938) 1 M.L.J. 863.

———O. 40, Rr. 1, 4—*Applicability—Accounts by third party during Receiver's administration.*

Neither R. 1 nor R. 4 of O. 40 has any application to accounts from a third party relating to the period of a receiver's administration and the non-rendition of accounts by third party during that period is not appealable under any of these provisions of law. (*Addison and Din Mohammad, JJ.*) SHANKAR DAS *v.* OFFICIAL RECEIVER. A.I.R. 1938 Lah. 328.

———O. 41, R. 1—*Scope—Provisions, if mandatory—Copy of decree not attached—Effect—Attaching of judgment, if optional.*

The provisions of O. 41, R. 1 are mandatory and an omission to attach a copy of decree is fatal to the appeal. As regards judgment it is for the Court to decide whether a copy of judgment may be dispensed with or not and the matter is not optional with the

C. P. CODE (1908), O. 41, R. 27.

litigant and if the Court does not dispense with it and if a copy of judgment is not filed, the appeal is incompetent. (*Vivian Bose, J.*) CHETANLAL PURSHOTTAM *v.* G.S. GUPTA. A.I.R. 1938 Nag. 233.

———O. 41, R. 20—*"Person interested in result of appeal"—Person against whom appeal is barred by time.*

Where an appeal against a person has become barred [illegible] time he ceases to be "a person who is interested in [illegible] result of the appeal" within the meaning of O. 41, [illegible] 20 and his name cannot be subsequently added as a [illegible]pondent under O. 41, R. 20. (*Young, C.J. and Monroe, J.*) RAMESHWAR DAS *v.* OFFICIAL RECEIVER, DELHI. A.I.R. 1938 Lah. 325.

———O. 41, R. 27—*Document held inadmissible for want of proper registration—Re-registration after deci-* [illegible] [illegible]eld to be [illegible] had not [illegible] after the decision of the appeal re registered under the provisions of S. 23-A of the Registration Act, and the defect on the basis of which it had been held to be inadmissible was removed, the re-registered document can be admitted in evidence on second appeal. (*Din Mohammad, J.*) ISHAR SINGH *v.* HARNAM SINGH. 40 P.L.R. 432.

———O. 41, R. 27 (b)—*Powers of Court—Additional evidence—When to be admitted.*

Where the appellate Court thinks that additional evidence is necessary to establish a fact necessary for the decision of the appeal, it is justified in taking such additional evidence as it considers fit. (*Ismail, J.*) NARAIN DAS *v.* GHAZI RAM GOJAR MAL.

1938 A.L.J. 449=1938 A.W.R. (H.C.) 294.

[illegible] entitled to produce it, although the Court may in its discretion in certain circumstances allow it to be admitted. Certain douments filed in a former case between one of [illegible] to accept them then and dismissed the suit. The Appellate Court refused to admit the documents as being additional evidence, under O. 41, R. 27 (1) In second appeal the plaintiff prayed for being allowed to produce the evidence.

Held, that the reference made by the Court and the parties to the documents in the absence of their copies on record was certainly irregular The documents were all along before the Court and used by it, and if it could be properly said, they were evidence *de facto* in the trial, though not evidence *de jure*. The documents that were so dealt with could therefore hardly be said to be "new evidence" The irregular reference to them in the trial caused substantial error or defect in the procedure of the Court which might have caused error in the decision of the trial Court. The point as to irregular procedure resulting in such error could therefore be raised in the second appeal under S. 100 (1) (c) and the documents could therefore be allowed to be produced in second appeal, as the refusal to allow them to be filed would simply perpetuate the substantial error or defect. (*Baguley, J.*) MA THET SU *v.* MA KYI DAN.

A.I.R. 1938 Rang.

———**O. 41, R. 33**—*Scope of—Decree in favour of non-appealing plaintiff and against non-appearing defendant—Powers of Court.*

Where in an appeal by certain defendants, the plaintiff and one of the defendants were made respondents and the defendant-respondent did not appear, the appellate Court passed a decree in favour of the respondent plaintiff and against the respondent defendant, it was held that under O. 41, R. 33 the Court had ample powers to pass such orders. (*Varma, J.*) ETWARI MAHTO *v.* GANGA MAHTO. **174 I.C. 452=4 B.R. 449.**

———**O. 43, R. 1 (m)**—*Time for appeal—Compromise—Minor party—Court refusing consent—Appeal, if to be preferred at once.*

Where there has been a compromise in which a minor is concerned, if the Court refuses its consent to such a compromise, it should be appealed against at once without waiting for final orders, as by that time the remedy under O. 43, R. 1 (*m*) would become time-barred. (*Darling, S.M. and Bomford, J.M.*) JAGDEO *v.* KHEDU SINGH. **1938 R.D. 477.**

COMPANIES ACT (VII OF 1913), S. 76 (1)—*Construction—Meeting called for particular date in one year but adjourned to next year—If separate meetings for two years—Requirements of section—If complied with.*

S. 76 (1) of the Companies Act demands that there shall be a general meeting held once at least in every year, *i.e.*, one separate and distinct meeting every year It does not mean that the same meeting can go on for several years being held once in each year. Where a meeting called and held on a day in one year is adjourned to a date in the next year and held on that date, the meeting held on the latter date, is not a different meeting from that which began on the former date; it is the same meeting and does not satisfy the requirements of S. 76. (*Burn, J.*) SREE MEENAKSHI MILLS CO., LTD. *v.* ASST. REGISTRAR OF JOINT STOCK COMPANIES, MADURA. **47 L.W. 635=(1938) 1 M.L.J 856.**

———**S. 91 B**—*Transaction entered into by interested director—Voidability.*

Where a director of a company has an interest as shareholder in another company or is in a fiduciary position towards and owes a duty to another company, which is proposing to enter into a transaction with the company of which he is the director, he comes within the rule laid down in S. 91-B and the transaction is voidable at the instance of the company with whom it is entered into. He has a personal interest in the matter and owes a duty which conflicts with his duty to the company of which he is the director. It is immaterial whether the conflicting interest belongs to him beneficially or as a trustee for others. S. 91-B would not however deprive of the benefit of his contract with the company a third party who had no notice of the defect in the director's authority. Such a person would be entitled to assume that the internal management of the company is properly conducted. But if the third party is shown to have knowledge of the real state of affairs, the transaction is voidable as against him. *S* company which had been financing *P* company through one *M T* company for seven years decided to have the property of *P* company as security for debt owed really by *M T* company and obtained an equitable mortgage over *P's* property by two indentures. The *M T* company which was putting up *P's* property as security, held almost all the shares in *P* company and the directors of *P* company had for years been directors of *M T* company and these facts were known to directors of the *S* company in course of their business. Winding up proceedings having been started in respect of *P* company, *S* company claimed to

be a secured creditor of *P*, by virtue of the equitable mortgage executed in its favour. The Official Liquidator disputed the claim :

Held, that the Official Liquidator was entitled to avoid the equitable mortgage on which *S* company based its claim. (1914) 2 Ch. 488, Rel. on. (*Sir George Rankin.*) T. R. PRATT (BOM.), LTD. *v.* M. T., LTD. **42 C.W.N. 733=174 I.C. 545=1938 O.L.R. 223=A.I.R. 1938 P.C. 159 (P.C.).**

———**S. 153**—*Depositors who have obtained decrees—If form separate class from ordinary depositors.*

Per *B. K. Mukherjea, J.*—Depositors with a loan company who have already obtained decrees for their amounts against the company form a separate class from the ordinary depositors and it is necessary, that there should be a separate meeting of such creditors before a scheme binding on them should be sanctioned by the Court. If the absence of any such separate meeting is brought to the notice of the Court which is invited to sanction the scheme binding on all the creditors, it should refuse to sanction it, or the parties affected might apply for a modification of the scheme by expunging the clause which made the scheme binding on that class of creditors who had no opportunity of having a meeting of their own. (*Derbyshire, C.J. and B.K. Mukherjea, J.*) KRISHNA NATH SEN *v.* DINAJPUR LOAN OFFICE, LTD. **A.I.R. 1938 Cal. 337.**

———**S. 153**—*Scheme sanctioned by Court—Executing Court, if can go behind.*

A scheme of arrangement which is sanctioned by the Court under S. 153 has the force of a judicial pronouncement. Where in execution of a decree obtained against a loan company by one of its depositors, the sanctioned scheme is set up as a bar by the company, the executing Court cannot go behind the sanction unless it is shown that the order giving the sanction was without jurisdiction. When the matter comes before the executing Court, it is not open to the decree-holder to urge against the sanctioned scheme that there was any defect in the procedure or that there was no meeting of the particular class of creditors to which he belongs. Such defects, if any, do not take away the foundation of the authority of the Court in granting sanction under S. 153 and they are at the most irregularities and do not render the sanctioned scheme a nullity in the eye of the law. The order of the High Court unless set aside or modified is binding on the decree-holder and on person who seeks to execute his decree and is one which the executing Court has to obey. (*Derbyshire, C.J. and B. K. Mukherjea, J.*) KRISHNA NATH SEN *v.* DINAJPUR LOAN OFFICE, LTD. **A.I.R. 1938 Cal. 337.**

———**Sch. 1, Table A, Art. 73**—*Construction.*

Art. 73 limits the directors' authority to borrow. The requirement of the article is that the directors shall so restrict their borrowing that the amount for the time being remaining undischarged shall not exceed the limit specified. The intention of the article is not satisfied by treating it as a direction that beyond the specified limit further borrowings, though not prohibited, are to be expended in reduction of existing loans. Where however the loans, although in excess of the authority of the directors, are not *ultra vires*, the money having been received by the company and applied for its purposes, the Official Liquidator of the company cannot, during the winding up proceedings, reduce the balance outstanding at the date of liquidation by disputing the liability of the company to pay the whole sums advanced. (*Sir George Rankin.*) T. R. PRATT (BOM.), LTD. *v.* M. T., LTD. **42 C.W.N. 733=174 I.C. 545=1938 O.L.R. 223=A.I.R. 1938 P.C. 159 (P.C.).**

CONTRACT—Breach—Damages—Rule as to mitigation of damages—Applicability to contract of service. *See* PRINCIPAL AND AGENT—AGENT'S RIGHT TO SALARY. (1938) 1 M L.J. 857.

——*Construction—Contract of service entered into in London—Employment in New Zealand on remuneration of seven hundred pounds sterling per year—Payment, if to be made according to English or New Zealand currency.*

An agreement was entered into between the respondents and the appellant in London, under which the appellant was to proceed to New Zealand, there to be employed by the respondents as a tailor cutter at a remuneration of seven hundred pounds sterling a year. A question arose as to whether the appellant was entitled under that agreement to be paid according to the English or the New Zealand value of the pound.

Held, that the question was purely one of construction of the particular contract The word 'sterling' was to be construed as signifying English currency, in contrast with the currencies of other countries, and in particular with that of Australi[illegible] New Zealand. The word was an express term in[illegible] fact excluding, the *prima facie* [illegible] the New Zealand pound woul[illegible] ency of the place of payment. [illegible] 'sterling' was not a common form in a service a[illegible] ment like the one under consideration. If it was in a business document in London it naturally m[illegible] 'British sterling' and nothing else. (*Lord Wright.*) C. F. MARTIN *v.* BALLANTYNE & CO.

174 I C 47=47 L W. 596= 10 R.P.C. 241=A.I R. 1938 P.C. 136 (P C.).

——*Construction — Sale of goods—Payment to be made in cash in exchange for delivery order on seller* [illegible] *issued to buyer without Mate's receipt but on le*[illegible] *guarantee by buyer— Non-payment* [illegible] *endorsing bills of lading—Delivery* [illegible] *by seller to damages against shipping* [illegible] *tainability—Property—When p*[illegible]

On 4 5-1926, the respondents [illegible] merchants at Calcutta, entered [illegible] three mills, respectively, for [illegible] quantity of 250 bales jute gunny bag[illegible] On the same day they sold the same quantity of 250 bales to a company carrying on business in Calcutta known as the Export Company. The contracts were in a form which contained, *inter alia*, the following material terms: (1) "Payments to be made in cash in exchange for delivery order on sellers or for Railway receipts or for Dock receipts or Mate's receipts (which Dock receipts or Mate's receipts are to be handed by a Dock or ship's [illegible] (2) The buyers [illegible] or Dock or Mate's receipts and the goods they represent until payment in full." The contracts stipulated for [illegible] should be sent alongside on notice, that freight was payable in Calcutta and that receipt of cargo issued by the ship (the Mate's receipt) must be exchanged for bill of lading On 4 5 1926, the Export Company shipping instructions to the respondents which they passed on in

CONTRACT.

the same terms to the mills concerned; and on 17 5-1926 and 18 5 1926, two of the mills sent alongside certain parcels to a vessel, and the remaining quantities were sent to another vessel, both of which were owned by the appellants, who received the goods and issued Mate's receipts as presented to them for signature by the mills. The receipts recited that the goods mentioned therein were received for conveyance to Kobe from the Export Company. The receipts were handed over to the mills' sircars who requested that the Mate's receipts might be handed to them. The appellants issued the bills of lading describing the goods as shipped by the Export Company and deliverable to order at Kobe, without the Mate's receipts being given in exchange, but taking a letter of guarantee from the Export Company. The respondents obtained the Mate's receipts from the mills a few days later against payment and tendered them to the Export Company who defaulted in payment. Thereupon on 27-5 1936, they gave notice to the appellants that bills of lading should not be issued to the Export Company until Mate's receipts were surrendered. But [illegible] mpany having the bills of [illegible] the goods to purchasers [illegible] over the bills of lading as [illegible] ge drawn for the price of goods and discounted by them. The appellants told [illegible] were delivered on presentation of the bills of lading. The respondents sued to recover the price of the goods from the Export Company and damages from the appellants.

Held, (1) that the property in the goods sold passed when the goods were appropriated by delivery alongside in implement of the contracts; (2) that the sellers [illegible] and possession after delivery [illegible] (4) that the [illegible] without Mate's re[illegible] against the respon[illegible] breach of duty, (5) [illegible] very of the goods to the holder of the bills of lading, convert the respondents' goods, as the respondents had no special property in the goods which could be said to have been violated by the delivery at Kobe to the bill of lading holders and which could give the respondents any right to damages in trespass or conversion; and (6) that the equitable lien or personal license which was all that remained with the respondents under the contract when the goods were delivered to the ship, did not affect the transferee [illegible] ills of lading so as to found a claim for con[illegible] though it might found a claim for breach of [illegible] against the Export company (*Lord Wright*) YUSEN KAISHA *v.* RAMJIBAN SEROWGEE.

174 I.C 564=42 C W.N. 677=1938 M.W N. 487= A I R. 1938 P.C. 152=(1938) 1 M.L J. 834 (P.C.).

[illegible] *ance — Counter offer — If* [illegible] ing certain conditions has [illegible] hat party by adding to the conditions makes a counter-offer, the counter offer amounts to rejection of the offer made to him. (*Addison and Din Mohammad, JJ.*) RAO GIRDHARI LAL *v.* SOCIETE BELGE DE BANQUE.

A.I.R. 1938 [illegible]

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——*Offer and acceptance—Plaintiff accepting defendant's offer to sell but adding a further term—Defendant refusing to consider term, but repeating his previous offer—Acceptance by plaintiff—If completes contract of sale.*

Where the plaintiff accepts the offer of the defendant to sell but seeks to add a further term, which the defendant refused to consider at the same time repeating the offer, which he had previously made, and the plaintiff accepts the offer, the transaction of contract of sale is complete and binding on the defendant. (*Lort Williams, J.*) PACIFIC MINERALS, LTD. v. SINGBHUM MINING SYNDICATE.

A.I.R. 1938 Cal. 343.

CONTRACT ACT (IX OF 1872)—*If exhaustive as regards law of agency.*

The Contract Act does not draw fine distinction between different classes of agents, but the Act is not exhaustive and so far as the law relating to agency is concerned, it merely lays down general principles in wide and general terms. (*Vivian Bose, J.*) KALYANJI v. TIRKARAM. **A.I.R. 1938 Nag. 254.**

——S. 64—*'Rescinds'—Interpretation.*

The word 're-cinds' as used in S. 64, Contract Act implies an "express and unequivocal cancellation of the contract." Where a domestic servant employed as sweeper of the house leaves his master without any notice and the master does nothing except engaging another person for doing the work the contract with the former servant is not necessarily rescinded by the master and hence the servant is not entitled to get the pay for the work done. (*Mackney, J.*) ETBARI v. v. BELLAMY. **A.I.R. 1938 Rang. 207.**

——S. 65—Applicability—Lease invalid for non-compliance with Ss. 68 and 69, Madras District Municipalities Act—Suit on—Right to relief. *See* T. P. ACT, Ss. 105 AND 107. **47 L. W. 668.**

——Ss. 69 and 70—*Applicability—Sale by Hindu widow—Discharge of personal debts of husband and of debts contracted by her for funeral rites of husband—Illegitimate sons of deceased—Liability to make re-imbursement to purchaser in respect of discharged debts.*

Where a Hindu widow sells the estate of her husband who has also left illegitimate sons, for discharging purely personal money debts of her husband or debts tracted by her to perform the funeral rites of her deceased husband, the purchaser cannot rely on Ss. 69 and 70 of the Contract Act and claim from the illegitimate sons of the deceased owner re-imbursement of the moneys paid by him in respect of the debts discharged. Neither S. 69 nor S. 70 have any application to such a case. The fact that the illegitimate sons are benefitted by the payment of the debts cannot give any right to the purchaser to recover the money from the illegitimate sons under Ss. 69 and 70. For the application of S. 70, the person benefitted must have an option either to accept or to reject the benefit. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) CHIKKAMMA v. NANJUNDA. **16 Mys.L J. 184 = 43 Mys.H.C.R. 105.**

——S. 72—*Suit against Hindu widow—Personal decree—Estate attached in execution—Property put to sale—Owner paying decretal amount to avoid sale—Right to recover.*

A suit was brought against a Hindu widow on a promissory note and a personal decree was passed against her. In execution of the decree, the decree-holder attached the estate whereupon the owner of the estate raised an objection that the decree holder could not proceed against the whole estate in execution as the decree was personal against widow. The objection was dismissed and the estate was put to sale. The owner therefore paid the decretal amount to avoid the sale.

Held, that the money so paid could be recovered back as money paid under compulsion. The fact that the person paying could have been made liable for the amount paid, had suitable proceedings been taken, was held to make no difference. (*Stone, C.J. and Niyogi, J.*) VASANT RAO v. BEHARI LAL.

A.I.R. 1938 Nag. 225.

——S. 182—*Commission agent—Position of.*

Commission agents are agents within S. 182 but are not agents pure and simple. They are agents up to a point and to that extent they stand in a position of active confidence towards their principals, but beyond that they are not agents in the real sense of the term and the relationship between the parties from then on is one of debtor and creditor. (*Vivian Bose, J.*) KALYANJI v. TIRKARAM. **A.I.R. 1938 Nag. 254.**

——S. 182—*Commission agent receiving goods as such and then selling them—Position of.*

Where a person receives goods from another as a commission agent and then sells them for him, he is an agent up to a certain point that is up to the date of the sale. Thereafter whether he still continues as an agent or the relationship is that of a debtor and creditor depends on whether the commission agent when he sells has authority to sell in his own name and whether he has authority in his own right to pass a valid title. If he has authority to sell and also authority to pass a valid title in his own right, he is acting as a principal *vis-a-vis* the purchasers and not merely as an agent and therefore from that point on, he is debtor of the erstwhile principal and not merely an agent. Whether this is so or not must depend on facts in each particular case. (*Vivian Bose, J.*) KALYANJI v. TIRKARAM.

A.I.R. 1938 Nag. 254.

——S. 182—*Definition—Scope of.*

Definition of agent given in S. 182 is very wide and embraces a servant pure and simple. All the agents therefore cannot be placed in the same category. (*Vivian Bose, J.*) KALYANJI v. TIRKARAM.

A.I.R. 1938 Nag. 254.

CO-OPERATIVE SOCIETIES ACT (II OF 1912)—*Mortgage to society—Bank obtaining award against members of society—Right to sell mortgaged property.*

Where an award obtained by a bank against a co-operative society shows that it was an award against the members of the society, then the Bank could sell the property mortgaged to the society by the members. (*Pollock, J.*) MST. GOMTI v. SOCIETY GHAT PINDARAI. **1938 N.L.J. 166.**

——S. 2 (c)—*Member—Joint Hindu family, if can be a member—Hindu coparcener becoming member of society and taking loans—Liability of joint family.*

The fact that the bye-laws of a co-operative society established under the Co-operative Societies Act of 1912 do not expressly state that the membership of the society is open to a Hindu joint family is no justification for holding that a joint family can in no event become a member of the society, when there is no provision in the bye laws to preclude a joint family from becoming a member of the society through one of its coparceners. It is no doubt desirable to have an express provision in the bye-laws stating that a Hindu joint family may join a society through one of its members chosen by all the other adult members of the family and that loans to such a family would be granted only on clear and complete proof that the money is required for some legal necessity of the family that would avoid a good deal of unnecessary litigation. Where it is clearly proved that

COURT FEES ACT (1870), S. 7.

a member of a joint family joinec
sentative capacity with the co
members of the family, though I
the karta of the family, and that
him were for the purpose of and
family, *i.e.* for the purpose of purchasing properties for the joint family it must be held that the money was borrowed for the necessity and benefit of the entire joint family, because the member represents the entire joint family in his dealings with the society. In such a case the society can proceed against the joint family properties including the properties purchased out of the money borrowed for the debts incurred by the member, although that member is not described in the registers of the company or in the order for contribution as representing his family. (*Courtney-Terrel, C. J., Fazl Ali and James, JJ.*) BINDESHWARI PRASAD *v.* SHIVA DUTT SINGH. 1938 P W.N. 329= 19 P.L.T. 328 (S.B.).

COURT-FEES ACT (VII OF 1870) in Madras), S. 7 (iv-A) and Sch II, A

—Applicability—Suit by Hindu widow ... declaration that defendant not adopted by her—Further prayer that deed of adoption executed by her in his favour be declared void and cancelled—Court fee payable—"Document securing money"—Meaning of.

The substance of the claim made by a plaintiff, a Hindu widow in a suit in a Subordinate Judge's Court

... dant should be declared void and canc
relief she paid a court fee of Rs. 100,
at Rs. 8,000, and on the second she
Rs. 112 8 0, valuing it at Rs. 1,000.
the market-value of the properties b
immovable, affected by the declarations was over Rs. 50,000.

Held, (1) that the court-fee in respect of the first relief of declaration as to the status of the first defendant was Rs. 500, under Art. 17 A (iii) of Sch. II of the C... as amended in Madras; (2) that the

... dant within the
Court-Fees Act
require to be set
plaintiff and the
correct.

Held, further, that the documents which required to be set aside were documents whereby rights are transferred or released such as sales, gifts, mortgages, leases, releases, etc., and to fall under S. 7 (iv A), the document sought to be set aside must of itself have secured the property, *i.e.*, there must have been a conveyance of the said property or a release of right thereunder which would operate to extinguish the right of the person conveying or releasing, and not merely a confirmation of an already existing right. (*Venkataramana Rao, J.*) SODEMMA *v.* KRISHNAMURTHY. 1938 M.W.N. 520.

——S. 7 (iv) (c) and (v)—*A... Partition suit—Plaintiff claiming to be in ... perty—Prayer for declaration tha ... preliminary decree based thereo ... binding—Plea of denial of join ... payable—Principle—Sch. II, Ar...*

It is well-settled that in a suit for partition of property court-fee is to be determined solely on the consideration of the cause of action as stated in the plaint. A suit for

CR. P. CODE (1898), S. 107.

possession according to law, falls, so far as the first relief is concerned, under S. 7 (iv) (*c*) and so far as the second relief is concerned under Art. 17 (vi) of Sch. II of the Court-Fees Act. A denial by the defendant of the plaintiffs' joint possession at the date of the suit does not alter the character of the suit. If the defendant succeeds in establishing his plea that the plaintiffs were not in joint possession of the property in suit, the plaintiffs' cause of action as laid would fail and suit would be liable to be dismissed unless the plaintiffs are permitted to amend their plaint and pay the additional requisite court-fee. (*Rupchand, Ag. J C. and Lobo, J.*) HUSSEIN BAKSH IMAM BAKSH *v.* MUHAMMAD MUSA MUHAMMAD TAYAB. 32 S.L.R. 124.

... ee ordered to be paid by decree not execution—If maintainable.

... court-fee had not been paid on a decree granted does not prevent the decree holder from making an application for execution and all that S. 11 provides is that the decree should not be executed. 34 Bom 189 and A.I.R. 1930 Nag. 241, Rel. on. (*Dalip Singh, J.*) UTTAR CHANDKAPUR AND SONS *v.* SAYAD HAMID ALI. A.I.R. 1938 Lah. 326.

... O. 33, C. P. Code
... *n forma pauperis*
... ODE, O. 33,

——Sch. II, Art. 17 (vi)—*Contract to execute deed of trust in respect of joint properties belonging to plaintiff and defendant—Suit for specific performance—Court-fees.*

The plaintiff sued for specific performance of a ... ecute a deed of trust in favour of certain ... respect of certain joint properties belong- ... possession of both the plaintiff and the ... nder the trust deed, both the plaintiff and

... ome under any of the
... fic performance which
are contemplated by S. 7 (x) of the Court Fees Act, that the relief claimed was not the property itself but merely specific performance of the agreement, the money value of which it was not possible to estimate, and that consequently the suit was governed by Sch. II, Art. 17 (vi) of the Court-Fees Act. (*S. K. Ghose and Edgley, JJ.*) BIRAJA CHARAN NANDA *v.* SAILAJA CHARAN NANDA. 42 C W.N. 667.

CRIMINAL PROCEDURE CODE (V OF 1898), S. 4 (h)—*'Complaint'—Report of non-cognizable offence by Police-officer.*

When a Police officer investigates a non-cognizable case under the orders of a Magistrate, the report which he makes at the end of his investigation is of the same

... a complaint. (*Baguley, J.*) JAGDEO PANDAY *v.* N C. HILL. 1938 Rang.L.R. 150.

——S. 107—*Object of.*

CR. P. CODE (1898), S. 107.

The object of the provisions contained in S. 107, Cr. P. Code, is prevention and not punishment of offences; it is intended not to punish persons for anything that they have done in the past, but to prevent them from doing in future something which might occasion a breach of the peace. (*Guha and Lethbridge, JJ.*) SETH SUKHLAL KARNANI *v.* EMPEROR.

66 C.L J. 564.

———S. 107—*Proceeding under—When may be started.* The law provides for a proceeding under S. 107, Cr. P. Code, being started on information received, if in the opinion of the Magistrate there is sufficient ground for a proceeding. The Magistrate has to satisfy himself that a person is likely to commit a breach of the peace or disturb the public tranquillity as mentioned in S. 107 before taking action. (*Guha and Lethbridge, JJ.*) SETH SUKHLAL KARNANI *v.* EMPEROR.

66 C.L.J. 564.

———S. 110 (e) and (f)—*Applicability—Offences involving breach of the peace—Persons in the habit of way laying women working fields and attempting to rape them—Order binding them over—If justified.*

Before a person can be bound over under S. 110 (*e*), Cr. P. Code, he must be found to have committed offences of which a breach of the peace is a necessary constituent. An assault is clearly an offence involving a breach of the peace and clearly an attempt to rape does involve an assault upon the person against whom this offence is committed. Persons who habitually attempt to rape women and are in the habit of way laying women working in fields, and attempting to rape them are habitually committing offences involving a breach of the peace and are desparate characters whom it is dangerous to leave at large. An order binding them over under S. 110 (*e*) and (*f*) is therefore perfectly justified. (*Horwill, J.*) VEERA REDDI, *In re.* 47 L.W. 640.

———S. 133—*Applicability—Long-standing obstruction.*

S. 133, Cr. P. Code, is not intended for long-standing obstruction but for an unlawful obstruction lately built, in a public place. Action under the section can be taken only on proof of urgency or imminent danger to the public interest. The fact that an obstruction has been allowed to stand, without objection, in a public place for many years itself indicates that there is no such urgency or imminent danger to the public interest. The existence of a long-standing obstruction cannot, therefore, without proof of something having recently happened, be considered to be a 'public nuisance.' (*Young, C.J. and Tek Chand, J.*) EMPEROR *v.* TULSI RAM.

40 P.L.R. 492.

———S. 133—*Magistrate ordering party to remove obstruction or appear before him—Party appearing before him—Power of Magistrate to send case to another Magistrate for disposal.*

Where a Magistrate orders under S. 133 a person causing obstruction or nuisance either to remove the nuisance or to appear before him, and to move to have the order set aside or modified, and the parties so appear before him, it is incumbent on him to proceed with the case himself and he has no power to send it at that stage for disposal to another Magistrate. (*Blacker, J.*) UMRAO SINGH *v.* KANWAR LAL.

A.I.R. 1938 Lah. 323.

———S. 144—*Order under—Value of as to possession.*

An order under S. 144, Cr. P. Code, does not establish possession. (*Khaja Mohammad Noor and Varma, JJ.*) UDIT NARAYAN PATWARI *v.* EMPEROR.

19 Pat.L.T. 336.

———S. 144—*Question of possession—Observations as to an order under—Evidentiary value of—If conclusive.*

CR. P. CODE (1898), S. 177.

Where an order under S. 144, Cr. P. Code, is passed without any evidence on the question of possession of the disputed property as is often done, the observation of the Magistrate on the question of possession are simply incidental observations in order to enable the order to be made. No inference can be drawn from the order as to possession of any particular party, having regard to the peculiar jurisdiction conferred by the section, though the fact of the order may be admissible in evidence under S. 13 of the Evidence Act. (*Dhavle, J.*) JAINUDDIN AHMAD SHEIKH *v.* KARI KANT DOSS.

1938 P.W.N. 390.

———S. 144—*Scope—Procession taken by Adi-Dravidas along streets occupied by caste Hindus—When to be restrained.*

There can be no doubt that Adi-Dravidas have a civil right to take a procession along all public streets, just as any other persons may have, and caste Hindus have no right to object at all. Ordinarily, those responsible for law and order should see that the exercise of such rights is supported by the police and the Magistracy except in cases where in the interests of peace persons have to be prevented from exercising their rights. If the Adi-Dravidas conduct the procession in order to irritate and annoy the caste residents of the locality, the Magistrate may properly place some restraint upon the procession. (*Horwill, J.*) SHANMUGAM PANDARAM *v.* PONNUSWAMI IYER. 47 L.W. 741.

———S. 162—*Statement to police—Admissibility—Person making statement dead at time of trial.*

A statement made to the police is not admissible in evidence, although the person who made the statement is dead at the time of the trial. (*Ram Lall, J.*) SUNDAR LAL *v.* EMPEROR. 40 P.L.R. 421.

———S. 164—*Statement under—Value of.*

A statement of a witness obtained under S. 164 always raises a suspicion that it has not been voluntarily made. The section was not intended to enable the police to obtain a statement from some person and as it were to put a seal on that statement by sending in that person to a Magistrate practically under custody, to be examined before the judicial inquiry or trial, and therefore compromised in his evidence when judicial proceedings are regularly taken. (*Dhavle and Chatterjee, JJ.*) EMPEROR *v.* MANU CHIK. A.I.R. 1938 Pat. 290.

———Ss. 177 and 180—*Applicability—Conspiracy—Jurisdiction of Court is determined by place where conspiracy was formed or made and not by place where act in pursuance of conspiracy is done.*

Conspiracy is a substantive offence in itself. It is not given in one of the illustrations to S. 180, Cr. P. Code, as one of the offences, which is an effence because of its relation to another offence, such as abetment which would give the Court jurisdiction either where the principal offence or the connected offence was committed, nor can it be brought within the meaning of this section itself. It is not one of the offences named in S. 181. The gist of the offence of conspiracy lies not in doing that act of effecting the purpose for which the conspiracy is formed nor in attempting to do any of the acts nor in inducing others to do them, but in the forming of the scheme of agreement between the parties. In certain cases it may be difficult for the Courts to decide whether a particular agreement which forms the basis of a criminal charge was made or concluded at a particular time or at a particular place. But it does not follow therefrom that the scope of the conspiracy would determine the place where the conspiracy or part of it occurred. It is not the act done in pursuance of the conspiracy but the place where the conspiracy was formed or made which determines the jurisdiction of the Court

and in an indictment for conspiracy the venue should be laid where the conspiracy was and not where the result of such conspiracy was put in execution. The criminal conspiracy was formed, that is to say, the offence was committed in U P, that is, outside the jurisdiction of the Sukkur Court. The accused also entered into a further conspiracy at Sukkur. The accused were however not charged with this second or further conspiracy, at all. The two conspiracies were not parts of one transaction.

Held that S. 177 applied and the Sukkur Court had no jurisdiction to try the offence of criminal conspiracy formed in U P (*Davis J C. and Lobo, J*) EMPEROR *v.* PURSUMAL GEHIMAL. A I R. 1938 Sind 108.

——S. 190 (1) (c)—*Scope and effect of—Trial commences as summons case—Magistrate discovering that offence triable as warrant case—Procedure.*

S. 190 (1) (*c*) is concerned with extra judicial information, knowledge or suspicion; it has nothing to do

dure has been committed, he is bound to apply that procedure thenceforward and he is not in any way disqualified from proceeding with the trial. (*Burn J.*) VENKATA RAMANA IYER, *In re.* 47 L W. 739.

——Ss. 195 (3) and 476-A—*"Court to which appeals ordinarily lie"—Meaning of—Power of Additional*

of the District Magistrate and not that of the Additional

I.L R (1938) Lab. 188.

——S. 196—*Order sanctioning prosecution—Form of and compliance with.*

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the rank not lower than that of Inspector of Police, to prefer a complaint, etc." In consequence of this order, a letter was issued by the Deputy Inspector General to an Inspector of Police, authorizing the latter to prefer a complaint and the letter was
Officer in the office of the De
for the Deputy Inspector General
accordingly filed by the Inspector to whom the letter was addressed.

Held, the complaint was properly filed and was in accordance with the order sanctioning the prosecution. (*Horwill, J.*) BATLIWALLA *v.* EMPEROR. 1938 M.W N 529

——S. 226—*Substitution of charge so as to deprive accused of right of trial by jury—Propriety*

Where the committing Magistrate framed charges of murder against some of the accused and abetment of murder against others, but when the case came on for hearing in the Court of Sessions, the Judge substituted for them a charge under S 302 read with S. 120-B. I P. Code against all the accused, with the result that the accused, instead of being tried by a jury, were tried by the Judge himself sitting with assessors.

Held that the accused were not properly tried when they were deprived of a trial by a jury by a manoeuvre

of this kind. (*Cunliffe and Henderson, JJ.*) KHIDIR *v* EMPEROR. 66 C L J. 575.

—— Ss 235 and 239—*"Same transaction"—Charges under R. 30 (a) (1) (i) of Madras Motor Vehicles Rules against owners and drivers of several motor lorries—Joint trial—Propriety.*

Several motor lorries were engaged at Calicut in Malabar District to deliver bags of grain at Pollachi in the district of Coimbatore. In some cases the owners and in other cases both the owners and drivers were prosecuted in one and the same trial under S. 16 of the Motor Vehicles Act on the ground that the owners had not obtained permits in form G as required by R. 30 (*a*) (1) (*i*) of the Madras Motor Vehicles Rules.

Held, that the offences were many and must be tried separately and it was very undesirable that they should be lumped and tried together. The offence committed by each person was his own offence and he should therefore be tried separately for it. Though both the the driver of a particular vehicle had com- offence in respect of a single journey, and ied jointly in one trial, it was very objectionable that several owners and several drivers should be tried in one trial for several offences committed separately and on different dates. (*Burn, J*) PUBLIC PROSECUTOR *v.* KRISHNAN. 47 L W. 774= (1938) 1 M L.J. 800.

—— S 239 (f)—*Joint trial—Legality—Stolen properties not proved to be proceeds of same theft.*

Where there is no proof that the stolen properties in respect of which the accused is charged under S. 414, I. P. Code, were the proceeds of the same theft, the case cannot be brought within the provisions of S. 239 (*f*), Cr. P Code and a joint trial of the accused along with another from whom the properties were recovered is consequently illegal. The irregularity is not such as could be remedied by S. 537, Cr. P. Code. (*Jack and Khundkar, JJ.*) RAM KHELAWAN KAHAR *v.* EMPEROR 42 C.W N. 729.

——S. 250—*Cause shown by complainant—Duty of Magistrate to record.*

chooses to put his reason into writing. If this is done and the writing is filed, it will obviously be unnecessary for the Magistrate to record it again, and filing the be recording the cause der of compensation is e, JJ.) THE KING *v.* A I R. 1938 Rang. 161.

—— S 250—*Discretion of Magistrate—Interference in appeal.*

Once it has been decided that a case is a false one and frivolous and vexatious, then it is a matter within the Magistrate's discretion as to whether it is one in which compensation should be given or not; and the Appellate Court is not entitled to set aside an order for payment of compensation in such a case save for very cogent reasons. (*Mackney, J.*) L. R. ABROL *v.* S L. SIRPAUL. A I R. 1938 Rang. 200.

—— S. 250—*Order for compensation—Duty of Magistrate to call upon complainant to show case.*

Under S 250. Cr. P. Code, the Magistrate must call upon the complainant to show cause why an order for payment of compensation should not be made. It is only after considering the cause shown by him that an order can be passed directing him to pay compensation.

CR. P. CODE (1898), S. 269.

(*Baguley, J.*) MA E MYAING *v.* THE KING.
1938 Rang.L.R. 163.

——S. 269 (3)—*Applicability—Joint trial of several persons, some charged with murder and some charged with conspiracy to murder.*

The plain meaning of the language used in S. 269 (3) is that the procedure indicated in that section is applicable when the accused are charged with more than one offence. In a case certain accused charged with murder were tried jointly with other accused charged with conspiracy to murder. These were the only two charges and no accused was charged with more than one offence.

Held, that S. 269 (3) was not applicable to the case and that the form of the trial was erroneous. (*M. C. Ghose and Bartley, JJ.*) RAM GOBINDA GHOSE *v.* EMPEROR. A.I.R. 1938 Cal. 364.

——S. 297—*Misdirection—Non-reference to minor matters of detail.*

Where the entire evidence is summarised before the jurors by the Judge, in which all the main features of the case are exhaustively dealt with, the non-reference to certain discrepancies with reference to minor matters of detail does not amount to misdirection or non-direction. (*Guha and Lethbridge, JJ.*) BIRINCHIPADA DAFADAR *v.* EMPEROR. 67 C.L.J 45.

——S. 307—*Powers of reference under—Case triable with aid of assessors—Judge agreeing with verdict of jury—Reference—Competency.*

A Sessions Judge has no power under S. 307, Cr. P. Code, to refer to the High Court a case in respect of offences triable with the aid of assessors; nor has he any power to refer to the High Court the case of any one in regard to whom he is in agreement with the verdict of the jury. (*Burn and Stodart, JJ.*) BOJJI REDDI, *In re.* 47 L.W. 240 = (1938) 1 M.L.J. 871.

——S. 342—*Scope—Non complistnce—Effect.*

The failure of a Judge to question the accused about a confession, which forms an integral and substantial part of the prosecution case, is a serious omission, not covered by the provisions of S. 537. (*Davis, J.C. and Haveliwala, J.*) RABAN LALU *v.* EMPEROR.
A.I.R. 1938 Sind 97.

——S. 367—*Magistrate exculpating accused—Remarks to prejudice of accused—If justified.*

Where a Magistrate by his own order exculpates rather than inculpates an accused, he is not justified in making remarks seriously to his prejudice which will be justified only if his order tended to inculpate rather than exculpate. (*Davis, J.C. and Lobo, J.*) KARTARCHAND *v.* EMPEROR. A.I.R. 1938 Sind 103.

——S. 367—*Power to expunge remarks from Magistrate's judgment or order—When to be exercised.*

It is a serious matter for the High Court to expunge remarks from a Magistrate's judgment or order. High Court will interfere to expunge remarks which are libellous and irrelevant. But, if they form an integral part of the judgment or its argument, and if they are inseparable, High Court will not interfere and mutilate a judgment so that it reads disjointedly or incoherently nor will it interfere merely because the Court may have passed remarks adverse to a witness provided the judgment shows there is some basis for them, however inadequate may appear this basis to the higher Court. It may well be the bounden duty of a Judge or Magistrate in giving his judgment and his reasons to comment adversely upon the conduct of witnesses; so also it may be his duty to comment adversely upon the conduct of accused persons even though he may not consider the evidence sufficient to commit them for trial to the Court of Session. Nor will High Court in revision inquire into question of fact, but in dealing with applications of

CR. P. CODE (1898), S. 423.

this nature it will take the Magistrate's judgment as it stands. (*Davis, J C. and Lobo, J.*) KARTARCHAND *v.* EMPEROR. A.I.R. 1938 Sind 103.

——S. 367—*Remarks against person not accused or witness—Propriety.*

Though a Magistrate may have to consider facts in relation to a particular individual who is not an accused or witness in order to weigh fairly the evidence against the accused or the evidence given by witnesses, yet he is not justified in condemning such person without his being given an opportunity of being heard. (*Davis, J.C. and Lobo, J.*) KARTARCHAND *v.* EMPEROR.
A.I.R. 1938 Sind 103.

——S. 417—*Acquittal—Interference—Considerations.*

Where there is a reasonable doubt as to the guilt of the accused, the High Court will not interfere with an acquittal in an appeal from an acquittal. Nor will the Court forget that the burden of proof lies upon the prosecution. It is for the prosecution to prove the guilt of the accused; it is not for the accused to prove his innocence. The High Court will not interfere and reverse an order of acquittal merely because there is room for an honest difference of opinion, merely because upon evidence the lower appellate Court might have come to the conclusion that the accused was guilty, unless it is quite clear that the Judge or Magistrate whose judgment of acquittal is appealed against is wrong. It would in every case give careful consideration and due weight to the findings of the lower Court. S. 417 of Cr. P. Code is not intended to be used in every case in which the Government thinks that there should be a conviction. It is not a power lightly to be used and should be used only where there is no reasonable doubt upon the record as to the guilt of the accused. (*Davis, J.C. and Lobo, J.*) EMPEROR *v.* HAJI GHULAB SHAH.
A.I.R. 1938 Sind 80.

——S. 417—*New plea—If open in appeal against acquittal.*

It is not proper in an appeal against an acquittal for Government to attempt to snatch a conviction by making out another case against the accused. An appeal against an acquittal is a serious matter. The liberty of a person once acquitted is again to be put in jeopardy, and cases, in which an appeal against an acquittal is to be made, should be carefully considered in all their aspects before the appeal is filed, and Government should be bound in argument and should consider themselves bound in argument to the grounds raised in the memorandum of appeal. (*Davis, J. C. and Lobo, J.*) EMPEROR *v.* PURSUMAL GERIMAL.
A.I.R. 1938 Sind 108.

——S. 423 (1) (b)—*Retrial—Order for—Legality—Evidence adduced insufficient for conviction.*

If the evidence actually adduced by the prosecution is insufficient to support a conviction, a retrial cannot be ordered simply to give the prosecution another chance of producing further and better evidence. (*B. K. Mukherjea and Biswas, JJ.*) TRIPURARI BHATTACHARJEE *v.* EMPEROR. A.I.R. 1938 Cal. 361.

——S. 423 (1) (b)—*Trial Magistrate convicting accused under S. 353, I. P. Code—Power of appellate Court to alter conviction to one under S. 352, I. P. Code.*

Where the trial Magistrate convicted the accused under S. 353, I. P. Code, for assaulting a certain person whom he thought to be a public servant, but the appellate Court finds that that person was assaulted but that he was not a public servant, it can alter the conviction to one under S. 352, I. P. Code. (*Baguley, J.*) MAUNG BA *v.* THE KING. 1938 Rang.L.R. 139.

CR. P. CODE (1898), S. 435.

——S. 435—*Scope of enquiry.*

Per *Sharpe, J.*—It is doubtful whether it is within the province of High Court when acting under S. 435 to canvass and express opinions upon all topics however interesting may be the points of law or practice involved in them, which have arisen in the course of the proceedings before the inferior Criminal Court. On revision inquiry is limited to "the correctness, legality or propriety of any finding, sentence or order recorded or passed" and to "the irregularity of any proceedings of such inferior Court." (*Baguley and Sharpe, JJ.*) THE KING *v.* MAUNG THOUNG SHWE.

A.I.R. 1938 Rang. 161.

——S. 436—"*Further inquiry*"—*Meaning of*—*Complaint*—*Dismissal on police report without examination of witnesses*—*Order for further inquiry by Sessions Judge*—*Trial Court ordering inquiry and report by Subordinate Magistrate*—*Latter summoning accused*—*Trial and discharge*—*Legality*—*S. 529*—*Applicability.*

An order by a superior Court to an inferior Court to hold a further inquiry into a complaint which has been dismissed under S. 203, Cr. P. Code, has acquired what may be called a technical meaning. It simply means re-consideration. In some cases re consideration might require summoning of more witnesses, looking into more evidence; in other cases it may be where the previous inquiry has been fuller, to re-consider the order and pass

to order an inquiry under S. 202
who is asked to hold an inquiry a
particular date has no jurisdiction to
the accused and hold a trial. A com
to the police, and on receipt of the police report, the Sub Divisional Magistrate who had cognizance of it, after considering the report and various aspects of the case, dismissed it on 3-11-1936. The Sessions Judge who was moved by the complainant directed a further inquiry into the complaint. On receipt of this order the Sub-Divisional Magistrate recorded an order on 10 3 1937 to the effect that the complainant should prove his case before Mr. *O* (a first class Magistrate) who was to fix a convenient date for his inquiry and
Mr. *O* ordered on 31-3-1937
to the accused and proceeded t
examined some witnesses, and on
the accused under S. 253 (2). The Sub Divisional Magistrate before whom the matter came up on 2-7-1937, held that the discharge of the accused by Mr. *O* was entirely without jurisdiction, and ignored it. He ordered summons to be issued against the accused, and after their appearance, made over the case to a second class

passed by Mr. *O* was not set aside by a competent

O for a limited purpose of inquiry and report, the case remaining with the Sub Divisional Magistrate, (2) that Mr. *O*. to whom the whole case had not been made over went beyond his authority
and proceeding with their
having been entirely wit
Divisional Magistrate was

CR. P. CODE (1898), S. 526.

the trial and discharge; and (4) that therefore the second trial and conviction were quite legal and within jurisdiction.

Held, further, that S. 529, Cr.P. Code, did not apply and could not come into play, as there was no ground for holding that Mr. *O* acted in good faith or with care and caution. (*Khaja Mohammad Noor and Varma, JJ*) UDIT NARAYAN PATWARI *v.* EMPEROR.

19 Pat.L T. 336.

——S. 476—*Preliminary enquiry*—*Notice to accused*—*If necessary.*

A Court making a preliminary enquiry under S. 476, Cr P. Code, need not issue notice to the accused. (*Skemp, J.*) NAZAR MOHAMMAD *v.* NARNAM SINGH.

I.L R. (1938) Lah. 188.

——S. 476-A—Making of complaint—Power of Additional District Magistrate. *See* CR. P. CODE, SS. 195 (3) AND 476-A. **I.L.R. (1938) Lah. 188.**

——S 488 (4)—*Mutual agreement to live apart*—*Evidence of*—*Agreement to pay half the salary to wife as maintenance.*

An agreement by the husband to pay half of his salary every month to his wife as maintenance is not by itself evidence of a mutual agreement to live apart. (*Biswas, J.*) R. B. W. TEASDALE *v.* F. TEASDALE

66 C.L.J. 567.

——S. 488 (4)—'*Sufficient reason*'—*What amounts*

with him. (*Biswas, J.*) R. B. W. TEASDALE *v.* F. TEASDALE. **66 C.L J. 567.**

——S 517—*Accused discharged on withdrawal of prosecution*—*Witnesses not examined*—*Order regarding exhibits*—*Power of Court to pass.*

Where the accused and the exhibits are sent up by the police to the Magistrate and he takes action under S 190 (*b*), Cr. P. Code, and directs summonses to issue to witnesses, proceedings are initiated and an enquiry
to have begun. If thereafter
drawn in the presence of the
discharged under S. 494, Cr.
P. Code, the enquiry is concluded although no witnesses are examined, and the Magistrate has, therefore, power to pass an order under S. 517, Cr. P. Code, with regard to the exhibits. (*Baguley, J.*) MAUNG PO TU *v.* THE KING. **1938 Rang L R. 143.**

——S. 520—*Powers of Sessions Court.*

Sessions Court power
er passed under S. 517
Baguley. J.) MAUNG

1938 Rang L.R. 143.

——S 526—*Grounds for transfer*—*Magistrate hear-*
inconvenient hours and refus-

me from 11-30 A.M. to 5 P.M.
10 P.M. for the hearing of the case although defence lawyers conducting cross-examination were Mahomedans fasting owing to Ramzan. Besides this by an earlier order the Magistrate refused to
give the accused a reasonable
, and instructing another lawyer
conducting cross-examination

CR. P. CODE (1898), S. 526.

Held, that the orders created a reasonable apprehension in the minds of the accused that they would not get a fair and impartial trial at the hands of the Magistrate and hence the orders were sufficient grounds for the transfer of the case. (*Mohamad Noor, J.*) LAL BAHADUR RAUT *v.* EMPEROR.

A.I.R. 1938 Pat. 238

——S. 526—*Ground for transfer—Magistrate, tenant of father of accused.*

The fact that the Magistrate lives in the bungalow which is owned by the father of one of the accused persons is no ground for transfer, when the landlord lives in another town and the Magistrate took the house on rent long before the institution of the case in his Court. (*Abdul Rashid, J.*) EMPEROR *v.* SHANA.

40 P.L.R. 468.

——S. 526—*Ground for transfer — Magistrate's display of unnecessary haste in trial of case.*

Where the Magistrate has displayed far too much haste in the trial of the case and has wrongly failed to give the accused opportunity to engage such legal assistance as he thought proper, the conduct of the Magistrate, although not inspired by any unfair motives, is such as to fill the mind of the accused, not unreasonably, with an apprehension that he will not secure a fair and impartial trial before him, and the accused can get his case transferred from such Magistrate. (*Mackney, J.*) U PO MYA *v.* THE KING.

A.I.R. 1938 Rang. 198.

——S. 526 — *Reasonable apprehension in mind of accused that he would not get fair trial—Transfer.*

Where the attitude and orders of the Magistate have created a reasonable apprehension in the minds of the accused that they would not get a fair and impartial trial at his hands, the case should be transferred even though there is no reason to doubt that the Magistrate will do his best to come to a correct conclusion if he continues the trial, as it is necessary not only that justice should be done but that it should appear that justice is being done. (*Mohamad Noor, J.*) LAL BAHADUR RAUT *v.* EMPEROR. **A.I.R. 1938 Pat. 238**

——S. 526—*Refusal to permit questions being put to witness—If ground for transfer.*

A witness who had been examined by the police can reasonably be asked whether a particular version which he was giving in Court was given by him to the police. If he did give it, he is not contradicted. But if he did not, or if there is no mention of it in the diary, the value to be attached to the omission will depend upon the circumstances and may even mean the rejection of the version. The question in any case would be perfectly relevant and legitimate. However, the rejection of such question cannot be a ground for transfer. (*Mohamad Noor, J.*) LAL BAHADUR RAUT *v.* EMPEROR.

A.I.R. 1938 Pat. 238.

——S. 526—*Right to apply for transfer—Complainant in cognisable case.*

The complainant in a cognisable case is, no doubt, entitled to apply for transfer under S. 526 Cr. P. Code, but his rights must be subordinate to those of the Crown, and in the case of conflict between the two, the right of the Crown must prevail. 6 Lah. 541, Foll. (*Abdul Rashid, J.*) EMPEROR *v.* SHANA. **40 P.L.R. 468.**

——S. 526 (8)—*Security bond—Liability to forfeiture—Transfer application filed but not prosecuted.*

A person asked a Magistrate to stay the proceedings before him in order to enable him to file a transfer application. He was asked to execute security bonds, which he did. The transfer application was also made but on being asked for depositing cash money in order to issue notice to District Magistrate, the applicant failed and his transfer application without being futher prosecuted was dismissed. The person appeared before the Magistrate before whom the proceedings were stayed and the Magistrate finding that the transfer application was not properly prosecuted forfeited the bond.

Held, that if the intention of the law was that bonds should be furnishsd with the undertaking that not only application should be filed but also that final orders should be obtained thereon, this should be more clearly expressed in the section itself and should also be clearly set out in the terms of the bonds themselves. And as such order forfeiting the bond was illegal. (*Blacker, J.*) TARA SINGH *v.* EMPEROR. **A.I.R. 1938 Lah. 337.**

——S. 529—Applicability—"Good faith"—Order by superior Court to inferior Court to make inquiry into complaint and to report by fixed date—Latter summoning accused and proceeding with trial—Discharge—Legality. *See* CR. P. CODE, S. 436. **19 Pat L.T. 336.**

——S. 537—Essentials of vitiation—Summons not giving all particulars required by S. 15 of U. P. Prevention of Adulteration Act—Cure of. *See* U. P. PREVENTION OF ADULTERATION ACT, S 15.

1938 A.L.J. 497.

——S. 537—Scope—Omission to comply with S. 342—If cured. *See* CR. P. CODE, S. 342.

A.I.R. 1938 Sind 97.

——S. 539-B—*Local inspection—Absence of memorandum—If fatal.*

The omission to make a note or memorandum at the time of local inspection as required by S. 539-B, Cr. P. Code, is not a fatal one. Where the local inspection has not much bearing on the case at all, the omission to record the note, can have had no practical effect on the decision. (*Gruer, J.*) JAMNA PRASAD *v.* EMPEROR.

174 I C. 523=39 Cr.L.J. 427 (2).

CRIMINAL TRIAL—*Appeal—Summary dismissal—Duty of Court to consider all aspects of the case and to give reasons for conclusion.*

An appellate Court, before dismissing an appeal summarily, ought to give indications that it has actually considered the various aspects of the case before it and give in short its reasons for its conclusion, so that the High Court in revision can know that the appeal was fully heard. (*Varma, J.*) BALA BUX *v.* EMPEROR.

19 Pat L.T. 395.

——*Confession—If to be accepted in entirety.*

There is no justification for the rule of law that in the absence of other evidence the whole of a given confession must be accepted as a statement of truth in its entirety. It is true that if an accused person makes a confession, the whole of that confession must be placed before the Court and is receivable in evidence. But there is no rule of law which compels belief in the statement of a witness. The Court, if it comes to the conclusion that the statement in its essential particulars is true, is entirely entitled to disregard the statements which it may hold in the circumstances are not true. (*Courtney Terrell, C. J., Dhavle and Chatterjee, JJ.*) EMPEROR *v.* ITWA MUNDA.

A.I.R. 1938 Pat. 258 (S. B.).

——*Confession — Retracted — Retracted confession should not form basis of conviction, unless substantially corroborated by independent evidence.*

As a rule of prudence a retracted confession should not be the basis of a conviction unless it is substantially corroborated by independent evidence. The object for looking for corroboration is to find out how far the confession is true and whether it can be acted upon for the purposes of a conviction. The best test is whether the story as set forth in the confession is consistent, natural

CRIMINAL TRIAL.

and plausible. (*Dhavle and Chatterjee, JJ.*) EMPEROR v. MANU CHIK. A.I.R. 1938 Pat. 290.

——*Conviction—Prosecution failing to examine material witness—Effect.*

Where the prosecution have failed to examine an important witness in the committing Magistrate's Court on whose evidence the prosecution and the Judge largely rely, and with whose evidence the evidence of other witnesses is closely connected, conviction is not justified. (*Davis, J. C. and Havelivala, J.*) RABAN LALU v. EMPEROR. A.I.R. 1938 Sind 97.

——*Duty of prosecution—Examination of witnesses.*

The prosecution is not bound to call any particular witness or witnesses when there is reasonable ground for the Public Prosecutor to come to the conclusion and belief that such witness or witnesses, if speak the truth , nor is it incumbent on to call any witness when the Public Prose that the evidence of such person is wholl for the trial. (*Guha and Lethbridge, JJ.*) BIRINCHIPADA DAFADAR v. EMPEROR. 67 C.L.J. 45.

——*Evidence—Appreciation—Village feuds—Testimony of partisans—Value.*

In cases where the existence party feuds is patent, though it would be wrong to reject the testimony of witnesses merely because they were related or were partisans, yet when the witnesses told lies on material points and their conduct was unnatural, the Court cannot act on such evidence. (*Young, C. J. and Monroe, J.*) JOWAND SINGH v. EMPEROR. 39 Cr.L.J. 426= 174 I.C. 431=A.I.R. 1938 Lah. 160

——*Evidence—Cross examination—Ord question must be repeated three times—*

Though it is the duty of every Court to questions are properly understood by the

the standard of intelligence of the witness can hardly be justified. (*Mohamad Noor, J.*) LAL BAHADUR RAUT v. EMPEROR. A.I.R. 1938 Pat. 238

——*Evidence—Murder of mother—Passers-by attracted by cries of child—Witnesses may speak not only of nature of cries but also of what child said.*

The evidence of the child is not admissible as evidence of the truth of what she said but as explaining the conduct of the other witnesses; even what she said is admissible in evidence. Thus in a trial for murder of mother of a child whose cries attracted the passers-by, the witnesses can speak not only of the nature of the child's cries, but even as to what the child said so far as it explains their conduct. (*Davis, J. C. and Havelivala, J.*) RABAN LALU v. EMPEROR. A.I.R. 1938 Sind 97

——*Evidence—Supervision notes from police diaries sent to Court—Admissibility.*

Dhavle, J.—It is a mistake to exclude supervision notes from the police diaries sent to the Courts. The) in the hands of a conducted by supe nay use the diaries ot rightly be left in ignorance of the supervision which necessarily determines the course of the investigation at point after point,

DECREE.

of course be used as evidence, any more than can the diaries of the investigating officer himself; but they usually make these diaries more intelligible and more useful as aids in inquiries and trials. (*Dhavle and Chatterjee, JJ.*) EMPEROR v. MANU CHICK. A.I.R. 1938 Pat. 290.

——Procedure—Dismissal of complaint on police report by Sub divisional Magistrate—Order for further inquiry by Sessions Judge—Sub divisional Magistrate directing 1st Class Magistrate to inquire and report—Jurisdiction of latter to summon accused and try case—Order of discharge by latter—Legality. *See* CR. P. CODE, S. 436. 19 Pat L.T. 336.

——*Sentence—Joint fine passed on two accused with terms of imprisonment in default—Legality.*

two accused with the case of each of that it is impossi onvicted persons is liable to suffer the entire term of imprisonment and for what proportion of the default and as such cannot be sustained (*Dhavle, J.*) SAFDER KHAN v. GAYA MUNICIPALITY. A.I.R. 1938 Pat. 271.

——*Transfer of case—Apprehension—Trying Magistrate subordinate to accused—Embarrassing position—Expediency of transfer.*

Where the Financial Commissioner is the accused and the case is before an Additional District Magistrate who is also a Collector and as such subordinate to the accused, and where the complainant applied for a a transfer of the case it was held that the complainant rongly, have the tionship that the case might have if it merely emjustify the comnight not be all ich an apprehent to transfer the (*Mackney, J.*) 9 Cr.L.J. 415= 174 I.C. 400=A.I.R. 1938 Rang. 68.

CUSTOM—*Requirements—Proof—Nature of evidence necessary—Strict construction.*

A custom to be a rule having the force of law must be ancient, certain, continuous and reasonable. It must be established by clear and unambiguous evidence and being in derogation of the general rules of law must be construed strictly. (*Thomas, C.J., Zia-ul-Hasan and Hamilton, JJ.*) RAGHURAI v. BINDRA PRASAD. 1938 O.W.N. 547 (F. B.)

DECREE—*Construction—Decree for future maintenance—Executability—Presumption.*

Ordinarily a decree for future maintenance should be construed as a decree capable of execution unless it clearly appears from the pleadings and from the decree that the intention was to grant a mere declaratory decree. The very purpose of a suit for future maintenance is to ensure the due payment of the amount claimed, and to avoid the institution of fresh suits. (*Iqbal Ahmad and Harries, JJ.*) KALLU MAL v. MST. BARFO 1938 A.L.J. 495=1937 A.W.R (H C.) 308.

——*Rights under—Determination—Interpretation.*

The rights of the decree holder under a decree mainly depend upon the interpretation of the decree. (*Stone, C.J. and Digby, J.*) SAHEBCHAND HARAKCHAND v. BATTASRAO RAMJI. A.I.R. 1938 Nag. 237.

——*Trial and appellate Court's decree—Ruling decree.*

Where there is an appellate decree, that is the decree that has to be construed, and that decree takes the

place of the lower Court's decree. (*Stone, C.J. and Digby, J.*) SAHEBCHAND HARAKCHAND *v.* BATTASRAO RAMJI. A.I.R. 1938 Nag. 237.

DEDICATION—*Proof—Long user—Inference from.*

In order to prove dedication of property, it is not legally necessary that there should be evidence of express grant. Dedication may be inferred from long user. It is of course always permissible to rebut the presumption by evidence of the owner's intention that the user by the public was permissive. (*Tek Chand, J.*) KAMMAN *v.* SUJAN SINGH. 40 P.L.R. 477.

DEED—*Consideration—Burden of proof—Sale deed reciting payment of price—Plea of want of consideration—Onus.*

Where the fact that consideration was paid in the presence of the Registrar is recorded in the sale deed, the onus to prove that consideration did not pass and that the sale deed was fictitious is on the party alleging it to be so. (*Wort and Manohar Lall, JJ.*) JOTI LAL SAH *v.* MT. RAMESWARI KUER. A.I.R. 1938 Pat. 281.

——*Construction—Reference to other documents—If permissible.*

The language of one document does not afford much assistance in the construction of another. Each document must be construed according to the words which are contained in it. (*Thomas, C.J., Zia-ul Hasan and Hamilton, JJ.*) RAGHURAI *v.* BINDRA PRASAD. 1938 O.A. 447 = 1938 O.W.N. 547 (F.B.).

——*Construction—Same word in the same document—Different meanings—If can be given.*

The ordinary rule, no doubt is, that the same words used in one and the same document should be given the same meaning, but it cannot be an invariable rule and if there are reasons for attaching a different meaning, there is no reason why it should not be so taken. (*Thomas, C.J., Zia-ul-Hasan and Hamilton, JJ.*) RAGHURAI *v.* BINDRA PRASAD. 1938 O A. 447 = 1938 O.W.N. 547 (F.B.).

——*Construction—Transfer of property to Hindu female—Estate taken—If a limited one—Rule.*

Where there are no words used in a document to narrow the interest of a female to whom property is given or transferred, the estate conveyed to her must be taken not to be a limited one. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) KITTAMMA *v.* SESHAMMA. 43 Mys.H.C.R. 43.

DIVORCE ACT (VI OF 1869), S. 16—*Decree for dissolution of marriage by High Court—Form of.*

A decree for dissolution of marriage, made by the High Court under the Divorce Act, whether in its appellate or in its original jurisdiction, should be a decree *nisi* and not a decree subject to the confirmation by the High Court under S. 17. (*Roberts, C. J., Dunkley and Sharpe, JJ.*) PO TUN *v.* MA CHIT. A.I.R. 1938 Rang. 204 (F.B.).

——**S. 37**—*Gross sum to be paid to wife—Fixing of amount—Principle—Considerations.*

It is difficult to apply any definite principle for the purpose of fixing the gross amount payable to a wife. Considerations as to the existence of debts and increase of illegitimate family are quite irrelevant for such a purpose. (*Yorke, J.*) MRS. QUIEROS *v.* MR. QUIEROS. 1938 O.W.N. 513 = 1938 O.L.R. 231 = 1938 O.A. 415.

——**S. 37, Paras. 3 and 4**—*Scope of—Power to substitute order under para. 3 for prior order under para. 4—Power to award gross sum—Nature and extent of wife's right in regard thereto.*

The provisions of paras. 3 and 4 of S. 37 of the Divorce Act, are alternatives at the discretion of the

Court. They are merely alternative methods of protecting the successful petitioner, the wife. The proviso to the section in terms relates only to the provisions in para. 4 for monthly and weekly payments, and it does not in terms provide for any increase in the amount of the payments. Though a prior order has been made under para. 4, a Court has power on a fresh application to pass an order under para. 3 of S. 37. The correct interpretation of the third para. of S. 37 is that the husband is to secure to the wife a gross sum of money which is to be at her disposal in the same way as the annual sum of money. The section does give power to direct a money payment. (*Yorke, J.*) MRS. QUIEROS *v.* MR. QUIEROS. 1938 O.W.N. 513 = 1938 O.L.R. 231 = 1938 O.A. 415.

EASEMENT—*Right of privacy—Acquisition of.*

There is no inherent right of privacy attaching to any property and this is specially so in a town. Such a right must be acquired either by usage or by grant. (*Jai Lal, J.*) HAFIZ ULLAH *v.* MOHD. HUSSAIN. 40 P.L.R. 483.

EASEMENTS ACT (V OF 1882), S. 4, Expl. 12 and 15—*Acquisition of easement—Right of way—Lessee of land for building purposes—If can acquire right of way over other land of lessor.*

A lessee of land who has taken it for building purposes cannot acquire a right of way by easement over other lands owned by his lessor. Such a lessee by reason of his being the owner of the materials of the house, would not become an owner within the meaning of S. 4 of the Easements Act, by virtue of the Explanation that 'land' includes also things permanently attached to the earth. The lessee is not in the position of an owner of immovable property under S. 12 for the purpose of a right of way. Though he may be an owner of immovable property for purpose of acquiring easements under the first and second paragraphs of S. 15, when a case of right of way arises, he comes under the third paragraph of S. 15 and anything which he would acquire would be as the person in possession of the land which is his site and he would acquire for the benefit of the owner of the site. (*Bennet, Harries and Bajpai, JJ.*) ABDUL RASHID *v.* BRAHAM SARAN. 1938 A.W.R. (H C.) 319 = 1938 A.L.J. 436 = A.I.R. 1938 All. 293 (F. B.).

——**S. 7, Ill. (i)**—*Right to flow water from land on higher level—Right to obstruct.*

The right of every owner of upper land to flow water naturally falling on such land and not passing in defined channels, to the adjacent lower land, is a right *ex jure naturae* and it comes under S. 7 (*b*) of the Easements Act. Until and unless anybody acquires any easement to restrict this right, it could not be interfered with. (*Ganga Nath, J.*) JAGANNATH *v.* ANGAD. 1938 A.L.J. 486 = 1938 A.W.R. (H.C.) 307.

——**S. 12**—Owner of immovable property—Claimant lessee of land for building purposes—If can acquire right of way. *See* EASEMENTS ACT, SS. 4 EXPL. 12 AND 15. 1938 A.L.J. 436 (F.B.).

——**S. 15**—Right of way—Lessee of land for building purposes—If can acquire. *See* EASEMENTS ACT, SS. 4. EXPL. 12 AND 15. 1938 A.L.J. 436 (F.B.).

ESTOPPEL—Will in contravention of statute—Devisee acting upon it—Dispute between co-devisees—Invalidity of will—Bar in pleading. *See* C. P. TENANCY ACT, S. 5. 1938 N.L.J. 181.

EVIDENCE—*Account books—Failure to produce—If fatal.*

Although accounting *qua* accounting is not a part of the cause of action in a suit, omission to produce accounts by a defendant, even though the burden were on the plaintiff may in conceivable circumstances prove

fatal to the defendant. (*Vivian Bose, J.*) KALYANJI v. TIRKARAM. A.I.R. 1938 Nag. 254.

EVIDENCE ACT (I OF 1872)—*If a complete Code.*

In questions relating to matters expressly provided for in the Evidence Act, it must not be dealt with as a mere modification of the law of evidence prevailing in England. The Evidence Act is, as it was intended to

——Ss. 10, 30—*Confession of person who is dead*

under S. 10, because S. 1

furtherance of a conspiracy

to the conspiracy and doe

made after the conspiracy, and the acts done in pursuance thereof were at an end.

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co-accused or who might have l

charge of conspiracy and the offences which were its purpose or committed in pursuance of it. (*Davis, J.C. and Lobo, J.*) DENGO KANDERO v. EMPEROR. A.I.R. 1938 Sind 94.

——S. 10—*Scope—Statements of third persons or alleged conspirators—Admissibility and evidentiary value of—Corroboration—Necessity—Nature of corroborative evidence required.*

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in certain circumstances be treated actually as evidence of the existence of the conspiracy; as for instance when an act is done or something is said in the presence of the persons implicated. But mere statements of third parties made in the absence of the persons implicated form a class by themselves, of no probative value whatever standing alone. The section does not permit of the attaching of weight as real evidence to mere statements of this kind made in the absence of the accused persons, and independent evidence required as corroboration of such statements must be something very much more than the evidence which may ordinarily be regarded as corroborating the evidence of an accomplice. It may be direct or circumstantial evidence. But it must be evidence which standing alone, would be properly treated

the intention. (*James, J.*) JAGDISH DAS v. EMPEROR. 1938 P W N. 403.

——S. 10—*Statement by deceased in dying declaration as to conspiracy—Admissibility and value of—Corroboration.*

Where from the dying declaration made by a person, who is alleged to have been murdered, it appears that there was clearly a conspiracy wrongly to implicate a particular person, the High Court before it would rely on the evidence of witnesses who have so conspired, and who have had such an influence over the deceased making a dying declaration that they could have induced him to make a particular dying declaration to suit their purpose, must have some other evidence before it which would enable it to distinguish the true from the false. (*Davis, J. C. and Lobo, J.*) DENGO KANDERO v. EMPEROR. A.I.R. 1938 Sind 94.

——S. 30—Confession of dead co-accused—Admissibility. *See* EVIDENCE ACT, SS. 10 AND 30. A.I.R. 1938 Sind 94.

——Ss. 32 (5) and (6)—*Pedigree—Admissibility—Conditions of.*

Before a pedigree or table of relationship can be admitted in evidence, it must be shown that it is a

16 Mys.L.J. 137=43 Mys.H.C.R. 21.

——S. 32 (6)—"*Pedigree*"—*Meaning of.*

ordinarily understood, a pedigree is an ancient record handed down from generation to generation and added to, as a member of the family dies or is

of the Evidence Act, and has to be treated as a mere

16 Mys.L.J. 137=43 Mys.H.C.R. 21.

——S. 34—*Account books—Entries in—Sufficiency by themselves—Need for corroboration.*

Under S. 34 of the Evidence Act entries in books of account regularly kept in the course of business are relevant, but they are not by themselves sufficient evidence to charge any person with liability. It is the duty of the person relying on such entries to corroborative evidence in support of such Any relevant fact which can be treated as evidence within the meaning of the Act would be sufficient corroborative evidence furnished by the entries in books of account if true. (*Ismail, J.*) NARAIN DAS v. GHAZI RAM GOJAR MAL. 1938 A.L.J. 449=1938 A.W.R. (H.C.) 294.

——S. 47—*Scope—Statement by witness that certain document is in handwriting of known person—Admissibility and value of—Document not before Court—Effect—Witness—If must state source of knowledge at first.*

When a witness says that a particular document is in the handwriting of a certain person whom he knows, it is evidence of a fact. The fact that the witness does not also say that he knows and is acquainted with the handwriting of the person concerned does not render that t is legal evidence of the The witness need not say nows the handwriting. It ite party to explore in of his knowledge, if he is not satisfied with the testimony of the witness as it stands. Nor would the fact that the document is not before the Court render such evidence inadmissible. (*James, J.*) JAGDISH DAS v. EMPEROR. 1938 P.W.N. 403.

——Ss. 92 and 94—*Intention of parties—Oral evidence—Admissibility—Conditions.*

Where the surrounding circumstances are not so compelling as to lead inevitably to the conclusion that there had been an inadvertent misdescription of property in a mortgage deed in suit and that the property which was intended to be mortgaged was something over and above what was actually described and specified in the document, the mortgagees are barred by the provisions of Ss. 92 and 94 of the Evidence Act from showing that the intention of the parties was different from what appears from the terms of the mortgage deed itself.

cllister and Bajpai, JJ.) GOBIND BEHARI *v.* UJAAT-MAND KHAN. 1938 A.L.J 477 = 1938 A.W.R. (H C.) 304.

——S. 93—*Scope—Oral evidence to show that two ferent deeds are one and same transaction—Admissi-ity.*

Where two deeds on their face appear to be separate nsactions, another agreement which was not evidenced any writing cannot be proved to show that the deeds ugh apparently two separate transactions, were eed to be treated as one. (*Wort and Varma, JJ.*) ONANDAN TEWARY *v.* DRAUPADI KUER.

A.I.R. 1938 Pat. 242.

——Ss. 114, Ill. (b) and 133—"*Accomplice*"—*Co-used pleading guilty and implicating other accused—viction on own account—Removal from dock—Exa-ation as witness—Value of such testimony—Corro-tion.*

witness is none the less an accomplice even though has already been convicted on his account. Where of the accused who pleads guilty and implicates the er is removed from the dock and examined as a wit- with a view to get better value for his evidence than ld be possible if he were treated as a co-accused, he till virtually an accomplice; and though it is not illegal ase a conviction on his evidence, the more prudent se is to require corroboration of his evidence. *dul Ghani, J.*) NARASIMHIAH *v.* GOVERNMENT MYSORE. 16 Mys.L.J. 147.

——S. 114, Ill. (b)—*Accomplice evidence—Need for roboration.*

n dealing with a question which has to be decided er Ss. 133 and 114 and Illus. (*b*), thereunder, the owing propositions should be noted First: Provided as been established by extraneous evidence or matters earing on the record that the accomplices are not ng in collusion with one another, the cumulative ct of the evidence of two or more of them may be cient to remove the *prima facie* presumption of the vidual unworthiness of credit of their statements, if this be the case a conviction may legitimately be rded upon their statements alone, if the Court is inced of their truth. The same observation applies e cumulative effect of the evidence of an accomplice the confession of a co-accused where the presump- of their unreliability has, in the special circum- ces, been rebutted. Secondly: that evidence from a ce which is not *prima facie* unworthy of credit may e a fact which displaces in a particular case the umption that an accomplice is unworthy of credit. dly: that corroboration must proceed from a source neous to the person whose testimony it is sought to oborate. But it may consist of extraneous proof of ct relating to that very person's prior conduct. The e conclusions apply to approvers also. 9 Rang. 404 A.I.R. 1937 Rang. 209 Overr. (*Roberts, C. J., uley, Mosely, Ba U, Dunkley, Braund and Shaw,* THE KING *v.* NGA MYO.

Rang.L.R. 190 = A I.R. 1938 Rang. 177 (F.B.).

——S. 114, Illus. (b)—*Evidence of accomplice—umption.*

is not desirable that in cases where the evidence of ccomplice is tendered, the Court should call for proof e presumption that he is unworthy of credit unless borated in material particulars. Experience has n that in the generality of cases it is unsafe to ct upon the uncorroborated testimony of an mplice alone, although it is not illegal to do so. Court should therefore regard an accomplice as *a facie* unworthy of credit, but this presumption it is open to the Court to draw is not a hard and fast presumption but one which may be displaced in the circumstances of a particular case. (*Roberts, C. J. Baguley, Mosely, Ba U Dunkley, Braund and Shaw, JJ.*) THE KING *v.* NGA MYO.

1938 Rang.L.R. 190 = A.I.R. 1938 Rang. 177 (F.B.).

——S. 114, Ill. (b)—*Evidence of approver—Appreci-ation—Proper method.*

Where a charge of conspiracy depends upon the evidence of an approver, the judge should make up his mind whether he is going to believe the approver and if he thinks that the approver's evidence is unsatisfactory and suspicious, he should disbelieve it altogether. If on the contrary he comes to the conclusion that inasmuch as there is corroborative evidence, it does not matter much whether the approver is telling the truth or not, he would be approaching the case from a wrong point of view. (*Cunliffe and Henderson, JJ.*) KHIDAR *v.* EMPEROR. 66 C.L.J. 575.

——S. 115—*Conduct—Cosharer tenant not impleaded in landlord's suit for rent, participating in compromise to set aside sale—If estopped from impugning character of landlord's decree as rent decree—B. T. Act.*

A cosharer tenant who is not impleaded in the suit for rent by the landlord and who during the execution proceedings voluntarily comes forward and offers him-self as a party to a compromise the sole object of which is to have the sale of the tenure set aside, does not there-by recognise the decree obtained by the landlord as a rent decree, and he is accordingly not estopped from subsequently disputing its character as such, particularly when he has not been made a party to the appeal filed by the auction-purchaser against the order setting aside the sale on the basis of the compromise. (*Khundkar, J.*) NARENDRA NATH ACHARJEE *v.* HIRENDRA NATH ACHARJEE. 42 C.W.N. 701.

——S. 115—Representation—Oral agreement of permanent lease by Mohunt of Thakur—Tenant paying Salami and building pucca structure—Tenant not getting agreement specifically enforced or taking registered lease—Suit to eject by succeeding Mohunt—Estoppel. *See* T. P. ACT, S. 107.

1938 P.W.N. 386.

——S. 133—*Uncorroborated evidence of approver—Conviction, if can be based on—Discretion of Court.*

S. 133 of the Evidence Act gives the court a discretion to base a conviction solely on the uncorroborated evidence of an approver. Such a conviction is not illegal. (*Baguley, J.*) NGA MYO *v.* THE KING.

1938 Rang.L.R 213.

——S. 145—*Compliance with—Sufficiency.*

Where the whole of the previous statement made by the witness is read out to him and he is cross-examined in respect of it but he gives evasive replies, S. 145 of the Evidence Act is fully complied with, although the witness is not specifically asked about particular portions of that statement. (*Tek Chand, J.*) BADRI PRASHAD *v.* HIRA LAL. 40 P.L.R. 471.

——S. 167—*Improper admission of evidence—Duty of Court—Conviction on the remaining evidence.*

Where there has been an improper admission of evidence, a Judge would be acting correctly under S. 167 of the Evidence Act, if he comes to the conclusion that the rest of the evidence is sufficient to justify the conviction. (*Gruer, J.*) JAMNA PRASAD *v.* EMPEROR.

39 Cr.L J. 427 (2) = 174 I.C. 523.

EXECUTION—*Jurisdiction—Consolidation of two decrees one of which alone under execution—Power of Court.*

There were two decrees under the jurisdiction of a Court and only as regards one had execution been taken

EXECUTION.

out. Then the parties came along and by the compromise in effect these two decre the parties agreed to pay instalm that, in the events of the instaln execution could be taken out as contended that the Judge had no this consolidation.

Held, that the Judge had jurisdiction over both the decrees and execution of both the decrees, and the mere fact that the compromise was stated be with regard to two decrees in no jurisdiction of the Judge. Had the minded, they could have entered into a compromise separately in respect of each decree. But the same result was effected by the methods which the parties in fact adopted. (*Wort and Manohar Lall, JJ.*) LAKHAN SAO v. KANI RAM BHAGWAN DAS. A.I.R 1938 Pat. 270.

——*Jurisdiction—Power to sell property beyond jurisdiction.*

A Munsif has jurisdiction to sell in execution a property beyond his own immediate jurisdiction but within the same division (*Wort and Varma, JJ*) HARBANS PROSAD v JADUNANDAN RAI. A I.R 1938 Pat 237

GANJAM AND VIZAGAPATAM AGENCY RULES, R. 55—*Interlocutory orders—Order of Assistant Agent refusing amendment—Revision by Agent —Interference.*

R. 55 of the Agency Rules is widely drawn and the Agent to the Governor has power to revise interlocutory orders passed by the Assistant Agent, *e.g*, orders refusing amendment of plaint. If he refuses to revise on the ground that he has no jurisdiction to revise such orders, he wrongly refuses to exercise a jurisdiction possessed by him and the High Court will set aside his order. (*Leach, C. J. and Madhavan Nair, J.*) KANNAYYA v. LAKSHMIDEVI.

47 L.W. 692=(1938) 1 M.L J. 813.

GENERAL CLAUSES ACT (IX OF 1897), S. 10—*Applicability—Compromise decree—Provision for payment in instalment—Date of instalment falling on Court*

to be done by a compromise decree. A compromise decree is nothing more than a contract, and is none the less an agreement between the parties though there is superadded the command of a Judge; and time is of the essence of that contract. Where the time fixed for payment of an instalment of the amount due expires on a day which is a Court holiday, the judgment debtor cannot invoke S. 10 of the General Clauses Act, and claim to pay it on the day the Court reopens. (*Wort and Varma, JJ.*) RAM KINKAR SINGH v. KAMAL BASINI DEVI. 17 Pat 191.

GOVERNMENT OF INDIA ACT (1935), Ss. 49, 50, 53 and 59—*Prosecution for sedition—Sanction under S. 196, Cr. P. Code—Powers of Governor—Duty to consult Ministers before according sanction—Failure to consult—Legality—If can be challenged in Court of law.*

There is nothing in the Government of India Act of 1935 which imposes a legal obligation upon the Governor

HINDU LAW—Adoption.

Governor is certainly not required to exercise his

GRANT—*Service grant—Village goldsmith service inam and Kundanam service inam granted before permanent settlement—Resumability.*

permanent settlement and the Government have every right to resume the inams granted for such purposes while the zamindar has no such right. The economic theory on which these villages were constituted or established in the past was that all the necessary amenities for communal life in the village should be available in the village itself. Even if there were services not directly connected with agricultural operations, they were nevertheless regarded as necessary village services, necessary in the sense that the villagers could not live their lives in the absence of persons who could render them such services in the village itself. Hence it is that the village purohit, blacksmith, washerman, snake charmer and so on were regarded as village servants or servants of the community performing services which were necessary for the welfare and continuance of the village community. It is well known that the village goldsmith is a village servant and that in many villages there are goldsmith's service inams. Kundanam service is hardly distinguishable from goldsmith's service, the former service merely demanding more skill in the art than the latter. These inams therefore must be taken to have been granted for village service and not for purely personal and private services to the zamindar. Such inams if granted before settlement are resumable by the Government. (*Pandrang Row and Horwill, JJ*) VENKATAKUMARA MAHIPATHI SURYA RAO v. SECRETARY OF STATE. A.I.R. 1938 Mad. 445.

AND WARDS ACT(VIII OF 1890) *without sanction—Avoidance—Res-*

e the property of a minor has been conveyed by the guardian without permission of the District Judge, the minor in a suit brought against him, cannot avoid the transfer without restoring the benefit which he has received. (*Collister and Bajpai, JJ.*) JAI NARAIN LAL v BECHOO LAL. 1938 A.L.J. 521.

——S. 30—*Guardian contemplated by.*

It is clear that the 'guardian' contemplated by S. 30 of the Guardian and Wards Act, is not only a certificated guardian who is the natural guardian of the ward, but also a certificated guardian who is not the natural guardian. (*Collister and Bajpai, JJ*) JAI NARAIN LAL v. BECHOO LAL. 1938 A.L J. 521.

HINDU LAW—*Adoption—Ceremonies —Giving and taking.*

The giving and taking ceremony is the essence of adoption and the law does not accept any substitute for it. Mere expression of consent or execution of a deed of adoption though registered but not accompanied by the actual delivery of the boy does not operate as valid

C. J. and Wazir, J.)

40 P.L.R. J. & K. 42.

of estate—Limits of the

doubts there be vesting in there can tion is ow of a Joint an In

HINDU LAW—Adoption.

such cases there is a divesting so far as the other coparceners are concerned and the adopted son obtains whatever interests his adoptive father had at the date of his death. (*Stone, C. J. and Bose, J*) JAGDISH *v.* PUNAMCHAND. **1938 N.L.J. 176.**

——*Alienation—Widow—Imprudent transaction.*

The mere fact that a widow entered into an imprudent transaction is no evidence of fraud alleged to be practised by her on reversioners. (*Wort and Manohar Lall, JJ.*) JOTI LAL SAH *v.* MT. RAMESWARI KUER. **A.I.R. 1938 Pat. 281.**

——*Alienation—Widow—Powers of to dispose of shares of illegitimate sons of husband.*

A Hindu widow has no power to alienate her husband's estate so as to defeat the rights of the illegitimate sons of her deceased husband. The rights of the widow and the illegitimate sons of a Sudra are independent and one cannot meddle with the share of the other. A sale of the shares of the illegitimate sons by the widow for whatever purpose is ineffective. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) CHIKKAMMA *v.* NANJUNDA. **16 Mys.L.J. 184=43 Mys.H.C.R. 105.**

——*Debts—Avyavaharika—Breach of trust—Decree against father—Liability of son and ancestral property.*

The trend of authority is in favour of the view that a debt which is repugnant to good morals is an avyavaharika debt and in each case it will be the duty of the Court to decide whether the debt in question is repugnant to good morals or not. Where the father was guilty of a criminal breach of trust and a decree was obtained against him in respect of a debt which arose because of the criminal breach of trust, the debt is one which the son and the joint ancestral property is not under an obligation to discharge. (*Collister and Bajpai, JJ.*) BRIJ BEHARI LAL *v.* PHUNNI LAL. **1937 A.L.J. 470=1938 A.W.R. (H.C.) 298.**

——Debts—Coparcener—Member becoming member of Co-operative Society with consent of all adult members and incurring debts—Purchase of properties for joint family out of loans—Liability of joint family properties—Representative capacity of coparcener. *See* CO-OPERATIVE SOCIETIES ACT, S. 2 (*c*). **19 Pat L.T. 328 (S.B.).**

——*Debts — Father — Pre-partition debt — Decree against father alone after partition—Execution against son's share—Right of creditor.*

A creditor who chooses to obtain a decree against a Hindu futher alone after a partition between the father and the son, in respect of a debt incurred before partition cannot proceed to execute the decree against the property in the hands of the divided son. Though partition does not put an end to the son's liability for a father's debt, it does put an end to the joint family as an entity, and if the creditor seeks to enforce the son's liability for the father's debt, he must do so by obtaining a decree against the son. (*Stodart, J.*) SINNAMMAL *v.* SETTIYA GOUNDAN. **1938 M.W.N. 525=(1938) 1 M.L.J. 875.**

——*Family arrangement—Validity—Conditions—Claims made—If to be just.*

It is not necessary that a family arrangement, to be valid, must evidence just claims; it is not invalidated even though the claims might, if pressed, prove unfounded. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) KITTAMMA *v.* SESHAMMA. **43 Mys.H.C.R. 43.**

——*Joint family—Business—Nature of—Family trading partnership and ordinary partnership—Distinction.*

A joint Hindu family trade is a species of ancestral joint property in which every member of a Mitakshara joint family acquires by birth an interest in the same

HINDU LAW—Partition.

way as in other kinds of property. They become not only coparceners but also co-partners of the trading firm. A joint family trading partnership appears to differ from ordinary partnership in two respects, namely, (*i*) it is not dissolved by the death of any member, and (*ii*) a member of the family becomes a co-partner by operation of law. (*Costello, A.C.J. and McNair, J.*) LALA BAIJ NATH PRASAD *v.* RAM GOPAL LACHMI NARAYAN. **I.L.R. (1938) 1 Cal. 369.**

——Joint family—Business—Partnership suit—Agreement to carry on business as before until final decree—Partnership, if can be inferred—Loan contracted by one of branches of family—Liability of other branches. *See* PARTNERSHIP ACT, SS. 4 AND 5. **I.L.R. (1938) 1 Cal. 369.**

——*Joint family—Business—Pronote by karta—Suit by creditor against family—Plea by one member that he has separated and therefore he is not liable—Burden of proof.*

In a suit to recover from a Hindu joint family firm money borrowed under a promissory note executed by the karta, the plaintiff who seeks to charge the joint family firm has the *onus* on him to prove that the money was borrowed for purposes binding on the joint family and that the karta had authority to so borrow. But if a member of the family admits that a business existed and seeks to escape liability on the ground that he has since separated from the family, it is for him to prove that the business is not a joint family business. (*Wort, J.*) MATHURA SAO *v.* RAM LAL JUGAL KISHORE. **1938 P.W.N. 398.**

——*Joint family—Coparcener—Income received by coparcener after date of disruption—If becomes accretion to joint property.*

If the income received by a coparcener after the date of disruption relates to a period prior to that date, it would be treated as an accumulation or accretion to the joint family property and he would be liable to account for it. A.I.R. 1916 Cal. 500, rel. on. (*Addison and Din Mohammad, JJ.*) SHANKAR DAS *v.* OFFICIAL RECEIVER. **A I.R. 1938 Lah. 328.**

——*Maintenance—Widow—Income from her personal exertions—If constitutes means.*

After a decree has been passed in favour of a widow for maintenance, the amount so decreed cannot be reduced if the widow happens to make her own living by personal exertions, because her income by personal exertions cannot be taken as her means'. (*Addison and Din Mohammad, JJ.*) JAI RAM *v.* MT. SHIV DEVI. **A.I.R. 1938 Lah. 344.**

——*Partition—Mother's share—Nature of son's interest in—Presidency Towns Insolvency Act, S. 17.*

The share which a mother takes in the estate of her deceased husband on a partition among her sons, is by way of provision for her maintenance, for which purpose she is even entitled in certain circumstances to alienate it. On the death of the mother, that share does not descend as if she had inherited it from her husband, but goes back to her sons from whom she received it. The right of the sons to take her share is not in the nature of a mere *spes successionis* during her lifetime. The sons have a subsisting interest in it and that interest vests in the Official Assignee under S. 17 of the Presidency Towns Insolvency Act on their adjudication as insolvents during the lifetime of the mother. (*Panckridge, J.*) HIRALAL MONDAL *v.* SANKAR LAL MONDAL. **42 C.W.N. 695.**

——*Partition—Severance of status—Institution of suit—Effect of.*

It is clear law that the institution of a suit for partition by a member of the joint family is an unequivocal

HINDU LAW—Partition.

intimation of his intention to separate and that there is consequently a severance of his joint status from the date when the suit is instituted. A decree may be necessary for working out the results of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by assertion of his right to separate whether he obtains a consequential decree or not. (*Costello, A. C. J. and McNair, J.*) LALA BAIJ NATH PRASAD *v.* RAM GOPAL LACHMI NARAYAN. **I. L. R. (1938) 1 Cal 369.**

——*Reversioners—Right of—Alienation by widow—Subsequent sale for arrears of revenue—Right of rever-*

...quently practised ...

Held, that the sale in June 1927 indicated that the sale was for one of the kists for the year 1926, that is, the year during which the widow was the owner. Consequently *B* could not be held to have caused the

... pro- ... raud ... n of ... fraud. He was under no obligation to the reversioners to pay the arrears. (*Wort and Manohar Lall, JJ.*) JOTI LAL SAH *v.* MT. RAMESWARI KUER. **A I R. 1938 Pat. 281.**

——*Widow—Alienation—Right to set aside—Reversioner party to and taking benefit under transaction—Right to repudiate.*

Where a Hindu widow or other limited heir enters into a family agreement or compromise involving an alienation of the estate, the reversioner who has been a party to and has benefitted by the transaction i... cluded from questioning the alienation and repudiate it. A party to the alienation cannot question it and is bound by his or h... *Ghani and Singaravelu* ... *v.* SESHAMMA.

——*Widow—Co-widows—Nature of estate held by—Powers of—Relinquishment by one of right of survivor-*

...vested interest, or at least a contingent ... a mere *spes successionis* under S. 6, T... Co widows in possession are competen... joint estate into estates held in several... them may relinquish her right of survivorship in that portion of the estate which is held by the other or others. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) KITTAMMA *v.* SESHAMMA. **43 Mys H.C R. 43.**

——*Widow—Suit against widow on promissory note—Binding nature of debt—Considerations—Nature of suit—Test—Adoption before judgment—If affects legal position.*

INSOLVENCY.

Prima facie if a Hindu widow is sued on a promissory note and no prayer is to be found which shows that she is sued as representing the estate, the case must be regarded as personal. The fact that the debt is of a kind that is binding on the estate makes no difference. In determining the nature of the suit, it is better to regard not the intention of the plaintiff but the object of the suit, *i. e.*, the matter which the Court is called upon to decide. Hence if the binding nature of the debt is not put in issue and evidence is not tendered in that respect, the suit must be regarded as a personal suit against the widow and the suit being personal the decree must be personal and hence only the widow's interest ...

suit is personal and he is not a party, neither he nor his estate is bound. (*Stone, C. J. and Niyogi, J.*) VASANT RAO *v.* BEHARI LAL. **A I.R. 1938 Nag 225.**

HINDU LAW OF INHERITANCE (AMENDMENT) ACT (II OF 1929), S. 1 (2)—*Applicability to Jains*

It appears to be probable that the Hindu Law of Inheritance (Amendment) Act, 1929, should apply to Jains and that the term 'Hindu' should be interpreted as including Jains more particularly in view of the wording in S. 1 (2) of the Act. (*Pollock, J.*) BALKISAN *v.* MST. JATNABAI. **1938 N.L J. 168.**

INCOME-TAX ACT (XI OF 1922), S. 13 Proviso —*Duty of income-tax officer in acting under—Flat rate, desirability of.*

When an income officer is acting under the proviso ... t remember that ... It is mislead- ... tax officer as a discretionary power. The application of a flat rate is proper when a truer state of income can be (*Stone, C. J. and Bose, J.*) COMMIS- ... INCOME-TAX *v.* ACHHRULAL. **1938 N L J. 172.**

——S 23—*Scope of—Duty of income tax officer under.* ... 's with matters of ... tion of the income, Ss. 10, 11 and 12'. ... rily with accounts, ... e' then the income-

1938 N L J. 172.

...or—vendee undertaking to vendor—If amounts to—If implied. *See* LIMITATION APPLICABILITY. **1938 A L J. 455 (F B.).**

INSOLVENCY — *Persons adjudicated insolvents under firm name—If individually become insolvents.*

If *A*, *B* and *C* are adjudicated insolvents under a firm name, then *A*, *B* and *C* individually become insolvents. If *A* and *B* are carrying on business elsewhere under another firm name, t... the ... re automatically involved in ...

INSOLVENCY.

adjudication. (*Braund, J.*) *In the matter of* MOTILAL PREMSUKHDAS. **1938 Rang. L.R. 166.**

——— *Question of title—Duty of Courts—Reference of dispute to Civil Courts.*

Courts should be a little careful in disposing of all matters in insolvency which have the effect of deciding the title alleged to reside in third parties, so as to defeat such title and bring the property within the estate of insolvent. Only in very simple cases, should title suits be in effect disposed of on motion ; and normally where there is any real difficulty or dispute, where either an official receiver or a creditor is challenging the apparent title of stranger so as to bring the property within the estate of the insolvent, the proper course will be to refer the parties to a suit. (*Stone, C. J.*) RAMA YADO TELI *v.* DHEKAL JHANA TELI.

A.I.R. 1938 Nag. 247.

INTERPRETATION OF STATUTES—*Mysore State—English rules of construction of wills and deeds—Rule of construction of foreign statute—Applicability in Mysore.*

It would not be at all proper for the Courts in Mysore to feel themselves bound, in interpreting a statutory enactment of that state, by artificial rules of construction developed in the Courts in England for the interpretation of deeds and wills executed by private persons. It is also unsafe to take a rule for the interpretation of even of a statute in another country and to apply to a statute of Mysore. (*Reilly, C J. and Abdul Ghani, J.*) CHICKANARASAPPA *v.* HONNURAMMA.

43 Mys.H C.R. 181 = 16 Mys.L.J. 167.

——— *Preamble—Reference to—Limits.*

The preamble may be consulted to solve any ambiguity whenever the enacting part is open to doubt ; but where the enacting part is clear, the preamble cannot operate to restrict that meaning. (*Pollock, J.*) BALKI SAN *v.* MST. JATNABAI. **1938 N.L.J. 168.**

——— *Reference to other statutes.*

It is always dangerous to seek to construe one statute by reference to words of another. (*Lord Wright.*) NIPPON YUSEN KAISHA *v.* RAMJIBAN SEROWGEE.

42 C.W.N. 677 = 174 I.C. 564 = 1938 M.W.N. 487 = A.I.R. 1938 P.C. 152 = (1938) 1 M.L J. 834.

JAMMU AND KASHMIR TENANCY REGULATION, Ss 66 and 67—*Alienation of occupancy rights by widow—Right of reversioners to challenge.*

The Tenancy Regulation is intended merely to control the relationship between landlords and tenants and has nothing to do with the powers of alienation possessed by a widow or the control of such alienations by reversioners. The reversioners may challenge the alienation by a widow if they are allowed to do so by their personal law or by any custom. Where, therefore, the parties are Hindus, the reversioner could challenge the right of the widow to alienate her occupancy rights in the land provided the alienation was without consideration and legal necessity. (*Kichlu and Wazir, JJ.*) NAND SINGH *v.* MST ACHHRI. **40 P.L.R J. & K. 44.**

JURISDICTION—Civil and Revenue Courts—Claim for share of profits as co tenants—Denial of tenancy. *See* AGRA TENANCY ACT, S. 230.

1938 A.W R. (H C.) 326

——— *Civil Court—Ghatwal—Fitness to hold office—Power to decide*

Per *Manohar Lall, J.*—The decision of fitness for the post of a Ghatwal must ordinarily rest with the executive authorities subject to this important reservation that if the executive has simply made a pretence of dealing with the question of the fitness of the Ghatwal who claims to be recognised as the next Ghatwal and declares him unfit in an arbitrary manner or in a manner which the law would not recognise then the Civil Courts are free to interfere.

Per *Chatterji, J.*—Appointment of Ghatwal is primarily an executive job. If the executive appoints a wrong man while dismissing the claims of a right person, the Civil Court can at the most give such right person a mere declaration that the appointment made is bad. But the Court cannot force the executive authorities to remove the one and appoint the other instead. A mere declaration therefore would be infructuous if the executive authorities, for reasons of their own, ultimately choose not to act upon that declaration. Such declaration the Court should not grant. (*Manohar Lall and Chatterjee, JJ.*) JOGENDRA NARAIN *v.* RADHA PRASAD. **A.I.R. 1938 Pat. 245.**

——— *Civil Court—Power to re-instate Ghatwal properly dismissed.*

The Court cannot re-instate a person in the Ghatwal land who has been properly dismissed from the office. (*Manohar Lall and Chatterjee, JJ.*) JOGENDRA NARAIN *v.* RADHA PRASAD. **A I.R. 1938 Pat. 245.**

——— *Civil Court—Suit for possession—Plaintiff coming to Court on strength of right of succession on death of last tenant.*

Where the relationship of landlord and tenant does not exist between the parties, and the plaintiffs come to the Court on the strength of their right of succession which devolves upon them on the death of the last tenant the suit is cognizable by a Civil Court. (*Kichlu and Wazir, JJ.*) KHUSHIA *v.* BAGU.

40 P.L.R. J. & K. 40.

KARACHI SMALL CAUSE COURTS ACT (IV OF 1929), S. 14—*Maintenance suit—Jurisdiction of Small Cause Court.*

S. 14 does not exempt suits relating to maintenance from cognizance of Court of Small Causes, Karachi. (*Mehta and Lobo, JJ.*) ASHI *v.* ABDUL KADAR.

A.I.R. 1938 Sind 106.

——— **S. 14 (h)**—*Suit by wife against husband for maintenance amount—If exempt.*

A suit for recovery of money can in no sense be treated as a suit to enforce a contract unless the contract is for the delivery of particular coins. Therefore a suit by a wife against her husband for the recovery of a certain amount for maintenance even though it be not acknowledged as a debt, is cognizable by the Court of Small Causes, Karachi, as it is not a suit for specific performance of any contract. (*Mehta and Lobo. JJ.*) ASHI *v.* ABDUL KADAR. **A.I.R. 1938 Sind 106.**

——— **S. 32**—*Aggrieved party deliberately choosing circuitous method—Review—Interference.*

Where a remedy is open to an aggrieved party to move the Judicial Commissioner's Court of Sind direct, and that party deliberately refrains from doing so and resorts to a circuitous method of approaching that Court, the Judicial Commissioner's Court should not exercise its extraordinary jurisdiction under S. 32 and review the whole case as if there had been an application for that from the aggrieved party. (*Mehta and Lobo, JJ*) ASHI *v.* ABDUL KADAR. **A.I R. 1938 Sind 106.**

LAHORE HIGH COURT RULES AND ORDERS, VOL. 5, CHAP. 1 A. R. 4—*Judges sitting in Letters Patent appeal—Jurisdiction to grant extension of time.*

Extension of time in case of a Letters Patent appeal filed after the period of limitation under R. 4 of Chap. 1 A. Vol 5 of the Rules and Orders of the Lahore High Court, can only be granted by Bench admitting the appeal. Judges sitting in Letters Patent appeal are not the "the admitting Bench" within the meaning of R. 4

LAHORE HIGH COURT RULES AND ORDERS VOL. 5.

and they have no jurisdiction to grant an extension in an appeal before them fixed for hearing. (*Young, C. J. and Monroe, J.*) RAMESHWAR DAS *v.* OFFICIAL RECEIVER, DELHI. A.I.R. 1938 Lah. 325.

to be calculated on the net value to the claimant of the property and such net value can be arrived at only after the usual deductions for cess and ground rent (*Wort and Manohar Lall, JJ.*) SECRETARY OF STATE *v.* SITAL PRASAD. A.I.R. 1938 Pat 266.

——S. 23—*Compensation—Basis of.*

The mere fact that the High Court has in a particular case given 16 years' purchase to a person claiming

——S. 34—*Agreement that claimant should take away material on land to be acquired—If deprives right to interest.*

Under S. 34, the claimant is entitled to interest at 6 cent. per annum from the time of possession by Government until the sum or compensation is paid or deposited and the mere existence of an agreement between the parties, that the claimant should take away the materials on the land to be acquired, does not disentitle the claim- the mant Vort

TE *v.* SITAL PRASAD. A.I.R. 1938 Pat. 266.

LANDLORD AND TENANT—*Abadi—House built by riya—Right to transfer—*Wajib ul arz—*Construction—Principles.*

On a construction of the *wajib-ul-arz* in question it was held that the *riya* who had constructed at his own expense a house, had only two rights (1) a right to sell the materials, and (2) a right to make a gift of the right of occupation. It was further held that these two were separate rights which were not combinable so as to produce a third right of sale of the right of occupation. Where a *wajib ul arz* has to be read as establishing a custom, it is not permissible to put on its terms any inferential construction. The terms of the custom can not be considered in the ordinary way to go beyond what is actually stated in the *wajib-ul-arz.* (*Yorke J.*) SAIDUDDIN *v* GANGA PRASAD. 1938 O.A. 410 = 1938 A.W.R. (C.C.) 45 = 1938 R D 534 = 1938 O W.N 500.

——*Acceptance of rent from sub tenant by zamindar—Effect.*

be presumed that the zamindars tenant in chief. (*Bomford, J M* DEO. 1

——*Admission to tenancy—*

Silence of zamindar—Effect.

LANDLORD AND TENANT.

The mere fact that a rent suit was filed does not amount to evidence of admission by the zamindars of the defendants, as tenants. Nor does the silence of the zamindar prove anything so far as they are concerned. (*Bomford, J. M.*) HAR NANDAN GIR *v.* BAWAN SINGH. 1938 R D. 456.

*sion to tenancy—*Khudkasht—*Several co-*

admission of a tenant to a plot of *khud-* usually be made by the *khudkasht* holder the co-sharers jointly. But if the *khud-* longs to more than one co sharer, then all join in the letting. (*Darling, S. M. and*) ASHARFI SINGH *v.* RAM LAKHAN SINGH. 1938 R.D 543.

——*Admission to tenancy—Proof of—Giving of receipts by persons not authorised to admit—Value.*

Admission to tenancy is not proved by the giving of receipts by a person who is not authorized to admit. (*Darling, S.M. and Bomford, J M.*) BIKRAM SINGH *v.* JAMUNA SINGH. 1938 R.D. 473.

——Bhejberars—*Status of—Quasi-proprietors or*

been generally accepted that the *bhejberars* are of the ordinary type. They are not tenants. roprietors. Their status is not dissimilar to sub-proprietors of S 3 (16), Land Revenue. enheim, S. M. and Drake Brockman, J. M.) *v.* BADLU. 1938 A.W R. (B.R.) 187.

——*Co-sharers—Single tenancy—An occupancy and a statutory tenant, if can share.*

A single tenancy cannot be shared by an occupancy and a statutory tenant. (*Darling, S. M. and Bomford, J.M.*) MOHAMMAD SADDIQ *v.* AISHA BIBI. 1938 R D. 480.

——*Co-tenancy—Claim as to—Burden of proof.*

When a person who has no title claims to be a co-tenant the burden clearly lies very heavily on him to prove that he has been admitted by the other parties concerned. (*Bomford, J. M.*) HAR NANDAN GIR *v.* BAWAN SINGH. 1938 R D. 456.

——Kabuliyat—*Construction— Additional rent for excess area.*

A stipulation in a *kabuliyat* by which a tenancy was created was as follows:—"If afterwards on measurement the area is found to be in excess or if any land which really belongs to this Jote is discovered later on, I will pay additional rent for this excess area without any objection."

Held, that the landlord was entitled to get additional rent for the excess area which was found out in the course of the settlement proceedings. (*Guha and Nasim Ali, JJ*) THE CHANDRA SEKHAR ZEMINDARY CO. *v.* RADHA GOBINDA KOER. 67 C L J 2.

——Kabuliyat—*Statement of area in—Standard of measurement—Presumption.*

Unless there is evidence to show that there was a different standard of measurement, it must be presumed that the measurement of the area noted in a *kabuliyat* was by the official standard. (*M. C. Ghose, J.*) THE BHOWANIPORE ZEMINDARY COMPANY *v.* RAM MONDAL. 67 C L.J. 1.

——*Lease—All co sharers not joining—Invalidity of can join others—Estoppel.*

it was not given by all the ctment of the lessees by all

LAL.) 62.

LANDLORD AND TENANT.

——Rent—Rent suit—Nature of—Reliefs awardable —Right to money decree when charge decree not possible. *See* BIHAR TENANCY ACT, S. 148.

19 Pat L.T. 325 (S.B.).

——*Rent—Suit for—Land in suit allotted to plaintiff's share by partition—Question if it appertains to Mahal paying rent—If can be raised in defence in rent suit—Bengal Estates Partition Act.*

Where there was a partition under the Bengal Estates Partition Act between the plaintiff and his co sharers and by that partition the land in suit was allotted to plaintiff's share, the question about the suit land being within a Mahal paying any rent or not cannot be raised by way of defence in the rent suit. It should have been decided in the partition proceedings. (*Jack, J.*) KOKARAM BAIRAGI *v.* KUMAR BIMALENDU ROY.

66 C.L.J. 578.

——Sir *land—Ejectment of tenant—All co-sharers, if should join.*

Sir is a purely personal holding, the rights in which can only be exercised by all the co-sharers. But in a suit for ejectment by only one of the co-sharers where the other appears in the witness box and states that he has no objection to the suit, it should be taken that for all practical purposes all co-sharers have joined. (*Bomford, J.M. and Darling, S.M.*) MAKUND SINGH *v.* AJODHIA. 1938 A.L.J. (Suppl.) 54.

——Sir *land—Joint* sir—*Mortgage by co-sir holder —Validity—Mortgagee obtaining possession—Effect on status of tenant.*

It is both alike doubtful whether a co *sir* holder can mortgage a share of *sir* and whether such a mortgagee can obtain possession on the basis of such mortgage. But if the mortgagee does get possession the tenant in *sir* becomes a tenant in *khalsa* and he can acquire occupancy rights. (*Darling, S M. and Bomford, J.M.*) RAGHUNATH *v.* ABID ALI. 1938 R.D. 472.

——Sir *land—Joint* sir—*Partition—Suit to eject tenant—All co-sharers if should join.*

Where a field was once the joint *sir* of other Zamindars but at partition it was definitely recorded as the *sir* of one, there is no need for the others to join in a suit to eject a tenant. (*Bomford, J.M. and Darling, S.M.*) NARSINGH DAYAL *v.* BISHWANATH LAL.

1938 A.L.J. (Suppl.) 62.

——Sir *land—Planting of grove—Effect.*

The mere fact that a grove has been planted in *sir* land will not affect the *Sir* character of the plot. (*Bomford, J.M. and Darling, S.M.*) RAM CHANDRA *v.* GOPAL LALJI. 1938 A.L.J. (Suppl.) 58.

——*Tenant building on land—Right to resist ejectment.*

Where a tenant builds on land which he holds under a lease, he does, not thereby in the absence of special circumstances acquire any right to prevent the lessor from taking possession of the land when the tenancy has determined. *P* had allowed *D* to build a temporary shed for residential purposes on his land in 1317 Fasli on condition that he would cook food for *P* on ceremonial occasions and render other menial services on wages. *D* having stopped to render service, *P* brought a suit for recovery of possession of the land. *D* alleged that he had built substantial structures on the land and that *P* having stood by and acquiesced in the construction was estopped from claiming possession of the land. The lower Court found that the structures were not substantial and no special circumstances were proved by *D*.

Held, that *D* had not acquired any right to prevent *P* from recovering possession of the land. The mere fact that there was no written lease although the land was taken as recently as 1317 did not affect the question. (*Dhavle, J.*) MT BATULAN *v.* SAYID MOHAMMAD NAEEM. A.I.R. 1938 Pat. 236.

LIMITATION ACT (1908), S. 3.

LAND TENURE- *Ghatwal — Hereditary nature— Forfeiture—Grounds for.*

Per *Manohar Lall, J.*—A hereditary Ghatwali tenure cannot be taken away from a family because the incumbent at any time misconducts himself or proves unfit to discharge his duties, so long as there is some other member of the family fit for the post, and in the case of a minor, so long as some suitable arrangement can be made for the performance of the necessary duties until the minor comes of age. When Ghatwal is dismissed for misconduct the whole tenure is not forfeited and Government have no right to appoint any one whom they like. The position of the Ghatwal is not like a mere jaghirdar who has "a jaghir assigned for support and remuneration". In a case where there is an express repudiation by the entire family to accept relation of Ghatwali or where the ruling power thinks that the incumbent who is being removed has left no heir who is capable of rendering even the vicarious services involved as a part of the obligations of the holder of the tenure, then in such cases ruling power will be justified in holding that these circumstances are themselves a ground for forfeiture in the persons of the entire family. (*Manohar Lall and Chatterjee, JJ.*) JOGENDRA NARAIN *v.* RADHA PRASAD. A.I.R. 1938 Pat. 245.

LEGAL PRACTITIONER—*Admission — Point of law—Binding nature of.*

The fact that the counsel has waived the objection as to limitation does not estop his client from raising the same, as counsel's admissions on a point of law are not binding. (*Dalip Singh, J.*) PANNA LAL JAIN *v.* JAIN BANK OF INDIA LTD., LAHORE.

A.I.R. 1938 Lah. 368.

LIMITATION ACT (IX OF 1908), Ss. 3 and 28 and Art. 144—*Suit relating to mosque—Limitation— Adverse possession of mosque—Continuing wrong.*

Per *Young, C.J. and Bhide, J.* (*Din Mohammad, J.*, contra).—S. 3 of the Limitation Act applies to every suit and provides no exception for suits concerning wakfs, religious institutions, or land and buildings dedicated to sacred uses. A suit relating to a mosque is, therefore, subject to the law of limitation and prescription laid down in Art. 144 and S. 28 of the Limitation Act. If the Sikhs have been in adverse possession of a mosque for over twelve years, the Muslims lose all rights in the land and building, including the right of worship. The Sikhs on the other hand by virtue of S. 28 of the Limitation Act obtain a good title to the land and building thereon and have full rights therein as owners. There is no duty cast on the Sikhs to maintain its original sacred character, or to maintain it as a building. If, therefore, the Sikhs demolish the building of the mosque after the perfection of their title by adverse possession, the Muslims have no cause of action. Nor can the refusal of the Sikhs to allow the Muslims to pray on the site of the mosque constitute a 'continuing' wrong within the meaning of S. 23 of the Limitation Act. For when all rights of the Muslims in the mosque are extinguished and the Sikhs become the owners of the building, the right to pray in the mosque is also extinguished and in refusing that right the Sikhs cannot be held to be guilty of any wrong, much less a 'continuing' one. (*Young, C.J., Bhide and Din Mohammad, JJ.*) MASJID SHAHID GANJ *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR.

40 P.L.R. 319=A.I.R. 1938 Lah. 369 (F.B.).

LIMITATION ACT (1908), S. 4.

——S. 4—Applicability and scope—If controls S. 20—Last day of limitation expiring on Sunday—Payment of interest next day—If saves limitation. *See* LIMITATION ACT, S.20. 47 L.W. 726.

——S. 5—*If can be invoked for the first time in second app*...

(*Quaere*, ... applied in ... to that eff... *Bose, J.*)

——S. 5 ... *appeal to Privy Council—Non-presentation in time owing to agreement between parties to end litigation.*

Where an application for leave to appeal to the Privy Council is not presented within the time prescribed by law owing to an agreement between the applicant and the opposite party not to continue the litigation further as the parties had incurred enormous ... accept as final the decision of the High ... opposite party goes back on the agreem... application for leave to appeal, there is ... for the applicant not presenting his ap... time. (*Tek Chand and Skemp, JJ.*) ... GANGA RAM. 40 P.L.R. 399.

——S. 5—Sufficient cause—Delay in filing appeal under S. 476-B., Cr. P. Code—Ignorance of filing of complaint. *See* LIMITATION ACT, ART. 154 AND S. 5. 1938 N.L.J. 183.

——S. 10 and Art. 48—*Applicability—Endowment to temple deity—High priest—If "trust"—War bonds vested in idol—Suit by high priest against widow of late high priest for recovery of bonds or substitutes or their value—Limitation.*

Art. 48 of the Limitation Act applies to an action in *detinue*. In the case of a Hindu Religious Endowment which is a gift directly to an idol or temple, the seisin to complete the gift is necessarily effected by human agency. He is only the manager and custodian of the idol or the institution. He is given the right to a part of the usufruct the mode of enjoyment and the amount of the usufruct depending on usage and custom. In no case is the property conveyed to or vested in him ...

... manager of the endowment, is concerned. The plaintiff, the present high priest of a temple instituted a suit against the widow of the late high priest for recovery of certain war bonds belonging to the deity or their substitutes, in the possession of the defendant, or in the alternative for recovery of Rs. 4,200 being the value of the said bonds, in case the delivery of the war bonds or their substitutes could not be bad.

Held, that the action was one in *detinue* and was governed by Art. 48 of the ... S. 10 of the Act did not app... within the meaning of S. 10 ... not a person in whom the prop... (*Wort and Manohar Lall, JJ.*) URMILA DEVI *v.* BAIDYA NATHJI. 19 Pat L T 367= A.I.R. 1938 Pat. 273.

——S. 14—*Benefit of—Availability—Ejectment under Agra Tenancy Act through fraud—Remedy by way of review—Failure—Suit under S. 99 of the Tenancy Act—Benefit of time spent in review, if available.*

LIMITATION ACT (1908), S. 28.

Where there has been an ejectment by fraud and the remedy by way of review has failed and subsequently a suit under S. 99 of the Agra Tenancy Act is filed, the benefit of S. 14 of the Limitation Act is not available to the plaintiff to cover the time spent in the futile ... hen a man takes one remedy ... e cannot be allowed to have ... e Limitation Act to enable ..., whatever the reason for the ... emedy. (*Darling, S.M. and* ...) ... RASAD PANDE *v.* JAI BAHA... 1938 R D. 469.

——S. 15—Scope—Joint decree against several persons—Insolvency proceedings pending against one—Period of pendency—Right to exclude in execution against others. *See* LIMITATION ACT, ART. 182, EXPL. I. 1938 P.W.N. 397.

——S. 20—"*Period prescribed*"—*If includes time* ...

... Schedule to the Act. It does not include the extended period within which the suit may be filed by reason of the Court being closed on the last day of limitation as contemplated by S. 4 of the Limitation Act. Where limitation for a suit on a promissory note expires on Sunday, a payment of interest made the next day cannot give a fresh starting point though a suit filed on that date would be in time. (*Stodart, J.*) PATTABHIRAMAYYA *v.* KRISHNA RAO. 47 L.W. 726=1938 M.W.N. 513.

... *to be beneficial purchaser of properties—Competency.*

In a suit by a mortgagee for sale on his mortgage, the mortgagors and their vendee were originally impleaded as defendants. Subsequently, after the expiry of more than 12 years from the due date fixed for payment, the plaintiff applied to implead another person as a party defendant as it was brought ...

... by itself let in the operation of S. 22 (1) of the Limitation Act, because he would not, in that view, be a new party. (*Varadachariar and Pandrang Row, JJ.*) SUBRAMANIA CHETTIAR *v.* SRINIVASARAGHAVA AYYANGAR. 1938 M.W.N. 500=47 L.W. 665.

——S. 23—Adverse possession of mosque—Refusal to allow Muslims to pray—Continuing wrong. *See* LIMITATION ACT, SS. 3 AND 23 AND ART. 144. ...=A.I.R. 1938 Lah. 369 (F B.).

... *possession for twelve years—If* ...

... The operation of S. 28 of the Limitation Act perfects a title to the property in favour of the person in adverse possession after the period prescribed for recovery of possession has run. Twelve years continuous possession by a wrong-doer *not only* bars the remedy and extinguishes the title of the rightful owner of land, but confers a good title upon the wrong-doer. (*Young, C.J., Bhide and Din Mohammad,*

JJ.) MASJID SHAHID GANJ *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR.
40 P.L.R. 319 = A.I.R. 1938 Lah. 369 (F.B.).

——S. 28 and Art. 44—*Scope—Alienation by guardian—Alienee getting possession—Sale by minor after majority to another—Latter vendee dispossessing prior alienee—Suit by alienee from guardian for possession—Right to decree—No suit by minor for setting aside alienation—Effect of.*

Art. 44 of the Limitation Regulation must be read with S. 28 of the Regulation and if an ex-minor fails to sue within the period prescribed by Art. 44 to set aside an alienation made by his guardian and obtain possession of the property alienated, then by the operation of S. 28, his right to that property becomes extinguished. It is not a case of a mere remedy getting barred, but a case where the right to the property is itself extinguished. If the alienee is subsequently dismissed by a purchaser from the minor after he attains majority, the alienee from the guardian is entitled to sue and obtain a decree for possession. A distinction must, however, be made between cases where the alienee from the guardian gets actual possession and those where the minor whose property is sold is never disturbed in his possession. In the latter cases where the minor's possession is not disturbed at all in spite of the guardian's alienation, the fact that the period under Art. 44 has expired does not disentitle the party in possession from successfully resisting the alienee's claim for possession. But the minor who has not been in possession and who has omitted to sue within the period limited by Art. 44 cannot resist the claim of the alienee to possession. Nor can a subsequent purchaser from the minor resist the claim of the alienee. (*Abdul Ghani and Nagesvara Iyer, JJ.*) ASWATHANARAYANA SETTY *v.* SIDDIAH. 43 Mys.H.C.R. 197.

——Art. 44—Scope—*If to be read with S. 44*—Failure of minor to sue within time prescribed—Effect of. *See* LIMITATION ACT, S. 28 AND ART. 44.
43 Mys.H.C.R. 197.

——Art. 48—Applicability—Suit against widow of late high priest of temple by present high priest—Claim to recover war bonds belonging to deity or their substitutes or their value—Limitation—High priest—If "trustee." *See* LIMITATION ACT, S. 10 AND ART. 44.
19 Pat.L.T. 367.

——Arts. 83 and 116—*Applicability—Vendee undertaking to pay off mortgage debt of vendor—If amounts to contract of indemnity—Non-payment—Vendor's property sold—Suit for damages, if lies.*

Where a vendee under a registered sale deed undertakes to pay off a mortgage debt of the vendor out of the amount left in his hands for that purpose, it amounts to a contract of indemnity. A contract of indemnity may be express or implied. Where such a vendee fails to make the payment and such non-payment has resulted in the property of the vendor being sold, the vendor has a cause of action to sue for damages for the breach of the contract of indemnity and such a suit would be governed by Art. 83 read with Art. 116 of the Limitation Act. (*Bennet, A.C.J., Bajpai and Ganga Nath, JJ.*) TILAK RAM *v.* SURAT SINGH. 1938 A.L.J. 455 = A.I.R. 1938 All. 297 (F.B.).

——Art. 91—*Suit to declare deed of gift invalid—Absence of knowledge of contents—Starting point.*

Where a suit is to declare that a deed of gift executed by the plaintiff was invalid and ineffectual, as it was executed without the knowledge of its real nature, it is governed by Art. 91 of the Limitation Act and the period is three years and starts from the time the plaintiff became aware of the true character of the deed and

of the transaction which he had entered into. (*Ganga Nath, J.*) IBRAR AHMAD *v.* KAMNI BEGAM.
1938 A.L.J. 502.

——Art. 96—*Applicability—Suit for sale on mortgage—Property mistakenly described—Suit for rectification barred—Right to relief—Oral evidence as to correct property and intention of parties—Admissibility—Specific Relief Act, Ss. 33 and 34.*

It is open to the plaintiff or the defendant in a suit to adduce oral evidence in regard to the correct description of the property in a conveyance executed between them and relief in regard thereto may be granted even though a suit for rectification has not been filed and even though a suit is barred by limitation under Art. 96 of the Limitation Act. Art. 96 applies only if the plaintiff wants to sue for rectification of the deed and prays only for that relief. But if a plaintiff sues for other reliefs in respect of the property incorrectly described, such for a sale of the property on the basis of a mortgage deed, and if the relief regarding rectification is only formal or incidental or not necessary for awarding the main relief prayed for, then Art. 96 has no application. If the plaintiff is able to establish that by mutual mistake the property was described wrongly; it is open to the Court to take oral evidence in regard to it, treat the document as rectified and give relief to the plaintiff on that basis, thus giving effect to the intention of the parties, especially when the rights of third parties have not intervened. (*King and Venkataramana Rao, JJ.*) SOORAMMA *v.* VENKAYYA. 1938 M.W.N. 499 = 47 L.W. 661 = (1938) 1 M.L.J. 806.

——Art. 144—Applicability—Suit relating to mosque. *See* LIMITATION ACT, SS. 3 AND 23 AND ART. 144. 40 P.L.R. 319 = A.I.R. 1938 Lah. 369 (F.B.).

——Art. 154 and S. 5—*Appeal under S. 476-B, Cr. P. Code—Computation of time—Delay—Excusing—Sufficient cause—Filing of complaint not known.*

The time for filing an appeal under S. 476 B, Cr. P. Code, has according to Art. 154 of the Limitation Act to be computed from the date of the complaint. But if the person against whom the complaint is filed is ignorant of the filing of such a complaint, and on coming to know of it files an appeal within 30 days of his knowledge in such a case time can be extended under S. 5 of the Limitation Act. (*Niyogi, J.*) BHIKAJI *v.* SAMBHURAM. 1938 N.L.J. 183.

——Art. 181—*Obstacle to execution—Removal by order of competent Court—Limitation for execution—Starting point.*

Where there is an obstacle to the execution proceedings, for instance, possession of the property by a third party, as soon as that obstacle is swept away by a Court of competent jurisdiction declaring the title of the judgment-debtor to the property as against that party, the duty again arises upon the decree-holder to take execution proceedings within three years notwithstanding the fact that that party has filed on appeal. (*Abdul Rashid, J.*) KANWAR CHANDRA RAJ SARAN SINGH *v.* MUNSHI LAL. 40 P.L.R. 481.

——Arts. 182 and 183—*Applicability—Payment order by District Judge under S. 164, Companies Act.*

Though by reason of S. 164, Companies Act, the District Judge has the same jurisdiction and the same powers as the High Court, yet the District Judge by virtue of S. 164 does not become the High Court for purpose of Art. 183, Limitation Act. Hence to a payment order passed by the District Judge under powers conferred by S. 164, Art. 183 has no application and the only article applicable is Art. 182. (*Dalip Singh, J.*) PANNA LAL JAIN *v.* JAIN BANK OF INDIA, LTD., LAHORE. A.I.R. 1938 Lah. 368.

LIMITATION ACT (1908), Art. 182.

——Art. 182 (2)—*Appeal rejected for non-payment of court-fee—Execution of decree—Limitation—Starting point.*

Where a memorandum of appeal filed with deficit court-fees was neither registered nor numbered as an appeal but was rejected for non payment of the requisite court-fees within the time allowed, the order of the appellate Court has not the effect of a decree and it does not deal judicially with the appeal at all which never came into existence. Consequently, the starting point for limitation under Art. 182 of the Limitation Act for the execution of the decree is the date of the trial Court's decree and not the date of the order of the appellate

cution—If necessary.

There can be a step-in-aid of execution without any application for execution having ever been made at all. (*Dalip Singh, J.*) UTTAR CHAND KAPUR AND SONS *v.* SAYAD HAMID ALI. A I R. 1938 Lah. 326.

——Art. 182 (5)—*Step in-aid—Application to recover monies deposited in Court.*

An application by a decree-holder to draw out monies deposited in Court in execution of the decree is not a step-in-aid of execution. (*Addison and Din Mohammad, JJ.*) HIRA LAL *v.* MOHNA SINGH. 40 P.L R. 494.

——Art. 182 (7)—*Decree for possession of immovable property—Execution staye*

furnishing security for mesne

Application for realization of

surety after dismissal of appeal—Limitation.

Where the execution of a decree for possession of immovable property is stayed on the judgment debtor

of mesne profits against the surety is governed by Art. 182 (7) and not by Art. 181 of the Limitation Act. (*Abdul Rashid, J.*) NANU MAL *v.* AMAR NATH. 40 P.L.R. 473.

——Art. 182, Expl. 1—*Scope—Joint judgment-debtor's—Execution against one—Insolvency proceedings against same—Limitation for execution against others—If saved—Provincial Insolvency Act, S. 78 (2).*

Under Expl. 1 to Art 182 of the Limitation Act, the

supervening of insolvency so far as he is concerned, cannot keep the remedy of the decree-holder alive against all of them, because there is no bar to the decree-holder executing the decree against the other judgment-debtors during the pendency of the insolvency proceedings against one of them. (*Noor, J.*) RAM RAN BIJOY PRASAD *v.* NAGESHWAR TEWARY. 1938 P.W N. 397.

LUNACY ACT, (IV OF 1912), Ss. 15 and 88—*Magistrate passing reception order—Power to order for payment of Cost of maintenance of lunatic.*

A magistrate who passes a reception order against a lunatic under S. 15 of the Lunacy Act has no jurisdiction to pass an order for the payment of the costs of the maintenance

sions of S.

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MADRAS

1926), S. 8—*Consecutive sentences—Offender under*

MADRAS LOCAL BOARDS ACT (1920), S. 207.

sentence of detention—Order in later case directing sentence to run after expiry of prior sentence—Legality.

The Madras Borstal Schools Act does not contain a provision corresponding to S. 397, Cr. P. Code; and therefore, a sentence of detention in a Borstal School must take effect at once and cannot be postponed An order directing that a sentence of detention shall take effect from the date of expiry of a previous term awarded in a previous case is illegal. (*Horwill, J.*) NONDI, *In re.* 1938 M.W.N. 535 = 47 L W. 636 = (1938) 1 M L J. 761.

MADRAS DISTRICT MUNICIPALITIES ACT (V OF 1920), Ss 68 and 69—Scope—Non-compliance conformity with—Suit on—Competency. *See* T. P. ACT, SS. 105 AND 107. 47 L.W. 668.

—— *Profession tax—Liability for—Person holding appointment—Actual residence—If necessary.*

The test of liability to profession tax in the case of a person holding appointment is not personal presence within the municipality. If he holds appointment within the municipality for 60 days he is liable to profession tax. (*Lakshmana Rao, J*) KRISHNAN NAMBIAR *v.* MUNICIPAL PROSECUTOR, CALICUT. 47 L W. 771 = (1938) M.W.N. 536.

MADRAS ESTATES LAND ACT (I OF 1908), S 74—*Scope and object of—Dispute as to validity of adoption or claims of rival landlords—If can be settled under.*

S 74 of the Estates Land Act was not intended to

of an adoption or

intended to enable

tain circumstances

what is the quantity or value of crops raised. (*Horwill, J.*) IRULANDI SERVAI *v.* V. R. A. VEERAPPA CHETTIAR. (1938) M.W N. 452.

—— S. 75 (8) (b)—Decision of Deputy Collector—Finality—Revision by District Collector—Juris . *See* MADRAS ESTATES LAND ACT, S. 205. (1938) M.W N. 452.

——S. 205—*Scope—Order on application under S. 74—Revision.*

If a landlord applies under S. 74 of the Estates Land Act, and the ryots plead that they have paid rent to his adopted son and that no rent is payable, the Deputy Collector can only settle the disputes between the parties under S.75 (2) on the ground that the ryots have alleged that no rent was payable. The decision would then 5 (8) (*b*) and be appealable to the District jurisdiction of the District Collector in be ousted. Subject to a possible appeal Court under S.75 (2) (*c*), the order of the Deputy Collector would be final and no application in revision would lie under S. 205. (*Horwill, J.*) IRULANDI SERVAI *v.* V. R. A. VEERAPPA CHETTIAR. (1938) M W.N. 452.

MADRAS LOCAL BOARDS ACT (XIV OF 1920), S. 207 (1)—*Offence under—What is—Notice under S. 159 (1) to remove encroachment—Failure to comply—Prosecution—Acquittal—Subsequent notice to remove same encroachment—Failure to comply with notice—Fresh prosecution—If barred.*

The offence punishable under S. 207 (1) of the Local Boards Act for failure to comply with a notice under S. 159 (1) requiring the accused to remove an encroach-

dience of a notice under S. 159 (1) is no bar to the

MADRAS SUPPRESSION OF IMMORAL TRAFFIC ACT (1930), S. 6.

prosecution and trial of the same accused in respect of disobedience of a later notice calling upon him to remove the same encroachment. (*Burn and Stodart, JJ.*) PUBLIC PROSECUTOR *v.* SABAPATHI CHETTY. 47 L.W. 777.

MADRAS SUPPRESSION OF IMMORAL TRAFFIC ACT (V OF 1930), S. 6 (2)—*Applicability—Warrant under Ss. 13 and 14—Raid—Order committing girls to Rescue Home—Legality.*

A Magistrate is competent to pass an order under S. 6 (2) of the Suppression of Immoral Traffic Act committing the girls found in the place raided to a Rescue Home only if the warrant for the search was issued under S. 6 (1). But where the warrant is issued under Ss. 13 and 14, and merely authorises the Inspector of Police to ascertain whether certain offences under the Act were being committed, the order passed by the Magistrates of the Juvenile Court under S. 6 (2) is incompetent and must be set aside. (*Horwill, J.*) KAMALAMMAL, *In re.* 47 L.W. 742= (1938) 1 M.L.J. 886.

MAHOMEDAN LAW—*Wakf—Adverse possession of wakf property—Muslims and Non-Muslims.*

Per *Young, C.J.*—The proposition of law that when a wakf is created all proprietary rights of men are extinguished in the property so dedicated, applies only as between Muslims themselves, and then only when no statutory modification of Mahomedan Law exists. There is no authority for the proposition that as between Muslims and non-Muslims dedicated property is inalienable or not subject to adverse possession.

Per *Din Mohammad, J.*—The British Courts in India cannot ignore the provisions of the Mahomedan Law altogether while dealing with a mosque and the special features which it possesses and the peculiar privileges which it enjoys are always to be determined under the Mahomedan Law and under no other law even though one of the parties to the suit before them may be a non-Muslim. (*Young, C. J., Bhide and Din Mohammad, JJ.*) MASJID SHAHID GANJ *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR. 40 P.L.R. 319=A.I.R. 1938 Lah. 369 (F.B.).

——*Wakf—Mosque—If a juristic person—Mosque as institution and as building—Distinction.*

Per *Young, C.J. and Bhide, J.*—A mosque as an institution (but not as a building consisting of stones, bricks and mortar) is a juristic person capable of suing and being sued. There is a clear distinction between a mosque as an institution, or as a juristic person which can own property, and a mosque as a building; the mosque as a building may be owned by the institution (juristic person) or by any one else who may acquire adverse possession over it. The mosque as an institution is, therefore, entitled to sue for possession of the building of the mosque or its site for the benefit of all persons interested in the institution. (*Young, C.J., Bhide and Din Mohammad, JJ.*) MASJID SHAHID GANJ *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR. 40 P.L.R. 319= A.I.R. 1938 Lah. 369 (F.B.).

MASTER AND SERVANT — *Right to wages—Monthly servant leaving service without notice—Right to payment for work done in fraction of month.*

A man who had undertaken work on a monthly wage as a domestic servant in a house and failed to perform his work properly, but behaved in an improper manner, and finally left the house without giving any notice whatsoever, should not able to claim payment for the work that he may have done in the period from the beginning of the month up to the date of his departure,

MESNE PROFITS.

being less than a month. (*Mackney, J.*) ETBARI *v.* BELLAMY. A.I.R. 1938 Rang. 207.

MESNE PROFITS—*Assessment—Mode of.*

It is no doubt the general rule that the sum to be awarded as mesne profits is not what the plaintiff has lost by his exclusion from the land but what the defendant has, or might with reasonable diligence have, made by his wrongful possession. But the application of this general rule to a particular case will depend on its own peculiar facts. 'Mesne profits' are in the nature of damages, which the Court may mould according to the justice of the case, and in determining the mode of assessment it is necessary for the Court to ascertain the nature of the plaintiff's possession before ouster and the character of the property. (*Tek Chand, J.*) TILAK RAM *v.* DEVI CHAND. 40 P.L.R. 443.

——*Calculation by High Court—Interference by the Privy Council.*

The High Court in calculating the mesne profits for certain period, obtained reliable figures representing the gross demand attributable to the suit lands for two years and took the average of these as being in their judgment the best basis of computation afforded. The material available was difficult and the conclusion arrived at after close scrutiny was reasonable and convincing. In considering deduction for collection charges, it was thought, it was in the interest of the defendant to establish specific figures showing the costs of collection.

Held, that the Judicial Committee of the Privy Council would not interfere with such figures, though they could be criticized in detail.

Held also, that if the result of this endeavour in showing collection cost was unfavourable to the defendant, the Board would not be right in varying the order on that account. (*Sir George Rankin.*) DHANRAJGERJI *v.* PANUGANTI PARTHASARATHY RAYANIM VARU. 174 I.C. 288=1938 O.W.N. 504= 1938 O.L.R. 200=42 C.W.N. 687= 1938 P.W.N. 417=A.I.R. 1938 P.C. 139 (P.C.).

——*Decree directing—Construction—Accounting for gross receipt, if contemplated.*

In a suit for redemption of a mortgage, which stipulated that if the mortgage money was paid at the latest before 31st August 1914 the defendant should refund all rents and profits as from 1st July, 1914, the trial Judge while decreeing the suit, ordered that if the plaintiff paid into Court the mortgage money before 5th March, 1919 the defendant should reconvey the property and pay Rs. 60,000 on account of past mesne profits for 1914, but awarded no mesne profits for any year after that. The money was duly deposited in the Court on 5th March, 1919. The defendant appealed to the High Court but not being satisfied with its order appealed to the Privy Council. The Board restored the decree of the trial Judge with the following variation that the plaintiff was chargable with interest at 6 per cent. per annum from 1st September, 1914, down to the date when the amount was paid into Court. On the other hand the defendant must account to the plaintiff for mesne profits of the properties from 1st July, 1914 until actual delivery of possession. The delivery of possession was given in December 1924. In taking accounts the dispute arose as to whether for the first year 1914 the figure arrived at by the trial Judge was to be accepted or a fresh account taken, as in the case of other years.

Held, (1) that the year 1914 could not be excluded from the account and the mesne profits for that year must be computed afresh. The defendant would get credit for the amount already paid by him. (2) That the order in Council could not be read as directing the defendant to account for gross receipt from 1st July 1914

MORTGAGE.

to the date of delivery of possession. The decree of the trial Judge, which was restored with variation and the order in Council itself must be taken to intend the meaning given to the phrase 'mesne profits' by cl. 12 of

mortgagee—If can be executed personall

given against a puisne mortgagee, such

the costs have to be paid, and the obligation to pay is not in any way dependent upon the mortgaged property proving suff

Digby, J.)

RAO RAMJI.

MOTOR VEHICLES ACT (VIII OF 1914), Ss. 5 and 16—*Arrest of offender—Legality.*

Per *Baguley, J*—For the commission of an offence under the Motor Vehicles Act a person cannot ted. The power of arrest given under S. 5 Code, will also be of no avail unless and ur offender fails to give his correct name and (*Baguley and Sharpe, JJ.*) THE KING *v.* MAUNG THOUNG SHWE. A.I.R. 1938 Rang. 161.

——S. 5—*Offence under, and offence under S. 279, I. P. Code—Distinction between.*

Per *Baguley, J.*—S. 5, Motor Vehicles Act, deals with reckless driving dangerous to the public having regard Code, t as to urt or n these two sections seems to be this. A man may drive a motor vehicle in a manner 'dangerous to the public' even if there is no person actually on the spot to be endangered, the public being regarded as some kind of an all pervading presence which may reasonably be expected to be at the place at the time. For inst a man drives out of a side-road and dashes a main road into another side-road at sixty miles a he may not endanger any person at all becaus there

amount there. Code, because there is not "any other person" who is likely to be hurt. For an offence under S. 279, Penal Code, there must definitely be some other person to be endangered. So, if in driving across the main road in this manner some passer-by only saves his life by a wild leap to safety, then the driver of the vehicle is driving in a manner so rash and negligent as at least to be likely to cause hurt to that person who only saved his life by his agility and an offence under S. 279, Penal Code has been committed. (*Baguley and Sharpe, JJ.*) THE KING *v.* MAUNG THOUNG SHWE. A.I.R. 1938 Rang. 161.

MYS. C. P. CODE REGN. (1911), O. 32, R. 7.

——**S. 11, Rules under, R. 38-B (Rangoon)**—*If ultra vires.*

Per *Baguley, J.*—The power to seize a license given under rules framed by Local Government from its owner and keep it for a certain time cannot in any way help to carry into effect the provisions of the Act. It is not even a temporary suspension of the license because given for cancelled urt trying must and HWE. ang. 161. *ules, Lorry place both —If*

"Letting for hire" in R. 30 (*a*) (1) (*i*) of the Madras otor Vehicles Rules framed under the Motor Vehicles ct of 1914, need not be one definite and localised act. When a motor lorry is engaged for a journey from Calicut in the district of Malabar to Pollachi in the dis e said to ut along the districts of Malabar and Coimbatore, and therefore, the owner who obtains no special permit in form G commits an offence under S. 16 of the Motor Vehicles Act

area through which vehicles engaged or plied for hire travel. (*Burn, J.*) PUBLIC PROSECUTOR *v.* KRISHNAN, 47 L.W. 774 = (1938) 1 M.L.J. 800.

——S. 16—*Onus—Madras Motor Vehicles Rules, R. 30 (a) (1) (i)—Violation of—Prosecution for—Failure to prove absence of G. permit—Effect.*

In a prosecution under S. 16 of the Motor Vehicles Act for violation of r. 30 (*a*)(1)(*i*) of the Madras Motor Vehicles Rules, it is incumbent on the prosecution to prove by evidence that the vehicle in question was not provided with G. permit. Failure to let in evidence of this essential fact is a fatal defect. (*Burn, J.*) PUBLIC PROSECUTOR *v* KRISHNAN. 47 L.W. 774 = (1938) 1 M.L.J. 800.

in revision against such order is competent. (*Singaravelu Mudaliar, J.*) KRISHNAMURTHY NAIDU *v.* PEDDANAGAMMA. 16 Mys.L.J. 158.

——S. 115—Award on arbitration in pending suit—Order refusing to file—Revision—Competency. *See* MYS. C. P. CODE REGULATION, S. 104. 16 Mys.L.J. 158.

——O. 32, R. 7—*Applicability and scope—Reference to arbitration in pending suit—Some parties minors—Leave of Court not obtained—Award—Validity of—If can be set aside at instance of adult party or by Court suo motu.*

Where a pending suit, some of the parties to which are minors, is referred to arbitration without the leave of the Court being obtained under O. 32, R. 7, C. P. Code

it is only the minors concerned and not any adult party that can avoid the order of reference or the award made on such reference. The award can be set aside by no party other than the minors whose interests are affected by the reference to arbitration. In the absence of any proceeding either by way of suit or by means of an application by the minors to set aside the order of reference to arbitration, the Court has no jurisdiction *suo motu* or at the instance of the adult parties to the suit to set aside the order of reference or the award. (*Singaravelu Mudaliar, J.*) KRISHNAMURTHY NAIDU *v.* PEDDANAGAMMA. 16 Mys.L.J. 158.

——O. 41, Rr. 4 and 33—*Scope—Appeal—Right of one defendant alone to appeal against whole decree.*

A respondent can, under rules 4 and 33 of O. 41, C. P. Code, claim that the suit of the appellant may be dismissed as a whole and not merely as against him or as against the portion of the property in suit which is retained by him. Such a course is permitted by rules 4 and 33 of O. 41; and when the decree under appeal proceeds on any ground common to all the defendants, any one of them is entitled to prefer an appeal against the whole decree. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) INTOOR POLIA *v.* IYAMANGALA RUDRAYYA. 16 Mys.L.J. 178 = 43 Mys H.C.R. 38.

——O. 41, R. 33—*Powers of Court under—If to be used to detriment of absent party.*

O. 41, R. 33, C. P. Code, permits a Court to exercise the power conferred on it *in favour of* a person who is absent, and not to his *detriment.* (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) INTOOR POLIA *v.* IYAMANGALA RUDRAYYA. 16 Mys.L.J. 178 = 43 Mys.H.C.R. 38.

——Sch. II, para. 15 (1) (c)—*"Otherwise invalid"—Award setting aside—Reference to arbitration bad—If ground for setting aside award.*

The grounds for setting aside an award are entirely different from the grounds for setting aside an order of reference. The Court which made the reference to arbitration is not competent to set aside the award under cl. 15 of Sch. II, C P. Code, on the ground that the reference itself was bad or invalid. The phrase "otherwise invalid" in cl. 15 (*c*) refers only to grounds which would invalidate the award and not having any reference to the previous proceedings in the suit in Court. (*Singaravelu Mudaliar, J.*) KRISHNAMURTHY NAIDU *v.* PEDDA NAGAMMA. 16 Mys.L.J. 158.

MYSORE CO-OPERATIVE SOCIETIES REGULATION (VII OF 1918 as amended in 1933), S. 43 A (6)(b)—*Scope—Decree by Assistant Registrar—Civil suit to declare invalid—Maintainability.*

A decree passed by the Assistant Registrar of Co-operative Societies is final and cannot be called in question in a Civil Court by reason of S. 43-A (6) (*b*) of the Co-operative Societies Regulation. A suit in the Civil Court for a declaration that the suit in which the decree was passed was not maintainable and was barred by time, and therefore the decree is not valid, is not maintainable. (*Abdul Ghani and Nagesvara Iyer, JJ.*) SAMPATHKUMARACHAR *v.* AGRICULTURAL AND TRADING CO-OPERATIVE SOCIETY, LTD. 43 Mys.H.C.R. 215.

MYSORE CRIMINAL PROCEDURE CODE REGULATION (II OF 1904 as amended in 1927), S. 174—*Investigation under—Scope of—Report—Form and contents of.*

It is desirable that in an investigation by the Police under S. 174, Cr. P. Code, statements of persons acquainted with the facts of the case should be made before the *panchayatdars.* That is the intention of S. 174. The record of the statements made by persons before

the *panchayatdars* should also be put into the case diary. An abstract of the statements of witness in such an investigation must be put into the form of a report sent to the magistrate. It is a mistake not to do so. (*Reilly, C.J. and Nagesvara Iyer, J.*) CHENNABASAVIAH *v.* GOVERNMENT OF MYSORE. 43 Mys.H.C.R. 220.

——S. 386 (1) (a)—*Warrant for fine—Execution by attachment of hypothecation bond and sale—Endorsement over to purchaser—If passes right to debt—Attachment by Civil Court and sale under C. P. Code—If necessary—Assignment of debt—If to be registered.*

A debt due under a hypothecation bond is movable property, and a warrant can be issued under S. 386 (1) (*a*), Cr. P. Code, for the levy of a fine by attachment and sale of any movable property. Where a warrant is addressed to the Deputy Commissioner, it would be better and more appropriate for him to approach a Civil Court for attachment and sale of such a debt, but he would all the same be acting within his power if he attaches the debt by actually seizing the hypothecation bond and selling it and making an endorsement on the bond itself and handing it to the purchaser. His action cannot be treated as either unauthorized or illegal or as not conveying any rights to the purchaser. A mortgage debt under a hypothecation bond can be assigned over in writing. It does not require a registered deed. (*Abdul Ghani and Nagesvara Iyer, JJ.*) KALIAPPA CHETTY *v.* VENKATARAMANA SETTY. 43 Mys.H.C.R. 153.

——S. 559—*Successor of abolished Court—Power of District Magistrate to constitute himself or to declare another as successor.*

The District Magistrate is entitled under S. 559, Cr.P. Code, to constitute himself the successor-in-office of a Court that is abolished. The power to declare a successor-in-office is left to the District Magistrate. If he wants to treat some other Court as successor-in-office, it would be necessary for him to determine such successor by an order in writing. But when that is not his intention and he wants to treat himself as the successor-in-office, he can well do so under S. 559. (*Abdul Ghani and Nagesvara Iyer, JJ.*) KALIAPPA CHETTY *v.* VENKATARAMANA SETTY. 43 Mys.H.C.R. 153.

MYSORE EXCISE REGULATION (V OF 1901), S. 64—*Vicarious Liability—Offence by servant of licensee—Liability of licensee.*

For any constructive liability of a holder of a license or permit in respect of offences committed by his servant, it must be proved that the servant who committed the offence was not only in the employ of the licensee at the time but was also acting on his behalf. The holder cannot be convicted unless it is shown that the servant was acting within the scope of his employment and for the benefit of his master. (*Abdul Ghani, J.*) NARASIMHIAH *v.* GOVERNMENT OF MYSORE. 16 Mys.L.J. 147.

MYSORE HINDU WOMEN'S RIGHTS REGULATION (X OF 1933)—*Scope—Retrospective effect—Widows of persons dying before 1—1—1934—Right to benefit of full of estate.*

Under the Hindu Women's Rights Regulation so far as widows are concerned, enlargement of their estate in what had been their husbands' separate property must be held to take effect not only for the benefit of widows whose husbands died after the Regulation came into effect, but also of widows living on 1—1—1934 whose husbands had died before that date in the absence of any exception in the Regulation which would prevent them from getting a full estate in that way. (*Reilly, C.J. and Abdul Ghani, J.*) CHICKANARASAPPA *v.* HONNURAMMA. 43 Mys.H.C.R. 181 = 16 Mys.L.J. 167.

MYS. HINDU WOMEN'S RIGHTS REGN. (1933), S. 10.

——**S. 10 (2) (g), Exception**—*"Alive"—Construction—Daughter in the womb at death of husband—Widow's rights in husband's property.*

The exception to cl. (g) of S. 10 (2) of the Hindu Women's Rights Regulation is a very important one and must be interpreted strictly. The Court must apply the

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MYSORE LAND REVENUE CODE ...

S. 193—*Scope—Security bond by Government Officials—Liability under—Forfeiture—Right to decide—If one*

... Revenue Code ... provides that ... lone which can ... the Government under security bonds executed to Government officials for the due discharge of their office. There is no provision which precludes an officer from contesting the correctness of the Government's decision in a suit. (*Reilly, C.J. and Shankaranarayana Rao, J.*) KRISHNACHAR

...

after personal remedy has become barred—Sufficiency to save limitation.

In the case of a debt due under a hypothecation bond, if the payment is by a person who has ceased to be per... liable for the debt and who has also parted wit... suc... anc... giv... Lir... M...

MY...

S. ...

of meetings.

The powers given to a Magistrate to issue orders under S. 39 of the Police Regulation, though restricted ... does not empower the magistrate t... order prohibiti... powers of the ... made. (*Reilly* ... G. R. SWAMY ...

——**S. 39**—...

There is n... which requires ... magistrate em...

43 Mys.H.C.R. 144.

NEGOTIABLE INSTRUMENTS ACT (1881), S. 85.

——**S. 70**—*Burden of proof—Disobedience of order under S. 39—Prosecution—Propriety or legality of order—Duty of prosecution.*

In a prosecution under S. 70 of the Police Regulation for disobedience of an order under S. 39, it is not necessary for the prosecution to prove either the reasons

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43 Mys H.C.R. 144.

MYSORE REGULATION (VII OF 1923)—*Scope—Suit for declaration—Wrongful detention of money by Government—Suit for recovery and for damages for breach of contract—Maintainability.*

A suit against the Government for a declaration is barred by Regulation VII of 1923. But a suit can be maintained against Government for wrongful detention of goods or money or for damages for breach of contract. Regulation VII is no bar to such suits. (*Reilly, C.J. and Shankaranarayana Rao, J.*) KRISHNACHAR *v.* GOVERNMENT OF MYSORE.

43 Mys. H.C.R. 208.

...

favour of ...

HINDU LAW—WIDOW. 43 Mys H.C R. 43.

——**S. 78**—*Gross neglect—Prior mortgagee parting with title deeds—If loses priority.*

Except in cases where a mortgage is by deposit of title ... to take the

...

NEGOTIABLE INSTRUMENTS ACT (XXIV OF 1881), S. 9—*"Holder in due course"—Promissory note by two persons—Paying relinquishing claim against*

...

... *Forged cheque—Payment—Liability of* ... *ence.*

...g to the negligence of the employees of a ... was made in respect of a forged cheque, ... ot escape the liability to make good the amount, by relying on the circumstance that the customer

OUDH RENT ACT (1886), S. 7-A.

was negligent in leaving his cheque book at a place to which others had access. It was the duty of the Bank to verify the signature of its customers. (*Ismail, J.*) PIRBHU DAYAL *v.* JWALA BANK. **1938 A.L.J. 504.**

OUDH RENT ACT (XXII OF 1886), Ss. 7-A and 61—Sir *lands—Usufructuary mortgage of proprietary rights—Retention of cultivating possession—Right to claim exproprietary rights.*

Where a usufructuary mortgage of sir lands is executed but cultivating possession is retained throughout, the mortgagor, and his sons after his death can claim at any time ex-proprietary rights in the sir lands and can resist ejectment. (*Darling, S. M. and Bomford, J.M.*) RAJ BAHADUR SINGH *v.* SAT NARAIN.

1938 R.D. 481 = 1938 O.W.N. 485.

PARTNERSHIP—*Dissolution—What amounts to.*

A firm carries on business so long as its business debts remain undischarged. The mere fact that no new business was done after a particular date does not amount to a dissolution of the firm. (*Davis, J.C. and Lobo, J.*) BHAWANIDAS *v.* JETHSING. **A.I.R. 1938 Sind 82.**

——*Suit against partners — Partnership business carried on by some members of joint Hindu family—Relief against other members on footing that business is joint Hindu family business—Pleadings—Relief.*

The determination in a cause must be founded on the case to be found in the pleadings, or involved in or consistent with the case thereby made. Where the plaintiff sues the defendants upon the footing that they are partners in a partnership business, he cannot be granted a decree on the footing that the business is a joint Hindu family business, in which the defendants are interested as members of the joint family; the two cases are entirely inconsistent. The same business cannot be a joint family business and also a partnership business. Where therefore the business carried on by certain persons, is a partnership business carried on by only some members of the joint Hindu family as partners, the other members of the family who are not interested in the business as partners cannot be made liable in respect of a loan borrowed for the partnership business, on the footing that the business is a joint Hindu family business. (*Mosely and Dunkley, JJ.*) RAMBILAS SABOO *v.* GOPIRAM. **A.I.R. 1938 Rang. 205.**

PARTNERSHIP ACT (XI OF 1932), Ss. 4 AND 5—*Joint Hindu trading family—Partition suit—Agreement to carry on business as before until final decree—Partnership, if can be inferred—Loan contracted by one of branches of family—Liability of other branches.*

Where after the passing or a preliminary decree in a partition suit, the different branches which formed a joint Hindu trading family agree that the business should be carried on as before until the final decree, and one of the branches so carries on part of the business for the benefit of all the branches; an agreement of partnership between the different branches can be inferred from the conduct of the parties and the circumstances of the case, although a severance of the joint family has been brought about by the partition suit. Consequently, a loan contracted before the final decree by the branch carrying on part of the business for the purpose of that business is binding upon all the branches, although it has been contracted after the severance of the family. (*Costello, A.C.J. and Mc Nair, J.*) LALA BAIJ NATH PRASAD *v.* RAM GOPAL LACHMI NARAYAN.

I.L.R. (1938) 1 Cal. 369.

——**S. 5**—*'Joint Hindu family firm'—Firm started by sons after their father's death.*

The assumption that a joint Hindu family firm can come into existence only if the business has descended from father to son, is obviously wrong. There is no provision of law which prohibits the members of a Hindu co-parcenary to start family business out of joint funds at any time, after the death of their father, or other ancestor. Such a firm is exempt from registration under S. 5 of the Partnership Act. (*Tek Chand, J.*) DEBI SAHAI *v.* GILLU MALL. **40 P.L.R. 456.**

PENAL CODE (XLV OF 1860), S. 34—*Applicability sudden scuffle.*

Where there was a sudden scuffle between the accused and the other party and there was no consultation or premeditation amongst the accused, S. 34, I. P. Code, is not applicable to the case. (*Wazir, J.*) BARKAT ALI *v.* STATE. **40 P.L.R. J. & K. 37.**

——**Ss. 34 and 37**—*Applicability and Distinction between—Intentional co-operation—What is.*

Per *Dhavle, J.*—The distinction between S. 34 and S. 37 is that while the former requires a common intention for a criminal act done by several persons (*i.e.*, "a unity of criminal behaviour which results in a criminal offence"), in which case each actor becomes liable as if that act were done by him alone S. 37 deals with intentional co-operation (which may not be the same as a common intention) in an offence committed by means of several acts, and punishes such co-operation (provided it consists in doing any one of those acts either singly or jointly with any other person) as if it constituted the offence itself; intentional co-operation must include action which contributes to the offence and is done with the consciousness that the offence is on foot, though without sharing the intention to commit that offence. (*Courtney-Terrell, C.J. Dhavle and Chatteree. JJ.*) EMPEROR *v.* ITWA MUNDA. **A.I.R. 1938 Pat. 258 (S.B.).**

——**S. 39**—*Applicability—Two men striking another with dangerous weapons and killing him—Offence.*

Dhavle, J.—Where two or more persons unite together and strike a series of blows, with dangerous weapons on the body of the deceased and it is impossible to identify any one of the wounds with any one of the assailants, nevertheless if the deceased dies as a result of the injuries received, each of the assailants is guilty of the offence of murder. The fact that one assailant committed the offence by yielding to the threats of other is no mitigation of the circumstances, because S. 94, Penal Code, is clear that the threat does not affect his liability, and his assault is not only intentional (as distinguished from, say, accidental) but also voluntary within the meaning of S. 39. (*Courtney-Terrell, C.J., Dhavle and Chatterjee, JJ.*) EMPEROR *v.* ITWA MUNDA. **A.I.R. 1938 Pat. 258 (S.B.).**

——**S. 107**—*Offence of abetment—Proof required.*

In order to convict a person of the offence of abetment, it must be proved that he instigated the person committing the offence or that there was an agreement between them to commit the offence. (*Derbyshire, C.J. and Henderson, J.*) PANCHKARI BANERJI *v.* EMPEROR. **67 C.L.J. 41.**

——**S. 124-A**—*"Government"—Meaning of—Attack on magistracy and police.*

"The Government" in S. 124-A, I. P. Code, means much more than the Ministers, and includes the machinery with which the Ministers have to work. An attempt to bring into hatred and contempt the magistracy and police is an offence under S. 124-A. (*Horwill, J.*) BATLIWALLA *v.* EMPEROR.

(1938) M.W.N. 529.

——**S. 124-A**—*Scope—Offence—Criticism of Government—If punishable—Intention.*

S. 124-A, I. P. Code, is intended as much to protect the people against agitators as it is to maintain the stability of the Government. Fair criticism of the

Government is no offence; but the question the Court has to decide in a prosecution under the section is whether the speech of the accused on which the charge is based indicates an intention to promote hostility and ill-will towards Government. If a person attempts to bring the Government into hatred or contempt or to excite disaffection towards it, force and violence is encouraged which may lead to a conflict with the authorities, with the certainty that there will be grievous loss of life. (*Horwill, J.*) BATLIWALLA *v.* EMPEROR.
1938 M.W.N. 529.

——S. 124-A—*Offence—Test—Political views—If relevant—Dissatisfaction with Government—If offence.*

The fact that the opinions expressed in a speech are in accordance with the principles of the political party in power at the time cannot take the case out of S. 124-A, I. P. Code. A Court clearly cannot take account of the principles of a political party and declare that an offence

methods and modes of address intended to cause disaffection towards the Government established by law or to bring that Government int
It is quite possible to express
Government without exciting
speech will have to be judged n
of the accused or his party, but by the purpose of the accused in expressing those opinions in the way he does. (*Horwill, J.*) BATLIWALLA *v.* EMPEROR.
1938 M.W.N. 529.

——S. 279—Offence under, and offence under S. 5 of Motor Vehicles Act—Distinction between. *See* MOTOR VEHICLES ACT, S. 5. A.I.R. 1938 Rang. 161.

——S. 279—*Rash and negligent driving—Meaning*

expect that if other vehicles are on the lines, they will give passage to him, and will not obstruct his ordinary progress. Where therefore a tram driver is driving his car at a fast but not at excessive speed and a camel cart or a bullock cart running parallel to it in the same direction suddenly swerves to the wrong side and collides with the tram car, the tram driver cannot be said to be rash or negligent within the maning of S. 279 merely beca
vehicle wou
of to the r
J.) ABDUL GHANI *v.* EMPEROR.
A.I.R. 1938 Sind 86.

——S. 302—*Poisoning—Administration of dhatura by wife to husband—Desire to get rid of him—Infer-*

wife is guilty of murder. (*Grille and Digby, JJ.*) MT. MINAI *v.* EMPEROR. 174 I.C. 386 = 39 Cr.L.J. 405.

——S. 304-A—*Contributory negligence of deceased—Plea of—Sufficiency.*

Contributory negligence on the part of the person killed is no defence of itself to a charge under S. 304 A. (*Davis, J.C.*) KANJI JUMA *v.* EMPEROR.
A.I.R. 1938 Sind 100.

——S. 304-A—*Conviction — Essentials for—Mere carelessness—Sufficiency.*

S. 304-A, like other sections of the Penal Code, requires a *mens rea* or guilty mind. The rashness or negligence must be such as fairly to be described criminal. Mere carelessness is not sufficient for conviction under S. 304-A. A lorry driver was driving a lorry loaded with wooden sleepers through a gateway. He drove the lorry several times without any accident. On one occasion when the lorry was overloaded and was not being driven fast, one projecting sleeper struck one of the stone pillars. The stone pillar fell upon the person standing behind it and caused his death.

Held, that it could not be said that the death was
driver. The fact
rt of its load which
f no consequence.
sleeper itself but a
stone in a pillar which struck the deceased did not make the act of the driver merely the indirect and
However, in the
guilty of only
l rashness. He
nder S. 304-A.

A.I.R. 1938 Sind 100.

——S. 406/511—*Offence under—Holder of lottery ticket lodging it with authorities for payment of prize money—Shareholder in ticket—If can file complaint against him.*

Where under the terms of a lottery the accused is the only person authorised to receive the prize money and all that has been done by him is to lodge the ticket with
charge of the lottery for payment of
, a complaint cannot be filed against
)/511, I. P. Code, by a shareholder in
allegation that the accused is denying
ying to take the prize money all for
himself. (*Bartley and Henderson, JJ.*) DHANI SARDAR *v.* HAKIM DOSAD. 42 C.W.N. 648.

——S. 471—*User—Document mentioned in affidavit of documents—Production at instance of opposite party.*

The accused had filed a suit for dissolution of partnership in which he was required to file an affidavit of documents which were in his possession relating to any matter in question in the suit. The accused had mentioned in it a certain document, namely, a delivery order
it he did not produce it in
It was the defendants who
accused required the document to be produced and the document was thereupon produced in Court at their instance. The document was alleged to be forged and the accused was prosecuted under S. 471.

A.I.R. 1938 Rang. 194.

——S. 499, Expl. 2—*Applicability—Complaint of an individual member.*

According to Expl. 2, S. 499 if a collection or company of persons as such is defamed, one of their

members may make a complaint on behalf of the collection or company of persons as a whole but the defamation must be shown to be of all the persons in the association or collection as such: the defamation is of the collection or association as such. Where the complaint is the complaint of an individual as such, Expl. (2) has no application. (*Davis, J. C.*) AHMEDALI *v.* EMPEROR. **A.I.R. 1938 Sind 88.**

———S. 500—*Prosecution against complainant for preferring false charge—Permissibility.*

Where a person, on his acquittal of the offence of theft with which he was charged by the complainant, lodges a complaint against him under S. 500, I. P. Code, the Court cannot refuse to permit the prosecution under S. 500, I. P. Code, if the facts appear to justify it, on the ground that the prosecution is designed to avoid the provisions of S. 195, Cr. P. Code, when the sanction of the Court was neither sought for nor refused. (*Jack and Khundkar, JJ.*) GURU PROSAD RAM GUPTA *v.* RAMESWAR MARWARI. **42 C.W.N. 674.**

PENSIONS ACT (XXIII OF 1871), S. 6—*Jagir not transferable—Certificate by Deputy Commissioner—If* ultra vires—*Pension Rules, Rr.* 8 *and* 9.

The Deputy Commissioner is competent to grant a certificate under S. 6 of the Pensions Act only when the claim relates to a pension or grant which is by law, or under the terms of the grant, transferable. If a Jagir has been notified under the Punjab Descent of Jagirs Act and the rule of primogeniture applies thereto, it can not be said that the same is transferable. The grant of a certificate in respect of a Jagir of this kind is, therefore *ultra vires*. (*Dobson, F.C.*) RAJENDAR CHAND *v.* KESRI CHAND. **17 L.L.T. 17.**

POLICE ACT (V OF 1861), S. 32—*License given to take out procession—Procession led by accused not licensees—Accused disobeying order of magistrate—Liability to Conviction.*

A license was given to certain persons under S. 30, Police Act, to take out a procession. The procession was led by the accused who was not one of the licensees. Order had been given by the Additional District Magistrate to the procession to move faster while passing a mosque. The order met with deliberate disobedience by the accused with the result that a riot took place. The accused was charged under S. 32, Police Act, with refusing to obey an order passed by a competent authority, and was convicted, no reference being made about the license.

Held, that the accused was properly convicted under S. 32. The license applied to the processionists generally and every processionist was governed by the terms of the license and as there was disobedience to a lawful order, the ordinary law applied. (*Young, C. J. and Monroe, J.*) BILAS RAI *v.* EMPEROR. **A.I.R. 1938 Lah. 425.**

POWER OF ATTORNEY—*Construction—Power to sign or execute bond—If confers power to enter into agreement on principal's behalf—Suretyship bond entered into by agent for his own benefit—Validity.*

A general power of attorney conferred authority upon the agent "to sign or execute any bond, indemnity bond, suretyship bond, mortgage or any other documents purporting to create any charge upon our property.... which we could have signed jointly or severally were we personally present and did the same."

Held, (*i*) that the power contemplated authority of the agent to agree on the principal's behalf, and not merely authority to take the steps necessary to reduce an agreement, of which the principal had approved personally, to legal or formal shape, (*ii*) that it was not beyond the scope of the agent's power to enter into a Contract of

suretyship whereby his principal became surety for himself, and that the principal could not repudiate such a contract when the agent was not alleged to have acted fraudulently, (*iii*) that the words "any other documents purporting to create any charge" did not limit the words preceding them which were wide enough to give the agent power to impose personal liability on the principal. (*Panckridge, J.*) KUMAR NARENDRA NATH *v.* BIMALA SUNDARI DEBI. **42 C.W.N. 718.**

PRACTICE—*Appeal—New plea—Point of law requiring the taking of fresh evidence and necessitating remand—If may be allowed in appeal for first time.*

A new plea of non-registration of a document, though one of law, should not be allowed to be raised for the first time in appeal, when it involves the taking of fresh evidence for disposal and a remand of the case for that purpose. (*Venkatasubba Rao and Abdur Rahaman, JJ.*) KUMARASWAMI GOUNDAN *v.* PALANISAMI GOUNDAN. **1938 M.W.N. 523.**

———*Evidence—Witness not summoned—If ground for rejection of evidence.*

The fact that a witness has not been summoned is no justification of itself for saying that his evidence is not to be accepted. (*Wort and Manohar Lall, JJ.*) JOTI LAL SAH *v.* MT. RAMESWARI KUER. **A.I.R. 1938 Pat. 281.**

———*Mysore High Court—Appeal—New plea—If can be raised.*

A plea which has not been raised in the pleadings should not be permitted to be raised in Appeal for the first time so as to enable the appellant to start a new case and take the respondent by surprise. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) CHINAMMA *v.* NANJUNDA. **16 Mys.L.J. 184= 43 Mys. H.C.R. 105.**

———*Pleadings— Abandonment — Abandonment by party not concerned with right—Binding force of.*

In a suit by the zamindar questioning the right of the Government to resume certain village service inams and claiming reversion in the lands so resumed by the Government, the Government gave up the right as regards shroff inams before the trial began and the lower Court decreed the suit in respect of those lands in favour of the zamindar declaring that the lands were granted for services purely private and personal to the zamindar and that he must be put in possession.

Held, in appeal, that the abandonment by the Government would not and could not settle the question so far as the persons who were in possession of the lands were concerned and that as between those persons and the Government who gave them possession the Government could not be allowed to say that they had no right nor could they abandon their right to resume in such a way as to prejudice the rights of the persons concerned with those inams and that there must be a decision on the question. (*Pandrang Row and Horwill, JJ.*) VENKATAKUMARA MAHIPATHI SURYA RAO *v.* SECRETARY OF STATE. **A.I.R. 1938 Mad. 445.**

———Pleadings—Issue raised and decided in suit—Appeal—Right of party to abandon that issue and to ask the Court to leave it out of consideration. *See* BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT, S. 25. **19 P.L.T. 328 (S.B.).**

PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), S. 26—*Order for Compensation—Power of High Court in revision to pass.*

Where the Small Cause Court in dismissing a suit has not awarded compensation to the defendant under S. 26 of the Presidency Small Cause Court, it would be wrong on principle for the High Court in revision to interfere and pass an order for compensation although in its

opinion it is a fit case for awarding substantial compensation. (*Ameer Ali, J.*) M. S. COHEN *v.* SIRDAR SAHEB IQBAL SINGH. 42 C.W.N. 658.

PRESIDENCY-TOWNS INSOLVENCY ACT (III OF 1909), S. 8 (2)—*Person aggrieved—Third* ... *by ad-*

... ffected by ... it and is entitled to appeal from it. But he is not entitled in any appeal under Cl. (2) of S. 8 to succeed on the basis merely of absence of notice by the Insolvency Court

... when he had no means of knowing of the existence of the proceedings in which that order was passed against him. (*Davis, J. C. and Lobo, J.*) BHAWANIDAS *v.* JETHSING. A.I.R. 1938 Sind 82.

——**S. 9 Expl.**—*Joint Hindu family insolvency by manager.*

Where members of a joint Hindu ... partnership business and if the elder ... family who is also the managing partner of the firm makes a fraudulent transfer of the firm property to pay a debt due by the firm, the act of insolvency constituted by the transfer is an act of insolvency on the part of the other partners also as the managing partner is an agent within the meaning of Explanation to S. 9. (*Davis, J. C. and Lobo, J.*) BHAWANIDAS *v.* JETHSING. A.I.R. 1938 Sind 82.

——**S. 13 (4) (b)**—*"Sufficient cause"— Deposit, before adjudication, of amount of debt due to petitioning creditors.*

A deposit by the debtor before the date of adjudication of the whole of the amount of debt due to petitioning creditors is not a "sufficient cause" within the meaning of S 13 (4) (*b*) so as to refuse an order of adjudication. (*Davis, J C. and Lobo, J*) BHAWANIDAS *v.* JETHSING. A.I.R. 1938 Sind 82.

——**S. 17**—*Order of adjudication—Vesting of property of insolvent in Burma.*

Obiter:—After the separation of Burma from India, an order of adjudication made in India is not sufficient to vest, under S. 17 of the Presidency Towns Insolvency Act, in an Official Assignee in India immovable property of the insolvent in Burma. (*Braund, J.*) *In the matter of* MOTILAL PREMSUKHDAS. 1938 Rang. L.R. 166.

——**S. 31 (1)**—*'Person interested'—Assignee from one of two joint creditors—Proof of claim put in by creditors not admitted by Official Assignee.*

An assignee of a joint debt from one of the two joint creditors of the debtor whose proof of claim was never formally admitted by the Official Assignee, is not a 'person interested' within the purview of S. 31 (1) of the Presidency Towns Insolvency Act, and he is not, there- ... basis ...

I.L.R. (1938) 1 Cal. 495.

——**S. 17**—Vesting of property—Mother's share at partition—Son's interest in—If vests in Official Assignee on his adjudication. *See* HINDU LAW—PARTITION. 42 C.W.N. 695.

——**S. 56**—*Fraudulent preference — Transfer in favour of creditor related to transferor.*

Where a person makes a transfer to one of the creditors who is related to him and at the time of the transfer the transferor is unable to pay his debts as they become due from his own money and there is no evidence of any threat of any criminal proceedings or any ...

A.I.R. 1938 Sind 82.

PRINCIPAL AND AGENT—*Accounts—Suit for—Basis of right.*

A suit for account is founded on the right of the ... from the other party. ... f the parties are in a ... ier. (*Vivian Bose, J.*) A.I.R. 1938 Nag. 254.

——*Agent's remedy—Suit for accounts—When competent.*

It is only in exceptional cases where an agent's remuneration depends on the extent of dealings which are not known to him or where he cannot be aware of the ... of ... or ... nt. ... ns from his principal is known to him, the only form in which the agent can file a suit is one for the specific sum of money due. (*Abdur Rahman, J.*) RAMACHANDRA MADHAVADOSS CO. *v.* MOIDUNKUTTI. 47 L.W. 654.

——*Agent's right to salary—Employment of agent for fixed term—Business proving unprofitable—Employment continued though agent absent from place of business—Principal's liability to pay damages for period of employment.*

A person was appointed as the agent of another for a period of three years at a certain salary. The employer finding that his business was not proving profitable terminated the agent's employment before the expiry of his period. He failed to prove that the agent could have obtained other employment. Further, the agent was absent for a period of four months and the last period of absence was nearly nine months before his services were dispensed with. But the employer continued his employment.

Held, that the agent is entitled to the stipulated salary for the full period agreed upon. The principle that a person must do what he can to mitigate damages applies to a contract of service just as it applies to an ordinary commercial contract. The agent is entitled to salary for the total period of absence as his employment continued despite his absence and the employer took no steps to terminate his employment on the ground of absence. *Hamley* v. *Pease and Partners, Limited*, (1915) 1 K.B. 698, Rel. on. (*Leach, C.J. and Lakshmana Rao, J.*) SUNDARAM CHETTIAR *v.* CHOCKALINGAM CHETTIAR. (1938) 1 M.L.J. 857.

PROVINCIAL INSOLVENCY ACT (V OF 1920), S 28 (2)—*Order as to vesting—Rule to be observed.*

... n *D* being adjudged an insolvent, one of *D's* credi- ... brought a notice of motion alleging that *D* had ... ed his fields on half produce rent and claiming attachment of the other half which was alleged to belong to *D*. The lessee alleged that the land was let on a rental basis and that he was entitled to all the crops. The lease was found to be sham, and the lower Court passed an order to the effect that the estate was to get the whole produce.

Held, that the motion being moved on the basis of the fact that the lessee was entitled to half the produce

PROV. INSOLV. ACT (1920), S. 28.

it was not proper for the lower Court to pass an order which had the effect of bringing the whole of the produce into the estate and that the lessee was entitled to half the produce. (*Stone, C.J.*) RAMA YADO TELI *v.* DHEKAL JHANA TELI. **A.I.R. 1938 Nag. 247.**

——S. 28 (2)—*"Property"—Insolvency of Hindu father—Suit against son as legal representative of father in respect of debt incurred by father—Attachment—Validity—Leave to sue not obtained—Effect—Official Receiver's power to sell son's share—If lost.*

If there is a prior valid attachment of a Hindu son's share in the joint family properties, the Official Receiver on the insolvency of the father cannot avail himself of the father's power to sell the son's share for the satisfaction of the proper debts of the father. But where the attachment is invalid as being opposed to the provisions of S. 28 (2) of the Provincial Insolvency Act the Official Receiver's power to sell the son's share is not lost or put an end to. Where the son is sued after the father's death as the legal representative of the father and after the father has been adjudicated an insolvent, without the leave of the Court being obtained under S. 28 (2) of the Act, the suit is really directed against the property of the deceased insolvent father in the hands of the son, though the property is joint family property in which the son also had his own share. An attachment effected in such a suit cannot prevail against the Official Receiver's power to sell the entire family property as the property of the insolvent father. The suit and the attachment are directly prohibited by S. 28 (2). (*Pandurang Row, J.*) BALUSWAMI NAIDU *v.* OFFICIAL RECEIVER, MADURA. **1938 M.W.N. 455= 47 L.W. 587=(1938) 1 M.L.J. 824.**

——S. 28 (2)—*Scope and effect of—Decree against joint Hindu family—Execution sale—Purchase by decree-holder—Insolvency of some co-parceners prior to sale—Receiver's right to claim shares of insolvents.*

A money decree was obtained against all the members of a joint Hindu family. In execution, the decree-holder purchased the joint family property. In the meantime some members of the family were adjudged insolvent and the Receiver claimed to sell insolvents' interest in the property purchased by the decree-holder.

Held, that the Receiver had the right to sell the interest of the insolvents in the family property. (*Courtney-Terrell, C.J. and Manohar Lall, J.*) JURO SAHU *v.* KAMLESHWARI PRASAD. **A.I.R. 1938 Pat. 234.**

——S. 37—*Vesting order under—If to be simultaneous with annulment of adjudication—Vesting order passed subsequent to annulment—Validity.*

A vesting order under S. 37, Provincial Insolvency Act, to be valid, need not be passed simultaneously with the order annulling the adjudication. A vesting order passed subsequently is perfectly valid and cannot be attached as being without jurisdiction. (*Pandrang Row, J.*) BALUSWAMI NAIDU *v.* OFFICIAL RECEIVER, MADURA. **1938 M.W.N. 455= 47 L.W. 587=(1938) 1 M.L.J. 824.**

——S. 42 (1) (a)—*Burden of proof under—Deficiency as assets—Debtor's responsibility—Onus.*

Where the assets of the insolvent do not realise eight annas in the rupee, S. 42 (1) (*a*) of the Provincial Insolvency Act lays on the debtor the burden of satisfying the Court that that fact has arisen from circumstances for which he cannot justly be held responsibles. It is for the debtor to discharge that burden. There is no burden on the creditors or on the Official Receiver to show that the debtor can justly be held responsible for the deficiency of assets. (*Burn, J.*) AHMED MARAIKAYAR *v.* THANGIAH NADAR. **1938 M.W.N. 528=47 L.W. 653= (1938) 1 M.L.J. 760.**

——S. 51 (3)—*Applicability—Sale in execution after admission of insolvency petition against debtor—Decree-holder aware of pending insolvency and not informing executing Court of same—Purchase by—If protected.*

An insolvency petition against a debtor by a creditor was admitted in October, 1932. Notice of the petition was published in the Gazette by 14-1-1933. Another creditor of the debtor, the appellant, brought the properties to sale in execution of a decree obtained by her against the debtor and the sale took place on 23-1-1933. Appellant was represented in the execution proceedings by her agent *C.* The agent was present during the talks held in respect of a proposal for composition, but instead of reporting to the appellant and taking her instructions as he promised to do, he got the properties purchased in the name of his employer, the appellant. The executing Court was not informed by the appellant or her agent, *C.*, of the pending insolvency and was unaware of the insolvency proceedings.

Held, that the appellant was not a *bona fide* purchaser and was not protected by S. 51 (3) of the Provincial Insolvency Act, and the sale was therefore invalid, as the omission of the decree-holder to inform the executing Court of the pending insolvency amounted to fraudulent conduct and was strong evidence of bad faith. (*Pandrang Row, J.*) POLAMMA *v.* OFFICIAL RECEIVER, NELLORE. **1938 M.W.N. 540= 47 L.W. 676=(1938) 1 M.L.J. 781.**

——Ss. 75 and 25—*Order dismissing creditor's application for adjudication of debtor—Appeal.*

An order under S. 25 of Provincial Insolvency Act dismissing a creditor's application for the adjudication of the debtor is appealable under S. 75 of that Act. (*Tek Chand, J.*) KAPUR SINGH *v.* PRABH DIAL. **40 P.L.R. 433.**

——S. 75 (2)—*"Any other person"—Order of District Judge declining to expunge debts from Schedule—Appeal by debtor to High Court—Competency.*

The words "any such person" in S. 75 (2) of the Provincial Insolvency Act include the debtor also. An appeal to the High Court by the debtor against an order of the District Court declining to expunge certain debts from the schedule and declaring that they have been proved by the creditors is competent. (*Worton and Varma, JJ.*) MAKHAN LAL GOVINDRAM *v.* BHAGWAN SINGH MISTRI. **17 Pat 201.**

——S. 78 (2)—Joint decree against several persons—Execution against one—Subsequent insolvency of same—Execution against others—Limitation—If saved. *See* LIMITATION ACT, ART. 182, EXPL. I. **1938 P.W.N. 397.**

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), Sch. II, Art. 31—*"Suit for accounts"—Suit by agent against principal for specific sum of money due on particular dealings—If one for accounts.*

A suit for accounts is a special form of suit. It does not mean that whenever accounts have to be looked into in order to ascertain the amount due by one party to the other that the suit should be technically called a suit for accounts. A suit for a specific sum of money alleged to be due to the plaintiff by the defendant in regard to certain dealings, the plaintiff being merely an agent of the defendant on the allegations in the plaint, is not a suit for accounts within the meaning of Art. 31 of Sch. II of the Provincial Small Cause Courts Act, especially when the plaintiff nowhere in his plaint asks for any accounts to be rendered to him. The allegations in the

plaint would ordinarily determine the nature of the suit (*Abdur Rahman, J.*) RAMACHANDRA MADHAVADOSS Co. v. MOIDUNKUTTI. 47 L.W. 654.

PUNJAB ALIENATION OF LAND ACT (XIII OF 1900), S. 2 (3)—*'Land'—Onus of proof.*

The onus of proving that the property in dispute is 'land' as defined in S. 2 (3) and therefore attachment and sale is on the judgment de on the decree holder. (*Tek Chand, J.*) PH v. KHAIR DIN. A.I.R. 1938 Lah 353.

——S. 2 (3)—*Land assessed to revenue—If necessarily 'land'.*

The fact that the land is still assessed to revenue will ... is 'land' as defined in S. 2

[illegible]

decrees creating charge.

According to the plain wording of S. Debtors' Protection Act, it would appl[illegible] cases in which the land has to be attached and then temporarily alienated. The section is, therefore, not applicable to the execution of a mortgage decree or a decree whereby a charge is created on the land, as no attachment is necessary in such cases. (*Bhide, J.*) JINDA RAM GURANDITTA MAL v. BUR SINGH. 40 P.L.R. 441.

PUNJAB LAND REVENUE ACT (XVII OF 1887), S. 13—*Order appointing lambardar on probation—Appeal, if competent.*

An appeal is competent against an order of the commissioner appointing an individual as lambardar on probation. (*Dobson and Garbett.*) GURDIT SINGH v. KIRPAL SINGH. 17 L.L.T. 15.

PUNJAB LAWS ACT (IV OF 1872), S. 5—*Mahomedan Law—If modified by Limitation Act.*

Per *Young, C.J. and Bhide, J.* (*Din Mohammad, J. contra*).—S. 5 of the Punjab Laws Act makes it clear that even when both the parties to the suit are Mahomedans, the Mahomedan Law applies ... it has not been altered or abolished by ... ment. The Mahomedan Law which dc ... time limit on the enforcement of claims ... fied by the Limitation Act, as S. 3 of ... to all suits without any reservation in f

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(13) (*a*) of the Municipal Act. The proviso to that clause cannot possibly apply in the absence of evidence

[illegible]

(I OF 1930)—*Applicability—Loan advanced before Act—Repayment after Act.*

The Punjab Regulation of Accounts Act does not apply when a repayment is made after the commencement of the Act in respect of a loan advanced before that Act came into force, and the creditor is therefore not required to comply with the provisions of the Act. (*Bhide, J.*) MEHY CHAND v. DIA SINGH. 40 P.L.R. 435.

——S. 2—*'Loan'—Defendant trader at time of loan and of striking of balance.*

... r at the time when ... s well as at the time ... the transaction is ... Punjab Regulation of Accounts Act. (*Tek Chand, J.*) BADRI PRASAD v. HIRA LAL. 40 P.L.R. 471.

PUNJAB SIKH GURDWARAS ACT (VIII OF 1925), S. 5—*Petition under—O. 1, R. 8, Civil Pro... applicable.*

... O. 1, R. 8, C.P.Code, is not strictly ap... tion under S. 5 of Sikh Gurdwaras Act.

[illegible]

JJ.) MASJID SHAHID GANJ v. SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR. 40 P.L.R. 319=A.I.R. 1938 Lah. 369 (F.B.).

PUNJAB TENANCY ACT (XVI OF 1887), S. 5 (1) (a)—*Acquisition of occupancy rights—Right of daughter or sister.*

... maleholdar of land ... to have fulfilled the ... Punjab Tenancy Act, even if she has been continuously in possession of land for 30 years without paying any rent therefor. Under the Act, a daughter or a sister can never acquire any occupancy rights. It is only a widow who can acquire occupancy rights under S. 59 (1) (*b*) of the Act. (*Abdul Rashid, J.*) SARWAN v. SHIB SINGH. 40 P.L.R. 411.

RANGOON CITY MUNICIPAL ACT (VI OF 1922), S. 80 (2)—*Gross rental value—Determination of—Rent actually paid by existing tenant—If a test.*

... y ascertaining the ... ht reasonably be ... d by an existing ... onclusive test of ... It is only *prima* ... circumstances in

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RANGOON INSOLVENCY ACT, S. 22—*Discretion of.*

... of the Court to annul or stay proceed... cation order under S. 22 of the ... y Act is a discretionary jurisdiction and cannot be invoked as of right. The dominating factor which decides the court whether to exercise its discretion or not is whether the assets can be more conveniently and efficiently administered in the one court than in the other. (*Braund, J.*) *In the matter of* MOTILAL PREMSUKHDAS. 1938 Rang. L.R. 166.

REGISTRATION ACT (XVI OF 1908), S. 17 (1) (e)—*Assignment of mortgage decree—Non-registration—Effect of.*

An assignment of a mortgage decree requires registration and such an assignment is invalid unless registered but the want of registration will not have the effect of extinguishing the original rights of the assignor mortgagee and a subsequent mortgagee bringing a suit on his mortgage, and whose mortgage is admittedly subject to the mortgagee rights of the prior mortgagee, cannot claim a decree free of the mortgagee rights of the prior mortgagee. His rights cannot be held to have disappeared merely because the assignments by him have been found to be invalid for want of registration. (*Dalip Singh and Bhide, JJ.*) PEOPLES BANK OF NORTHERN INDIA, LTD. *v.* MALIK RAM KISHAN.

A.I.R. 1938 Lah. 430.

RES JUDICATA. *See* C. P. CODE, S. 11.

RIPARIAN RIGHTS—*Nature of—Riparian tenement—Requisites of—Riparian proprietor—Rights of—Extent of and limits to—Use of water for purposes unconnected with riparian tenement—Injunction—Proof of actual injury—Necessity.*

A riparian right arises from the right of access to the stream which land-owners on its banks have by the law of nature. For the existence of the riparian right the land should be in contract with the flow of the stream. A riparian tenement connotes, in addition to contract with the river, a reasonable proximity to the river bank. Each riparian proprietor has a right to the water flowing past his land; but it is right only to the flow of the water and the enjoyment of it, subject to the similar rights of all the proprietors on the banks on each side to the reasonable enjoyment of it. While he may legitimately use the water for ordinary or primary purposes and for extraordinary or secondary purpose, he is not entitled to use it for purposes foreign to or unconnected with his riparian tenement. He may take it for purposes of irrigation, but not so much as to hurt the right of the inferior owner to have the stream passed on to him practically undiminished. While the right of a riparian owner to take the water is a natural right and not an easement and not capable of being lost by non-user, he cannot use the water for purposes unconnected with his riparian tenement. If he does so, he would be prevented by an injunction from doing so though no actual injury is sustained by the other party. (*Venkatasubba Rao and Abdur Rahman, JJ.*) VENKATADRI APPA RAO *v.* SEETHARAMAYYA. **47 L.W. 744.**

SHIPPING—*Mate's receipt—If document of title—Right of person holding Mate's receipt—States in—Value of—Bill of lading—Distinction.*

The Mate's receipt is not a document of title to the goods shipped. Its transfer does not pass property in the goods nor is its possession equivalent to possession of the goods. It is not conclusive and its statements do not bind the shipowners as do the statements in a bill of lading signed within the master's authority. It is, however, *prima facie* evidence of the quantity and condition of the goods received and *prima facie* it is recipient or possessor who is entitled to have the bill of lading issued to him. But if the Mate's receipt acknowledges receipt from a shipper other than the person who actually receives the Mate's receipt, and in particular if the property is in that shipper, and the shipper has contracted for the freight, the shipowner will *prima facie* be entitled and indeed bound to deliver the bill of lading to that person. If the shipowner, before he issues the bill of lading, is given express notice that he is not to issue the bill of lading without the Mate's receipt or to any one but the person who delivered the goods he cannot disregard that notice. Even without express notice he may be affected by notice to the same effect by knowledge of the actual circumstances of the case. (*Lord Wright.*) NIPPON YUSEN KAISHA *v.* RAMJIBAN SEROWGEE.

42 C.W.N. 677 = 174 I.C. 564 = 1938 M.W.N 487 = A.I.R. 1938 P.C. 152 = (1938) 1 M.L.J. 834 (P.C.).

SPECIFIC RELIEF ACT (I OF 1877), Ss. 33 and 34—Rectification—Powers of Court—Suit for sale on mortgage—Wrong description of property—Oral evidence as to mistake—Admissibility—Relief on basis of rectification—If awardable. *See* LIMITATION ACT, ART. 96. **47 L.W. 661 = (1938) 1 M.L.J. 806.**

——**S. 42**—*Declaratory suit—Cause of action—Attempt to attach plaintiff's goods.*

An attempt by the defendant to attach the goods belonging to the plaintiffs in execution of a decree obtained by the defendant against another person, gives the plaintiffs a cause of action to sue for declaration under S. 42 of the Specific Relief Act. It is not necessary for them to wait till their goods are actually attached and then to sue under O. 21, R. 63, C. P. Code. (*Tek Chand, J.*) NAND LAL *v.* KHARAITI LAL-CHAMAN LAL. **40 P.L.R. 407.**

——**S. 42, proviso**—Applicability—Suit under O. 21, R. 63, C. P. C.—Frame of. *See* C. P. CODE, O. 21, R. 63. **47 L.W. 724 = (1938) 1 M.L.J. 803.**

——**S. 42, proviso**—*Scope of—Alienation by Hindu widow—Suit by reversioner for declaration that it is not valid beyond life time of widow—Death of widow pending suit—Effect—Suit—If can be continued—Discretion of Court.*

Where a Hindu reversioner sues for a declaration that an alienation made by the widow of the last male owner is not valid beyond her life time, and the widow dies pending the litigation, it cannot be held that the plaintiff can no longer continue his suit on the ground that the widow having died he is entitled to sue for recovery of the property concerned. The proviso to S. 42 of the Specific Relief Act does not preclude the plaintiff from prosecuting his suit for a declaration because the widow has died and the plaintiff can sue for recovery of the property, although if the plaintiff is to get any real benefit he has to follow it up with a suit for recovery within the period of limitation. It is legal for him to prosecute his suit for declaration for the time being. The Court may, however, say that in its discretion the suit should not be allowed to be continued or it may, in its discretion, permit the suit to go on. (*Reilly, C. J. and Abdul Ghani, J.*) CHICKANARASAPPA *v.* HONNURAMMA.

16 Mys. L. J. 167 = 43 Mys. H. C. R. 181.

——**S. 56 (1)**—*Suit for possession barred—Relief by way of injunction—If can be granted.*

Per *Bhide, J.*—It is well-established that when it is open to a person to sue for possession, he cannot be granted any relief in the shape of a mere injunction. When a suit for possession has become barred by time, the plaintiff cannot circumvent the law of limitation by merely suing for an injunction. (*Young, C. J., Bhide and Din Mohammad, JJ.*) MASJID SHAHID GANJ *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR. **40 P.L.R 319 = A.I.R. 1938 Lah. 369 (F.B.).**

SUCCESSION ACT (XXXIX OF 1925), S. 63 (a)—*Execution of will—Validity—Testator affixing his mark—His hand guided by another in doing so.*

A will is validly executed although the testator signs his will, not with his name but with his mark, and in doing so his hand is guided by another person. In order to constitute a direction within the meaning of

63 (*a*) of the Succession Act, it is not necessary that anything should be said. If a testator, in making his mark, is assisted by some other person, and acquiesces and adopts it, it is just the same as if he had made it without any assistance. (*McNair, J.*) AMULYA KUMAR BOSE, *In the goods of*. 42 C.W.N. 649.

——S. 63 (c)—*Due attestation—Presumption.*

Where the testator was roused from unconsciousness in order to sign the will and the attestation took place immediately after his signature and the attesting witnesses were in close proximity to the testator in the same room.

Held, that it was not an excessive presumption to say

tion was taking place and that, therefore, there had been sufficient compliance with the provisions of S. 63 (*c*) of the Succession Act. (*McNair, J.*) AMULYA KUMAR BOSE, *In the goods of*. 42 C.W.N. 649.

——S. 214—*Applicability—Impartible raj governed by primogeniture—Decree for possession and costs obtained by holder—Execution of decree for costs by successor—Succession certificate—Necessity.*

Succession to impartible raj governed by the rule of primogeniture is decided by the rule of survivorship,

ficate. The decree for costs is only a part of the estate. (*Agarwala and Madan, JJ*) RAM RANBIJAYA PRASAD SINGH *v.* PARMATMANAND SINGH. 19 Pat L.T. 342.

——S. 228—*Object and effect.*

The real object of S. 228 is to dispense with the production of the original will owing to its having been deposited in some other Court. The section is merely an enabling section and if the Court considers that there is a question to be decided relating to the validity of the will, such as the power of the testator to make a will, etc., the Court is bound to try that question before enabling the executor to act under the will. (*Monroe, J.*) RAM LAL *v.* CHANAN DASS. A.I.R. 1938 Lah. 349.

——Ss. 276 and 228—*Application for probate—Letters of administration—If can be granted.*

have been for letters of administration under S. 228.

Held, that the Court could grant letters of administration with a copy of the copy of the will annexed or at least could allow the petition to be amended. (*Monroe, J.*) RAM LAL *v.* CH...

——S. 291—*Orde...*
Power of appellate C...

When the discretion has been exercised in a judicial and reasonable manner an appellate Court should not interfere with the way in which it is exercised unless the Court is satisfied that the result is incorrect. (*Bagulry and Sharpe, JJ.*) ZUBEIDA KHATOON *v.* MUHAMMAD ZAKARIA. 174 I.C. 421 = A.I.R. 1938 Rang. 67.

SUITS VALUATION ACT (VII OF 1887), S. 8—*Valuation for Court-fees and jurisdiction—Proper method.*

Under S. 8 of the Suits Valuation Act, the proper method is to value for the purpose of court-fees first and then to take that value for the purpose of jurisdiction. (*S. K. Ghose and Edgley, JJ.*) BIRAJA CHARAN NANDA *v.* SAILAJA CHARAN NANDA. 42 C.W.N. 667.

TORT—*Defamation—Right of action—Defamation of class—Right of member of class to take action.*

A defamatory matter may appear only to apply to a class of individuals; yet, if the descriptions in such ... be ... an ... ject ... the libel designates the complainant in such a way as to let those who know him understand that he was the person meant, it is not necessary that all the world should understand the libel; it is sufficient if those who know him can make out that he is the person meant. (*Davis, J C.*) AHMEDALI *v.* EMPEROR. A.I.R. 1938 Sind 88.

——*Negligence—When actionable.*

Negligence in law is the breach of duty to take care, and want of care is only actionable at the suit of a ... defendant ... owards him ... large or a ... (*Roberts,* ... BOSE *v.* M. R. N. CHETTIAR FIRM. A.I.R. 1938 Rang. 185 (S.B.).

——*Nuisance—Embankment to protect against flooding—Damage to another—Liability for.*

A person in order to protect his lands from being flooded, can lawfully put up an embankment on his land, and if thereby the water is thrown upon the adjoining lands of others and damage is caused, he is not liable. (*Niyogi, J.*) SHANKAR *v.* LAXMAN. I.L.R. (1938) Nag. 239.

TRADE MARK—*Passing off—Expiry of patent—Rival manufacturer manufacturing goods similar in appearance as patented goods and adopting to them descriptive name by which patented goods had been known—Manufacturer—If guilty.*

It is difficult where a name is descriptive of patented product to conceive that a manufacturer could be held ... passing off, if he manufactured the goods in ... with the expired patents, and the only ... known. It is conceivable that in the case of a patent, long ago expired, the evidence might possibly establish that the name had become distinctive of a particular manufacturer rather than descriptive of the goods, ... a case is to prove in the ... it must be additionally ... ord is the name of goods as well as being descriptive of those goods (*Lord Russell of Killowen*) CANADIAN SHREDDED WHEAT CO., LTD. *v.* KELLOG CO. OF CANADA, LTD A.I.R. 1938 P.C. ...

——*Registration—Words merely descriptive of patented product—If can be registered—Descriptive words—If can acquire secondary meaning.*

T. P. ACT (1882), S. 3.

Where a name is merely descriptive of the patented product or of the character and quality of the goods in connexion with which it is used, the name, after the patent has expired, cannot be registered as a trade mark because it would be attempting by registering the name of the patented product to prolong the patent monopoly. It is however clear that such a descriptive word may possibly have acquired a secondary meaning, and have come to mean or indicate that the goods in connexion with which it is used are the goods of a particular manufacturer, in other words that the word in question has in its secondary meaning become indicative cf origin. But the onus on the person who attempts to establish this secondary meaning is a heavy one. If in addition to being descriptive of the goods in connexion with which it is used, it is in fact the name of the product of which those goods are composed, then a state of affairs exists which makes it extremely difficult that the word should ever become indicative of origin so as to render it capable of registration as a trade mark. The difficulty may sometimes be overcome in a case where the alleged trade mark is in fact a description of the goods, but is not recognized by the trade or the public as being such, and is taken by them as being a fancy name *e. g.*, where a chemical description not generally known to the public has been adopted, or where an unusual substance unknown to the public is being used in the manufacture. Where the words are purely descriptive and in common use it is even more difficult to conceive a case in which they could acquire a secondary meaning. In order to ascertain whether words have acquired secondary meaning it is of primary importance to see how the manufacturer used the words, *i.e.*, to see whether he used them as a trade name or common law trade mark for the purpose of indicating the origin of the goods, or whether they were used by him merely descriptively. (*Lord Russell of Killowen.*) CANADIAN SHREDDED WHEAT CO., LTD *v.* KELLOGG CO. OF CANADA, LTD.

A.I.R. 1939 P.C. 143.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 3—*Attestation by Sub-Registrar—Proof required.*

In order to show valid attestation by the Sub-Registrar, it must be proved by evidence that the Sub-Registrar put his signature on the document in the presence of the executant. (*R. C. Mitter, J.*) ATUL CHANDRA BHADURI *v.* KRISHNA CHARAN DEY SARKAR.

67 C.L.J. 31.

———**S. 51**—Applicability—Landlord and tenant—Oral agreement of permanent lease—Tenant paying salami and taking possession and erecting pucca house—Ejectment suit by representative of lessor—Tenant's right to compensation. *See* T. P. ACT, S. 107.

1938 P.W.N. 386.

———**S. 53**—*Applicability—Transfer of movable property—Part of consideration fictitious—Transfer, if wholly void.*

The principle contained in S. 53, T.P. Act, applies to transfers of movable property also. A transfer is wholly void if part of the consideration was non-existent and the object of it was to defraud the creditors. (*Pollock, J.*) MOTILAL *v.* KASHIBAI. **174 I.C. 398 = A.I.R. 1938 Nag. 249.**

———**S. 53-A**—*Applicability—Contract to transfer occupancy holding—B. T. Act, S. 26-C.*

S. 53-A of the T. P. Act applies to a contract to transfer occupancy holding which has not been completed in the manner prescribed by S. 26-C of the B. T. Act. There is no provision in the latter Act which in any way takes away the right conferred by S. 53-A upon a purchaser to retain possession as against his vendor in the circumstance mentioned in that section.

T. P. ACT (1882), S. 100.

(*S. K. Ghose and Nasim Ali, JJ.*) NOKUL CHANDRA POLLEY *v.* KALIPADA GHOSAL. **42 C.W.N. 630.**

———**S. 53-A**—*Right of defence under—Limitation—Limitation Act, Art. 114.*

S. 53-A of the T. P. Act confers only a passive right and is available to a defendant to protect his possession. Art. 113 of the Limitation Act certainly cannot apply to such a right. Consequently the right of defence under S. 53-A is available to a defendant although his right to sue for specific performance of the contract made in his favour is barred by limitation. (*S. K. Ghose and Nasim Ali, JJ.*) NOKUL CHANDRA POLLEY *v.* KALIPADA GHOSE. **42 C.W.N. 630.**

———**S. 54**—*Sale, when takes effect—Sale of property under management of Collector under Sch. 3, C.P. Code—No permission—Registration on date when Collector ceased to function—If can validate.*

In case of a sale, as in the case of gift, the date on which the transfer takes effect is the date of the instrument and not the date of the registration of the instrument. Where, therefore, a sale is effected of property which is under the Collector's management under Sch. 3, C. P. Code, without the written permission of the Collector, such a sale is a nullity and the fact that the property has ceased to be under the management of the Collector on the date on which the instrument of sale is registered will not render the sale valid. The nullity cannot be turned into an effective transfer simply by registration of an ineffective transfer at a date after the Collector has ceased to function. (*Stone, C.J. and Puranik, J.*) GANESHPRASAD *v.* BHAIYALAL.

A.I.R. 1938 Nag. 253.

———**S. 61**—*Several mortgages—Provision in later on that money thereunder should be paid at time of redemption of earlier one—Right to redeem later mortgage alone.*

Where a subsequent mortgage deed executed by the same mortgagor to the same mortgagee distinctly provides that the amount borrowed thereunder should be paid at the time of the redemption of a prior mortgage, the mortgagor is not entitled to redeem unless he offers to redeem both the mortgages. (*Pandrang Row and Venkataramana Rao, JJ.*) KAMMARAN NAMBIAR *v.* KOMAN. **1938 M.W.N. 78 = 47 L.W. 686.**

———**(as amended), S. 92, Paras. 1 and 3**—*Applicability—Purchaser of portion of mortgaged property redeeming whole—Position and rights of.*

Where a purchaser of a portion of the mortgaged property redeems the property, he is in the position of a co-mortgagor and his case falls under para. 1 and not para. 3 of S. 92 of the T. P. Act. Hence on redemption, he would, according to para. 2 of S. 92, be subrogated to the rights of the original mortgagee. (*Thomas, C.J. and Zia-ul-Hasan, J.*) KUNDAN LAL *v.* FAKIR BAKHSH. **1938 O.A. 472 = 1938 O.W.N. 489.**

———**S. 100**—*Charge—Creation of—Compromise in execution proceedings—Attachment of property continued—Stipulation that judgment-debtor should not transfer attached property till payment of entire decretal amount—Charge on property—If created.*

No doubt mere attachment of property does not create a charge on the property in favour of the attaching creditors. But where the parties enter into a compromise in the execution [illegible] not only the attachment of the [illegible] but it is specifically stated that until the payment of the entire decretal amount the judgment-debtor shall not transfer the attached property by mortgage, sale or gift to any other person, and that in default of payment of the instalments fixed the decree-holders would be entitled to realize the entire decretal amount from that property,

T. P. ACT (1882), S. 105.

one year reserving yearly rent of value of ... Rs. 1,000 —Execution by lessee al... two Councillors affixed ... Suit upon—Maintaina... Madras District Municipalities Act, Ss. 68 and 69.

The letting by a Municipal Council ... collect the fees of the municipal slau... fish-bazaars is a lease as defined by S... Act, the right to collect the said fees ... fit arising out of land and therefore ... perty. Under S. 107, such a lease ... both by the lessor and the lessee an... year reserving an yearly rent has to be made by a registered instrument. Where such a lease is executed by the lessee alone and registered, it is invalid under S. 107. Where it is not executed on behalf of the Municipal Council before registration, it is not in conformity with the requirements of S. 107, although subsequent to registration the President and some members of the Municipal Council put their signatures on it, and where the contract is of more than Rs. 1,000, it is not valid and binding in the absence of proof that the Municipal Council passed a resolution authorising the President or the members to execute such lease as required by S. 68 of the Madras District Municipalities Act. Failure to comply with Ss. 68 and 69 of the District Municipalities Act renders the lease unenforceable and incapable of being sued on. But if the lessee has had the advantage of the lease, the invalidity of the lease would not prevent the Municipal Council from recovering such amount as may be found reasonable under S. 65 of the Contract Act. (*Abdur Rahman, J.*) MOHAMED ROWEHER *v.* THE TINNEVELLY MUNICIPAL COUNCIL. 47 L.W. 668.

——S. ... *dure—No...*

Where ... 'refused', ... and of the ... due course ... been a p... BACHCHA LAL *v.* LACHMAN. 1938 A.L.J. 511=1938 A.W.R. (H.C.) 328.

——S. 107—*Scope—Oral agreement of lease of homestead by mohunt of thakurdari—Payment of Salami— ... P. Act, S. 51.*

The Mohunt of a thakurdari ... homestead land with the defendant ... agreement for a permanent lease. ... a sum of Rs. 250 to the Mohunt as ... a pucca structure on the land, ... Mohunt was removed and was succeeded by the plaintiff who sued to eject the defendant from the land. The defendant had taken no steps to get a registered lease or to get specific performance of the oral agreement within the time limited. He pleaded that he was a permanent lessee, that the plaintiff was equitably estopped from ejecting him and that he was entitled to compensation for the pucca house erected by him. It was found that the settlement of the land with the defendant

TREASURE TROVE ACT (1878), S. 2.

T. P Act, and as he had not instituted a suit for specific ... binding on the thakurdari, the defendant was in equity entitled to be compensated for improvements, *i.e.*, the cost of the pucca house erected by him on the land, on the analogy of S. 51, T. P. Act. (*Agarwala and Varma, JJ.*) MAINA SAHU *v.* BALAK DAS. 1938 P.W.N. 336.

——S. 135—*Transfer by mortgagee—Payment by mortgagor to mortgagee without notice of transfer—Transferee—When bound.*

Payments of interest and payments on account of principal, made by a mortgagor to a mortgagee after, but without notice of, a transfer must, in absence of collusion, be allowed to the mortgagor as against the transferee. The principle applies to a case when the mortgagor has paid off the whole of the mortgage debt in the absence of notice. The question of notice will however only arise if payment has in fact been made; and if it is shown that no payment was in fact made by the mortgagor, no question of notice arises, and the transferee is entitled to recover the amount due on the ... that the ... trans... not pass ... it was ... was to ... *v.* MT. ... at. 265.

TREASURE TROVE ACT (VI OF 1878), Ss. 4 and 20—*Scope and effect of—Finding of bangle—Sale and deposit of proceeds in bank—Right of Crown to recover same from bank in criminal proceedings—Deposit in ...*

... posits ... asing ... Government money when it changes hands. When the money is deposited ... the bank, ... ount to the ... S found ... portions of ... sought to recover the sums of money deposited in the banks.

Held, that though the proceeds of the sale of the bangle was Government money it ceased to be so when it changed hands, and the Crown could not in criminal proceedings claim the refund of the moneys deposited in the banks out of the proceeds of the sale of the bangle. (*Horwill, J.*) THE NEDUNGADI BANK, LTD., OTTAPALAM *v.* THE COLLECTOR OF MALABAR. (1938) 1 M.L.J. 767.

TRUSTS ACT (II OF 1882), S. 59—*Applicability—Chit fund—Security bond to stake-holder by successful bidders—Insolvency of stake-holder—Sale of his properties in auction—Purchaser in auction—Right to sue on security bonds for money due thereunder.*

The starter of a chit-fund took mortgage security bonds from defendants 1 and 2 who were successful bidders. He was subsequently adjudged insolvent and his properties were sold by auction by the Official Receiver and purchased by the plaintiffs. Plaintiffs sued defendants 1 and 2 who had committed default to recover the amounts due by them. It was contended that the suit was not maintainable at the instance of the plaintiffs.

Held, that the position of the stake-holder while taking the security bonds from the successful bidders was that of a trustee, and he having ceased to perform and rendered himself incapable of performing the duties devolved upon him as trustee, the case fell under S. 59, Trusts Act, and conferred a right of suit on the beneficiaries, and the suit was therefore maintainable. (*Venkatasubba Rao and Abdur Rahaman, JJ.*) KUMARASWAMI GOUNDAN *v.* PALANISAMI GOUNDAN, 1938 M.W.N. 523.

———S. 88—*'Person bound in fiduciary character'—Co-sharer tenant impleaded in landlord's suit for rent—Tenure purchased* benami *for him in execution sale—If inures to the benefit of other non-impleaded tenants.*

A co-sharer tenant who is impleaded in the landlord's suit for rent does not come within the language of S. 88 of the Trusts Act as a "person bound in a fiduciary character" to protect the interest of the other tenants who have not been impleaded in the suit. Consequently, if the tenure is put up for sale in execution of the decree obtained against him and is purchased *benami* for him, the purchase does not inure to the benefit of the non-impleaded tenants. (*Khundkar, J.*) HARENDRA NATH ACHARJEE *v.* HIRENDRA NATH ACHARJEE. 42 C.W.N. 701.

UNITED PROVINCES AGRICULTURISTS' RELIEF ACT (XXVII OF 1934)—*Costs of original decree—Reduction, if possible.*

The Agriculturists' Relief Act does not authorise a Court to make any deduction in the amount of costs allowed under the original decree. (*Thomas, C.J. and Zia-ul-Hasan, J.*) DWARKA PRASAD *v.* MOHAMMAD TAQI HUSAIN. 1938 O.A. 466=1938 O.W.N. 573.

———S. 2 (2)—*'Agriculturist'—Mutawalli if can be.*

Where a Mutawalli of a waqf has a beneficial interest under the waqf, then his payment of land revenue brings him under the definition of agriculturist. (*Thomas, C.J. and Zia-ul-Hasan, J.*) DWARKA PRASAD *v.* MOHAMMAD TAQI HUSAIN. 1938 O.A. 466=1938 O.W.N. 573.

———S. 30—Application under—If competent, after an order under S. 6 of Encumbered Estates Act. *See* U. P. ENCUMBERED ESTATES ACT, S. 7 (*a*) *and* (*b*). 1938 A.W.R. (H.C.) 324.

———S. 30 and Sch. III and S. 4—*Future interest on decrees prior to Act—Provision governing.*

Future interest on decrees passed before the passing of the Agriculturists' Relief Act is governed by S. 30 and Sch. III of the Act and not by S. 4. (*Thomas, C.J. and Zia-ul-Hasan, J.*) DWARKA PRASAD *v.* MOHAMMAD TAQI HUSAIN. 1938 O.A. 466=1938 O.W.N. 573.

UNITED PROVINCES ENCUMBERED ESTATES ACT (XXV OF 1934), Ss. 4 and 6—*Objection as to application being defective—Amendment—Further defects—Amendment, if can be objected to by creditor.*

U. P. ENCUMBERED ESTATES ACT (1934), S. 7.

Where on an objection by a creditor, an application under S. 4 was directed to be amended and where during the course of further proceedings it was found that certain minor members were not mentioned in the application, the application could be suitably amended and the creditor cannot at that stage raise fresh objections. (*Darling, S.M. and Bomford, J.M.*) KAMLAPAT RAM *v.* LACHMAN PRASAD. 1938 R.D. 482.

———S. 4—*Right to apply—Persons becoming landlords after the Act had come into force—Gift of entire property to son—Son if can be accepted as heir.*

It is only those who are landlords on the date on which the U. P. Encumbered Estates Act came into force, are entitled to the protection of the Act. Those becoming landlords subsequent to that date are not so entitled. Where a father transfers his entire property to his only son after the Act came into force, the son cannot be accepted as an heir as contemplated by the 4th and 5th provisos of S. 4 of the Act, so long as the father is alive. (*Darling, S.M. and Marsh, J.M.*) KHUB CHAND *v.* KEHRI SINGH. 1938 R.D. 556.

———S. 4 (4)—*'Prevented'—What amounts to—Collusion by co-debtors with creditors—If a ground for extension of limitation.*

Where a debtor imagining that his interests would be protected by an application by his co-debtors, keeps quiet, and on finding that his co-debtors had colluded with the creditors presents his application under S. 4 of the Encumbered Estates Act after the time prescribed, he cannot be said to have been 'prevented' by the above circumstances from presenting his application in time. (*Darling, S.M. and Bomford, J.M.*) BABOO RAM *v.* SUKH LAL. 1938 R.D. 489.

———S. 6—*Order under—Cancellation by successor—Validity—Proper procedure.*

The Sub-Divisional Officer has no authority to cancel the order passed by his predecessor under S. 6 of the Encumbered Estates Act. But if he considers that a mistake has been made, he has only to submit the record to the Board for orders under S. 46 of the Act. (*Darling, S.M. and Bomford, J.M.*) BABOO RAM *v.* SUKH LAL. 1938 R.D. 489.

———S. 6—*Order under—Setting aside—Procedure—Sub-Divisional Officer, if can cancel predecessor's order.*

The Sub-divisional Officer has no authority to cancel the order passed by his predecessor under S. 6 of the Encumbered Estates Act. If for any reason, he comes to the conclusion that, it is erroneous or made by mistake, he should submit the record to the board with a recommendation. The Board in its exercise of revisional powers under S. 46 pass suitable orders. (*Darling, S. M. and Marsh, J.M.*) ALAUDDIN-KHAN *v.* NARAIN DASS. 1938 R.D. 544.

———Ss. 6 and 7—*Effect of order under S. 6—Nature of proceedings to be stayed under.*

As soon as an order is passed under S. 6 of the Encumbered Estates Act, the Court is bound to take action under S. 7 of the Act, and stay all proceedings in respect of a debt with which the applicant's property is encumbered. This has to be done even though some property which has been purchased by another person is also encumbered by that debt. (*Bennet and Varma, JJ.*) RAGHUBAR DAYAL *v.* AMBA PRASAD. 1938 A.W.R. (H.C.) 330.

———S. 7—*Applicability—Transfer to decree-holder under S. 5 of Regulation of Sales Act—Execution and registration of sale—Subsequent order under S. 6 of Encumbered Estates Act—Proceedings for formal possession by decree-holder, if can be stayed.*

Where after the property has been transferred to a decree-holder under S. 5 of the Regulation of Sales Act

U. P. ENCUMBERED ESTATES ACT (1934), S. 7.

and a sale-deed had also been executed and registered, an order under S. 6 of the Encumbered Estates Act is ... by ... be ... The transfer was complete before the order under S. 6 was passed consequently S. 7 of the Act will not come into operation. (*Darling, S. M. and Bemford, J. M.*) SHIAM SUNDER BADRI DAS *v.* PACHORI GANGA PRASAD. 1938 R.D. 490.

——Ss. 7 and 13—*Decree against indebted landlord outside United Provinces—Injunction against execution—Special Judge in United Provinces, if can issue.*

Where a creditor has obtained a decree against an indebted landlord in a province other than the United Provinces, a Special Judge in the United Provinces is not competent to issue an injunction indefinitely restraining such a creditor from executing his decree against property of the debtor in that province. The United Provinces Encumbered Estates Act is concerned exclusively with the protection of land in the United Pr... ve... C... a decree obtained ... has not had recourse to the Special Judge, is discharged so as to be unexecutable in that province. The operation of S. 13 is limited to Courts having jurisdiction in the United Provinces. (*Collister and Bajpai, JJ.*) DARBAR PATIALA *v.* NARAIN DAS GULAB SINGH. 1938 A.L.J. 481=1938 A...

... Manual and not by way of appeal under S. 45 of the Act. (*Darling, S. M. and Marsh, J M.*) SAHIB SINGH *v.* NARAIN DAS. 1938 R.D. 558.

——S. 7 (a) (b)—*Nature of proceedings contemplated by—Application by indebted landlord under S. 30, ... Relief Act—Competency.*

... Act is not incompetent. (*Collister and Bajpai, JJ.*) ...

—— ...

... United ... entitled ...

... the Court ... has to de... prepared ... KHAN. ...

1938 O L R. 212=1938 O W.N. 494.

——S. 9 (5)—*Joint judgment debt—Application under the Act made only by one of the joint debtors—Procedure—Stay.*

Where there is a joint judgment debt and only one of the joint debtors applies under S. 4 of the Encumbered

U. P. LAND REVENUE ACT (1901), S. 41.

Estates Act, still the whole execution in respect of such joint debt has to be stayed, until such time as the Special Judge apportions the amount as required by S. 9 (5) (*a*) of the Act. (*Darling, S.M. and Marsh, J.M.*) SAHIB SINGH *v.* NARAIN DAS. 1938 R D. 558.

——S. 13—Scope of—Powers of Court—Limits. *See* U. P. ENCUMBERED ESTATES ACT SS. 7 AND 13. 1938 A.W.R. (H.C.) 313.

——S. 45 (2)—*Interpretation—Right of appeal—Extent of—Refusal to set aside dismissal for non payment of publication charges—Remedy.*

S. 45 (2) of the United Provinces Encumbered Estates should not be interpreted to mean that the right of appeal is only against decisions, decrees or orders which fall specifically under the Act in the sense that they are such orders as can be passed under any one of the sections of the Act itself. An order refusing to set aside the dismissal of an application for non-payment of publication charges, is appealable to the District Judge and no revision lies to High Court under S 115, C. P. Code (*Yorke, J.*) ASHIQ ALI *v.* ABDUS SAYEED KHAN. 174 I C 736=1938 O A. 384=1938 R D. 520=1938 A W R (C C.) 43 (2)=1938 O.L R 212=1938 O.W.N. 494.

——S. 46 and C. P. Code, S. 115—*Distinction between.*

The revisional powers contained in S. 46 of the United Provinces Encumbered Estates Act, of calling for the records, relate only to proceedings in a case under the Act pending in a Court, that is to say, the Act does ... ovided ... ALI *v.* ... 736= ... 520= 1938 A.W.R. (C C.) 43 (2)=1938 O L.R 212=1938 O.W.N. 494.

**UNITED PROVINCES LAND REVENUE ACT (III OF 1901), S. 34—*Mutation—Right to—Compromise decree among claimants—Possession of half and right to resume possession of the other half of the property on the death of a lady—Death of the lady ... o ask for mutation on strength of partial*

... n settlement of disputes between the daughter ... nd daughter in-law a compromise decree was ... which the grandson was put in possession of ... operty, with a right to get the other half on ... of the daughter-in law, and mutation was ... y made, on the death of the daughter in-law the grandson can on the strength of the decree obtain mutation at the hands of the Revenue Courts under S. 34 ... Land Revenue Act, in respect of the whole pro... (*Darling, S M. and Bemford, J M.*) RUDRA ... AP SINAH *v.* BANS BAHADUR SINGH. 1938 O.W.N. 576=1938 R.D. 553.

——S. 35—*Scope of—Disputed mutation case—Powers of Tahsildar to decide.*

... of the United ... of a disputed ... a Tahsildar. ...) BAIJNATH ... 38 R D 479= ... O.W N. 487.

—— ... *dispute as to plots in abadi—Proper remedy.*

Where the dispute is about the boundaries of plots in an abadi, the Revenue Courts have not the least interest or concern in such matters. S ... Act was never intended ... rties should be referred to a C...

U. P. LAND REVENUE ACT (1901), S. 233.

(*Darling, S.M. and Bomford, J.M.*) BRIJ MOHAN *v.* ANANT LAL. 1938 R.D. 537.

———S. 233 (k)—*Applicability—Suit for partition of house—Agricultural land also attached to—Forum—Determining factor.*

Where a suit was for partition of a house situated in the heart of a city to which agricultural land was also attached, it was held that as the dominant characteristic of the property was not agricultural property but house property with land attached thereto, the Civil Court was the proper forum for such a suit, and that S. 233 (*k*) of the Land Revenue Act could not be applied. (*Bennet and Verma, JJ.*) MOHAMMAD SALEH KHAN *v.* NUR FATIMA BEGAM. 1938 A.L.J. 513.

UNITED PROVINCES PREVENTION OF ADULTERATION ACT (VI OF 1912), S. 15—*Non-compliance with—Particulars not given in summons—If justifies acquittal—Effect of S. 537, Cr. P. Code—Requirements of summons—Sufficiency.*

There is nothing in the U. P. Prevention of Adulteration Act which justifies the conclusion that it was the intention of the legislature that a failure to give the particulars in the summons required by S. 15 of the Act would justify an acquittal, even if it were perfectly clear that the person charged had been guilty of the offence and had a full opportunity of defending his conduct. The provisions of S. 537, Cr. P. Code are perfectly clear and mere quibbles as to errors, irregularities and omissions in procedure should not interfere with substantial Justice. Where the summons stated that a sample of ghee was taken from the shop of the accused and that he was prosecuted under S. 4 of the Act and that the Sanitary Inspector was the prosecutor, it contains all the particulars required by S. 15 of the Act. (*Allsop, J.*) HIRA LAL *v.* EMPEROR. 1938 A.L.J. 497.

UNITED PROVINCES REGULATION OF SALES ACT (XXVI OF 1934), S. 3—*Absence of notice to Judgment-debtor to his correct address—Validity of proceedings in his absence.*

Where no effort was made to serve the judgment-debtor with notice at his correct address, all proceedings taken under the Regulation of Sales Act in the absence of the judgment-debtor are defective and a fresh opportunity should be given to him to contest the valuation. (*Darling, S. M. and Bomford, J. M.*) TRIBENI SINGH *v.* LACHHMI RAM. 1938 R.D. 487.

———S. 3 (3)—*Service of notice—Failure to appeal against valuation—Re-opening in revision, if permissible.*

Where the services of notices were good and the judgment-debtor refrains from taking advantage of the appeal allowed against the valuation under S. 3 of the U. P. Regulation of Sales Act, such a judgment-debtor cannot be allowed to re-open the matter in revision. (*Darling, S. M. and Bomford, J. M.*) PARKALI KUER *v.* RAJA RAM MALL. 1938 R.D. 485.

USURIOUS LOANS ACT (X OF 1918), S. 3 (1) (ii)—*Operation of.*

The words "Notwithstanding any agreement, purporting to close previous dealings and to create a new obligation" in S. 3 (1) (*ii*) of the Usurious Loans Act, merely have the effect of extending the power conferred upon the Court to re-open accounts already taken even to cases in which some agreement exists which purports to close previous dealings. These words do not restrict the operation of this sub-section only to cases in which such an agreement is forthcoming. (*Edgley, J.*) GHANSYAM DAS MARWARI *v.* J. NICHOLS. 42 C.W.N. 665.

WAJIB-UL-ARZ—Construction—Inferential construction—If permissible. *See* LANDLORD AND TENANT —ABADI. 1938 O.W.N. 500.

———*Construction—'Lawalad'—Meaning.*

On a construction of the 2nd para. of the Wajib-ul-arz concerned, it was held that there was no reason to give the word the meaning of 'sonless'. (*Thomas, C. J., Zia-ul-Hasan and Hamilton, JJ.*) RAGHURAI *v.* BINDRA PRASAD. 1938 O.A. 447= 1938 O.W.N. 547 (F.B.).

WILL—*Testamentary capacity—Proof required—Instructions given to lawyer when testator was conscious—Will executed by him when he was half conscious.*

If a testator had given instructions to a lawyer when he was fully conscious to make a will, and the lawyer prepared it in accordance with those instructions, all that is necessary to make it a goodwill, if executed by the testator when he is midway between consciousness and unconsciousness, is that he should be capable of understanding that he is engaged in executing the will for which he had given instructions to the lawyer. It is unnecessary to place before the testator all the various alternatives or the details of the will that he desired to make. It is sufficient if the general tenor of his dispositions placed before him. (*McNair, J.*) AMULYA KUMAR BOSE, *In the goods of.* 42 C.W.N. 649.

II—TRAVANCORE CASES.

AGRICULTURISTS' RELIEF REGULATION, S. 33—*Applicability—Execution of sale—Purchase by decree-holder—Issue of sale certificate—Effect—Money—If still due.*

After issue of a sale certificate to the decree-holder who has purchased the property in Court-auction, the Court cannot treat the case as one where money is recoverable un[illegible] S. 33 (1) of the [illegible] poses of S. [illegible] be regarded as remaining due for recovery after a sale certificate has been issued. (*Joseph Thaliath and Para*[illegible]

[illegible]

ought"—Meaning of.

To come within Expl. IV of S. 10, C. P. Code, it will have to be established to the satisfaction of the Court that the matter which is sought to be concluded on the principle of *res judicata* not only might have [illegible] in the former [illegible] been so made. [illegible] ound of defence [illegible] o be raised by a [illegible] raised a ground of attack or defence, the rule of constructive *res judicata* will not apply. It is further [illegible] ground of attack or defence which n[illegible] also be one which ought to have b[illegible] above question is essentially one of [illegible]

[illegible] ght lead [illegible] e pleas [illegible] There [illegible] are based on causes of action which [illegible] inconsistency and confusion be combi[illegible] pleas cannot be characterised as pleas [illegible] have been raised in the former case. [illegible] aforesaid pleas stands a plea, the evide[illegible] which is such as to be destructive of other pleas. In such cases, also, it cannot be sai[illegible] bound to raise the plea in the form[illegible] *J. and Sankarasubba Iyer, J.*) [illegible] MED SAHIB *v.* NEELAKANTAN.

——**S. 52**—*Rubber quota—Whether attachable.*

Export quota right is saleable property under S. 52, C. P. Code, not exempted under the section from attachment. (*Parameswaran Pillai, Gopala Menon and Sankara Subba Iyer, JJ.*) JOSEPH *v.* NILAKANTA IYER. **28 T.L.J. 265.**

——**S. 57**—*Mesne profits—Right of auction purchaser—If accrues from date of sale or date of* [illegible] *only.*

Under S. 57 of the C. P. Code, an [illegible] chaser is entitled to claim mesne profits [illegible] from the date of the sale. (*Joseph Thaliath and Sankarasubba Iyer, JJ.*) SUBRAMONIA IYER *v.* LAKSHMANA SASTRI. **28 T.L.J. 345.**

——**S. 59**—*"Assets"—Meaning of.*

Purchase money accruing from a Court-sale held at the instance of one of the decree-holders would be assets held by the Court under S. 59. The assets will now include all a man's property of whatever kind which may be used to satisfy his liabilities existing against him [illegible]

[illegible] 69 such appropriation towards the decree-debt shall be subject to the provisions of S. 59. R. 185 of the Civil Court's Guide in so far as it insists upon payment of the entire purchase money into Court is not only obsolete [illegible] with the provisions of the new C. P. Code including the rules under the first schedule. (*Verghese, C. J. and Parameswaran Pillai, J.*) NEELAKANTAN *v.* GOVINDAN. **28 T.L.J. 311.**

——**S. 89**—"Court Subordinate to High Court"—Registrar of Co-operative Societies—Order by—Revision *See* CO-OPERATIVE SOCIETIES ACT, S. 42, R. 17. **28 T.L.J. 329.**

——**S. 108 (1)**—*Construction and scope—Sale in execution—Subsequent variation or reversal of decree—*

[illegible] than that eventually found due, the rule has no application. Nor can any sound reason be found to support it. A judgment-debtor seeking as plaintiff to get rid of the [illegible] on that he paid [illegible] decree, in other [illegible] should be treat[illegible] ne purchased for [illegible] Under the old [illegible] possible only in cases where the decree was reversed or varied in appeal [illegible], however, been [illegible] versals, whether [illegible]. Even though [illegible] of the original [illegible] necessarily be, if anything is found to be due from the defendant to the plaintiff, it is the latter decree which must be considered as the formal expression of the adjudication between the parties. There can be only one decree in a case. S. 108 speaks of part of decree being varied. This can apply to cases where a decree consists of two distinct or sepa[illegible] very of [illegible] movа[illegible] form [illegible] eof" in S. 108 can refer only to such part of a decree which is capable of being separated from the other part of [illegible] (*Verghese, C. J. and Sankarasubba Iyer, J.*) K[illegible] IYER *v.* MUTHAYYA. **T.L.J.** [illegible]

——**S.** [illegible] —Death of [illegible]

means—Right to continue suit or pauper. *See* C. P. CODE, O. 22, R. 1. **28 T.L.J. 288.**

——**Ss. 115 to 117**—*Power of Court to make corrections.*

The Court has ample jurisdiction to make necessary corrections under the provisions of Ss. 115 to 117 of the C. P. Code. (*Sankarasubba Iyer, J.*) VELLAYAMMAL *v.* SEENITHAYI. **28 T.L.J. 285.**

——**O. 21, R. 94**—*Scope—Successive applications—Maintainability.*

O. 21, R. 94, C. P. Code, is the rule under which a holder of a decree for possession of immovable property or an auction-purchaser has to apply to the Court, complaining of resistance or obstruction. The words used in the rule are 'may make an application, complaining of such resistance of obsuruction," thus indicating that it is only a permissive provision, which, as affording a summary remedy, the obstructed person is given an option to use or forego. Hence it is clear that either a decree-holder or an auction-purchaser may apply for a fresh writ of possession without making an application under O. 21, R. 94, C. P. Code. Merely because a prior application for delivery has become infructuous by reason of obstruction, that cannot operate as a bar to a fresh application for delivery, provided such application, which is one in execution, is made within the time limited by law. This view has been taken by several Courts in British India and also by this Court. (*Sankarasubba Iyer, J.*) KASIN *v.* MANCHUNATHA PYE. **28 T.L.J. 276.**

——**O. 22, R. 1**—*Legal representative of deceased pauper plaintiff—Right to continue pauper suit—O. 33, R. 9 and S. 110, C. P. Code—Legal representative if could be dispaupered on ground that he is possessed of means in private capacity.*

A Court must appreciate the distinction between the right for leave to sue in *forma pauperis* and the right to continue a suit already registered as a pauper suit. The former right is no doubt purely a personal one, depending upon the pauperism of the petitioner and does not survive to his legal representatives, under O. 22, R. 1, C. P. Code. It therefore follows that the latter cannot seek to continue the application but must file a fresh application in their own right, and show that they are paupers. The above consideration cannot apply to a case where the plaintiff dies, after the pauper petition has been registered as a suit. What the legal representative has to do is to take up the suit at the stage at which it was left when the original plaintiff died and to continue it. The defendant in a pauper suit cannot, after it has been registered as a suit, be allowed by reason of the death of the original plaintiff to re-open a previous stage of the proceedings in the suit. There is a well-marked distinction between the status of a person who figures as a party to a case in his individual capacity and that of the same person when he is made a party in the capacity of the legal representative of a deceased plaintiff or defendant. Though the individual is the same, he fills two distinct characters and hence constitutes two different persons in the eye of the law. It follows as a logical consequence that, where the Court is concerned with the additional plaintiff only in his character as legal representative of a deceased plaintiff, the question of pauperism or otherwise of such person becomes absolutely irrelevant, as it is really the estate of the deceased plaintiff, represented so far as the Court is concerned by the person brought on record in his place, that must be considered the real plaintiff in the cause. The Court is therefore not concerned with the question whether the legal representatives who have been brought on record as additional plaintiffs are

possessed of properties or not. An analogy is afforded by the next friend of a minor suing on the latter's behalf. In such cases, the next friend is allowed to sue in *forma pauperis* if the minor is not possessed of properties, though the next friend himself may be possessed of means. A legal representative of a deceased plaintiff can continue the suit in *forma pauperis*. The object of S. 110, C. P. Code, is to allow a proceeding or application which could have been taken or made by or against any person, if he were living, by or against those who claim under him. In order that the section might apply, the latter proceeding or application must be one which might be taken or made by or against the predecessor-in-interest. Judged by this test, a proceeding to dispauper the legal representatives of a deceased plaintiff cannot be treated as a proceeding for dispaupering the deceased plaintiff. (*Verghese, C. J. and Sankarasubba Iyer, J.*) KOLAPPAN ASARI *v.* VALLI AMMAL. **28 T.L.J. 288.**

——**O. 22, R. 10**—*Transferee* pendente lite—*Right to continue suit after death of transferor.*

A transferee *inter vivos* is the person on whom the interest of the deceased transferor has devolved and who is entitled to continue the suit. It is enough if the transferee is only a transferee for a portion of the interest. (*Verghese, C. J. and Gopal Menon, J.*) KANIPAVAL KURISU *v.* ANTHONI PANDARAM. **12 T.L.T. 899=28 T.L.J. 208.**

——**O. 33, R. 5 (d)**—*Enquiry under—Scope.*

In considering the question whether the application in *forma pauperis* has a cause of action or not, the Court has to look only into the allegations made by the applicant, this does not mean that the Court should confine itself to allegations in the petition, but it is open to the Court to consider not only the allegations contained in the plaint, but also the facts appearing in the examination of the applicant. (*Verghese, C. J.*) KRISHNAN *v.* KESAVAN. **28 T.L.J. 274.**

——**O. 33, R. 5 (d)**—*Enquiry under—Scope of.*

It is undesirable on an application for leave to sue in *forma pauperis*, to embark on an elaborate consideration of questions of law and fact and decide issues affecting the merits of the case. (*Sankarasubba Iyer, J.*) PADMANABHA PILLAI *v.* PARAMESWARAN PILLAI. **28 T.L.J. 340.**

——**O. 33, R. 9**—Scope—Pauper suit—Death of plaintiff—Legal representative possessed of means—Application to dispauper—Competency. *See* C. P. CODE, O. 22, R. 1. **28 T.L.J. 288**

——**O. 38, R. 1**—*Order for the appointment of a receiver—Grounds—Appeal.*

It is only one order which is contemplated by O. 42, R. 1, Cl. 22, C. P. Code, as appealable and this is the final order. An order appointing an *interim* receiver cannot be considered to amount to a final disposal of the application. When a Court passes an order under O. 38, R. 1, the Court determines the question of the necessity for the appointment of a receiver. When once the Court passes such an order it cannot, of its own accord, alter it without a review or other proper proceeding. But the nature of the order passed by the Court below and sought to be revised is liable to be changed by the Court, of its own accord, as a result of the enquiry which it proposes to hold on the application. It is open to the Court, as a result of such enquiry, either to make the *interim* order absolute or to vacate it. The element of finality connoted by the expression "decision" which is used in the definition of the expression "order" must be held to be wanting in an introductory order. All orders passed in the course of a suit, like orders appointing a receiver, directing attachment before

C. P. CODE REGN., O. 40, R. 32.

judgment, issuing temporary injunction, etc., are styled interlocutory, but as already pointed out, once these orders are passed, they cannot be varied *suo moto* by the Court, but only by way of review or by other appropriate proceedings at the instance of either party. The distinction therefore between an interlocutory order which is final and one which is only an *interim* one lies not in the circumstance that the first is interlocutory and the other is not, but in the feature, that, though both are interlocutory in their nature, the Court reserves to itself the power to vary such order of its own accord in the latter cases while it has no such power in the former It is also well settled that a plaintiff applying for the appointment of a Receiver must show *prima facie* that he has a strong case and good title to the property or a special equity in his favour. (*Sankarasubba Iyer, J.*) POUSHI UMMAL *v.* KALIYANI PILLA.

28 T. L. J. 210.

——O. 40, R. 32—*Powers of appellate Court—Suit decreed against one defendant alone and dismissed against other defendants—Appeal by former defendant—Other defendants not parties to appeal—No appeal by plaintiff—Remand for* de novo *trial—Competency—Trial Court's jurisdiction to try case against other defendants.*

suit as against defendants 1 and 3.
ferred by the 2nd defendant, the lov
set as
case.
case was ...
dant alone or against all the defendants. After remands, evidence was being let in and 3rd defendant was examined as a witness. Subsequently 3rd defendant put in an application to set aside the *ex parte* order passed against him. This petition was allowed and 3rd defendant filed

...

of the plaint amount and was otherwise dismissed. The lower appellate Court confirmed the decree.

Held, in special appeal, (1) that the appellate Court had no power under O. 40, R. 32 to interfere to the prejudice of a person who was a party to the suit but who has not been a party to the appeal and the lower appellate Court had no jurisdiction

...

ence that he acquiesced in the *de novo* trial of the case

...

NAR *v.* THIRUMALAYANDI MOOPANAR.

12 T.L.T. 714.

——O. 42, R. 1 (22)—Scope—Order appointing *interim* receiver—Appeal. *See* C. P. CODE, O. 38, R. 1. 28 T.L J. 210.

CO OPERATIVE SOCIETIES REGULATION, S. 42, R. 17—*"Touching the business of the society" —Order of Registrar—Revision—C. P. Code, S. 89.*

CR. P. CODE REGN., S. 404.

The expression "touching the business of the society" in R. 17 of the rules under S. 42 is wide enough to include arising out of any particular transaction of the society. It is difficult to say that the Co-operative Registrar is a Court. The circumstances that the Co-operative Registrar is allowed under the rules to take evidence and is authorised to pass a decision or award cannot *per se* make him a Court. There is nothing in the rules to show that he is in the true sense of the word subordinate to the High Court. (*Verghese, C. J. and Sankarasubba Iyer, J.*) MADHAVAN PILLAI *v.* NARAYAN IYER. 28 T.L J. 329.

COURT-FEES REGULATION, S. 6—*Distinct subjects—Suit by junior members of Tarwad to set aside a hypothecation bond by Karnavan and suit by the hypothecatee to enforce bond—Former suit dismissed and the latter decreed—Consolidated appeal by junior member against both decrees—Court-fee.*

An application for permission to present a consolidated appeal from the two decrees having been granted, the question was raised whether court fees had to be paid separately on the value of each of the suits. The valuation in one of the suits was slightly less than that in the other and the higher figure was adopted for purpose of

...

principal and interest due on the hypothecation bond) was proper. (*Verghese, C J., Parameswaran Pillai and Narayana Iyer, JJ.*) PONNAMMA *v.* NARAYANA PILLAI 12 T.L.T. 796.

——S. 10—*Revision against valuation, competency.*

A revision petition on the question of court fee or ...on is not contemplated by S. 10 of the Court ...tion. But it cannot be said that a petition does not lie in regard to the question of ... (*Verghese, C.J.*) 12 T.L.T. 738.

CRIMINAL PROCEDURE CODE REGULATION, S. 167—Applicability and scope—Offence started in British India and completed in Travancore—Jurisdiction to try. *See* TOBACCO REGULATION, S. 25 (*e*). 12 T.L.T. 697.

——S. 366 (3)—*Offer to maintain—If should be "as*

... is to provide ...ght not to be ... the husband ...on his wife. ...A *v.* KUNJU. ...8 T.L J. 310.

...*minal cases—Offences arising from settlement operations in Poonjar* ...*mer of the*

... is to clear ... and distrust ... the administration of justice which is so essential to social order and security. It is essential to preserve the administration of justice, not merely of any taint of bias or impartiality but also as far as possible from suspicion of such taint. Where ...connection with settlement ...l, and the trial Magistrate of the Poonjar F...

Held, that though the Commissioner of Poonjar may have no control over the Settlement Officer of that Edavakai, it cannot be denied that Poonjar Chief is highly interested in the survey and settlement operations of his Edavakai. Hence he must have some interest in the prosecution also. Therefore, the Commissioner of Poonjar who was the manager of the Chief, was not entirely disinterested in the prosecution. (*Joseph Thaliath and Gopal Menon, JJ.*) PAREETHU *v.* SIRKAR.
28 T.L.J. 253.

CRIMINAL TRIAL—*Revision—Acquittal—Interference by High Court—Grounds.*

The High Court will seldom interfere with orders of acquittals recorded by the lower Courts. If, however, there has been some error of law in the judgments of the lower Courts, or if there has been no fair trial, the Court may interfere. There is nothing irregular on the part of judicial officers in accepting a part of the deposition of a witness and rejecting the rest, and the Courts in this State do accept that part of the prosecution case or defence which is supported by the probabilities of the case, and reject the rest. This has become inevitable because the witnesses we get seldom speak the whole truth. (*Verghese, C. J. and Joseph Thaliath, J.*) KRISHNA PILLAI *v.* SIRKA. 28 T.L.J. 326.

———*Transfer—Grounds for—Committing Magistrate probable witness.*

The mere fact that a Magistrate, in whose Court a criminal case is pending, is, or may be, summoned as a witness for the defence is of itself no reason for the transfer of the case from the Court of such Magistrate. It may be sufficient reason that he should not pass a sentence himself but should commit the case to a Court of Sessions. The trying Magistrate's knowledge of the existence of enmity between the prosecution and the accused, and the fact that the accused desires to cite the Magistrate to depose to such enmity is no sufficient ground for the transfer of the case to another Magistrate. (*Verghese, C. J.*) NARAYANA PILLAI *v.* SIRKAR. 28 T.L.J. 321.

DECREE—*Construction—Suit for redemption of kanom on payment of the value of improvements—Original decree registered—Appeal confined to value of improvements dismissed—Effect of—Appellate decree—If one relating to immovable property—Decree to be executed—Whether original decree or appellate decree.*

An appeal from a decree for redemption of a kanom was confined to the amount of value of improvements; the appeal was dismissed.

Held, the appellate decree though it was merely worded as a dismissal of the appeal must be treated as a decree confirming the original decree as regards the recovery of property on payment of a certain amount towards the value of improvements. It cannot be said that when an appeal is filed merely on the question of the value of improvements and when such appeal is dismissed, the appellate decree ceases to be a decree relating to immovable property. For the essence of the decree in such cases is the declaration of a right to redeem the property on payment of a certain sum as value of improvements and the liability to surrender the property on receipt of that sum. The execution relates to the appellate decree and not the decree of the first Court. (*Gopal Menon and Parameswaran Pillai, JJ.*) KASIAN PILLA *v.* MADASWAMI NAIDU.
12 T.L.T. 930 = 28 T.L.J. 251.

EVIDENCE ACT, S. 116—*Applicability in Travancore—Tenant's plea of title of paramount—If estopped.*

The principle of S. 116 of the Evidence Act has been accepted by Courts in Travancore though the Evidence Act has no statutory force in Travancore. All that the section means is that the tenant is estopped during the continuance of the tenancy from denying that the landlord has any title at the beginning of the tenancy to immovable property. It is therefore open to the tenant to show that his landlord's title has expired or become determined at any other point of time. This right of the tenant is called the right of proving eviction by title paramount. (*Joseph Thaliath and Sankarasubba Iyer, JJ.*) SUBRAMONIA IYER *v.* LAKSHMANA SASTRI.
28 T.L.J. 345.

EXECUTION—*Attachment—Abandonment—Second attachment—Inference that decree-holder intended to give up rights under original attachment—If justified.*

Held, it is well-recognised law that the mere fact that there was a second attachment does not lead to the inference that the decree-holder intended to give up his rights under the original attachment. (*Gopal Menon and Parameswaran Pillai, JJ.*) MEERAL *v.* BALA PRASAD.
12 T.L.T. 792.

———*Executing Court—Power to question validity of decree.*

Held: (*i*) A decree when passed with jurisdiction is executable and the execution Court cannot go behind it and refuse execution. (*ii*) The validity or propriety of the decree cannot be questioned by the execution Court even though the decree may have been passed in the erroneous or irregular exercise of jurisdiction by decretal Court. (*iii*) A decree which is altogether a nullity in the sense that it is no decree in the eye of the law is inexecutable and the executing Court is not bound to execute such decree. (*iv*) A decree which is passed against the person of a defendant without any notice or process being issued to him is a nullity so far as the person of the defendant is concerned and must be regarded as no decree in the eye of the law and the executing Court is perfectly competent to disregard such decree and refuse to execute it. (*Gopal Menon and Parameswaran Pillai, JJ.*) KESAVAN *v.* SOSAMMA. 12 T.L.T. 761 = 28 T.L.J. 256.

———*Pre-decree agreements—If can be pleaded as bar to execution.*

An agreement entered into between the parties prior to the passing of the decree, was pleaded as a bar to the execution of the decree.

Held, that the conduct of the parties in such cases amounted to an abuse of the process of the Court and such contentions should not be countenanced. (*Joseph Thaliath and Gopal Menon, JJ.*) KRISHNA PILLAI *v.* KOLAPPA PILLAI. 12 T.L.T. 910 = 28 T.L.J. 279.

———*Revivor—Application struck off after release of judgment-debtor—If a judicial disposal—Subsequent application—If revival of former.*

Where a judgment-debtor is released from arrest on an order of the Court and the execution application is struck off the file, no judicial order is passed on the application and a subsequent application must be deemed to be a continuation of the former. (*Parameswaran Pillai, J.*) KAILASAM IYEN *v.* NARAYANA IYER.
28 T.L.J. 338.

———*Revivor—What amounts to—Prior application for execution not judicially disposed of—Subsequent application—Nature of.*

The decree-holder applied for execution on 30-3-1110. The Court ordered attachment and proclamation schedule was ordered to be produced on 29-4-1110. This direction was not complied with. On 24-5-1110 the Court ordered further steps to be taken on 3-6-1110. This was also not complied with and on 25-6-1110 the Court struck off the application for execution. The next

Held, that the application of 30 3-1110 had not been judicially disposed of and that the subsequent application of 1 8-1110 was only a revival of the earlier one.

Held, further, that such cases were of almost every day occurrence and the High Court had repeatedly pointed out that owing to the defect in the procedure adopted by the lower Courts in the matter of posting execution application and taking them up for disposal, a large number of execution application which would otherwise have been hopelessly barred by limitation, had to be treated as pending judicial disposal. If without taking up the matter for disposal the Court desires to adjourn the case, an order adjourning the case to a specific date should be passed. (*Verghese, C. J. and Parameswaran Pillai, J.*) AHAMAD *v.* THOMMI. 28 T.L J. 354.

GUARDIAN AND WARDS REGULATION. S. 36 (3)—*Power to order rendition of acc[illegible] of property.*

S. 36, Cl, (3) of the Regulation sta[illegible] may require the guardian, or if he is [illegible]tative to deliver any account relating to any past or present property of the ward. But that does not mean that the Court can go into the accounts and find if they are correct or not; and if it finds a larger amount as due from the guardian it can order him to deposit in Court the additional amount so found. The Court cannot order rendition of accounts under the Regulation. The preponderance of authority is in favour of the view that where the matter is complicated the Court exercising its powers under the Regulation should be chary in ordering restoration of properties. (*Joseph Thaliath and Gopal Menon, JJ.*) MARY *v.* SIVANANCHI. 28 T.L.J. 282.

INCOME-TAX REGULATION, S. 50 (2)—"*Passed*"—*Meaning of.*

An order can be said to be passed [illegible] of S. 50, Cl. (2) of the Income Ta[illegible] from the date when the notice of the [illegible] on the person concerned. So a petiti[illegible] Revenue Authority within 30 days from the date when the notice of the order of the Assistant Peishkar was served on the Petitioner, is within time. (*Verghese, C. J. and Gopal Menon, J.*) 12 T L.T. 744.

INSOLVENCY REGULATION, S. 9 (1) (c)—*Act of insolvency—Registered deed of gift—Period of three months-Computation—Starting point—Date of execution* [illegible]

[illegible] date of the execution of the document and not from the date of its registration.

Obiter.—The same principle would hold good, and especially in Travancore, in the case of other transfers as well. (*Narayana Iyer and Sankarasubba Iyer, JJ.*) CHACKO *v.* UTHUPPAN. 12 T.L.T. 836.

——S. 28 (2), Proviso—*Construction of—Secured creditor—Rights of—If affected the adjudication of the debtor as insolvent—Execution proceedings without the Official Receiver as party if* ab initio *void.*

The rights of a secured creditor over a property are not affected by the fact that the person who created the encumbrance has been adjudicated an insolvent. This is the only intention underlying the proviso to Cl. (2) of S. 28 of the Insolvency Regulation. That does not, however, imply that an action against the person who has incurred the second debt can go on in the absence of [illegible] on the Official Receiver, if the execution proceedings take place without him on record, but cannot, however, be considered to be *ab initio* void. (*Joseph Thaliath and Sankarasubba Iyer, JJ.*) GOVINDA PILLAI *v.* MEERA MAUTHI. 12 T.L.T. 881.

——S. 46—"*Mutual dealings*"—*Meaning of—Set-off—When may be allowed.*

The foreman of a Chitty became an insolvent after the collapse of the Chitty. Between the collapse of the Chitty and his insolvency he assigned in favour of non-prized subscribers security bonds which he had taken from the prized subscribers. One Kuruvilla Phillipose was a prized subscriber and his bond was signed to one Kurien Avira. This Kuruvilla Phillipose took an assignment of the rights of Kandan Konthi, a non-prized subscriber after the collapse of the Chitty.

Held, the term "mutual dealings" in S. 46 of the [illegible] a very extended [illegible] British India and [illegible]ch may be set-off [illegible]endency to termi[illegible] which necessarily terminate in debts. Therefore, an assignment taken by a debtor in respect of a claim against the insolvent may ordinarily be set off against what may be found due from the debtor to the insolvent, provided, however, the debts are due respectively in the same right and the claims on each side are such as result in pecuniary liabilities arising out of contract. Presumably such assignment before it can be relied on for purpose of set-off must have been taken *bona fide* and with notice to the insolvent, and necessarily, before the order of adjudication in insolvency. The principle of set-off cannot be extended to cases where at the time of the insolvency one person owes a debt to the insolvent, and with full knowledge that the latter has become hopelessly [illegible]aims against the [illegible] the liability of [illegible]ment in this case [illegible]mutual dealings [illegible] with respect to which a claim of set-off could successfully be urged. (*Parameswaran Pillai and Kumaran, JJ.*) KURUVILLAY *v.* AVIRA. 12 T.L.T. 752=28 T.L.J. 297.

INTERPRETATION OF STATUTES—*Proceedings of—Legislature—When justified.*

Sankarasubba Iyer, J.—In interpreting statute, it is [illegible] ambiguity or doubt, to [illegible]he Legislature. (*Gopal* [illegible] *and Sankarasubba Iyer,* [illegible]AI. 12 T.L.T. 721=28 T.L.J. 185 (F.B.).

JENMI AND KUDIAN REGULATION—*Kudipulli Thanathu lands—Whether Jenmom property.*

Kudipulli Thanathu lands recorded as such in the Revenue accounts are Jenmom lands under the definition of 'Jenmom land' contained in the Jenmi and Kudiyan Regulation. Jenmom lands which are exempt from payment of any revenue to Government become subject to Kadama when they are demised on Kanapattom tenure to which the rights of occupancy are attached. (*Verghese, C. J. and Sankarasubba Iyer, J.*) SREENARAYAN NAMBOORIPAD *v.* PARAMESWARAN. 12 T.L.T. 748=28 T.L.J. 204.

JURISDICTION—*Criminal Case—Lands in Travancore occupied by the Tinnevelly-Quilon Railway, whether Travancore territory—Political documents—Agreements and treaties between* [illegible] *the*

JURISDICTION.

British Government, whether Courts may refer to such political documents—Travancore Tobacco Regulation of 1087, S. 25—Bringing beedi tobacco from British India without permit to Kundara Railway Station—Travancore Courts, jurisdiction of—Criminal Procedure Code, S. 167.

The South Indian Railway area in Travancore is Travancore territory, and the importation of tobacco without permit into the Railway line west of Shencottah into Travancore territory is an offence under S. 25 of the Tobacco Regulation (I of 1087). The residue of all legislative power still vests in the Maharaja, and it will be a relevent fact for the Courts to construe if His Highness the Maharaja has ceded jurisdiction over the Railway area in Travancore.

Per *Verghese, C. J.*—When a foreigner starts the train of his crime in a foreign territory and perfects and completes the offence within British limits, he is triable by the British Courts within whose jurisdiction he is found and when a subject of a Native State starts his crime in British territory and perfects and completes his offence in the Native State he is triable by the Court of the Native State within whose jurisdiction he is found, in whichsoever manner he might come there.

Per *Joseph Thaliath, J.*—By virtue of the provisions of the S. 167, Cr. P. Code, the Travancore Courts have jurisdiction to try an accused even though the offence he committed might have begun, continued and completed outside Travancore. The policy of the Cr. P. Code as shown by Ss. 410 to 414 is to uphold in most cases the orders passed by the Criminal Court which was lacking in local jurisdiction or which had committed illegalities or irregularities unless failure of justice has been occasioned or is likely to be occasioned through such want of jurisdiction or such illegalities or irregularities. (*Verghese, C. J., Joseph Thaliath and Kumaran, JJ.*) CHAKKO *v.* SIRKAR. 28 T.L.J. 357 (F.B.).

———*Small Cause Court—Counter-claim exceeding small cause jurisdiction—Court's power to try.*

There is nothing to forbid a Court exercising small cause jurisdiction in addition to its regular jurisdiction from trying a counter-claim exceeding small cause jurisdiction. (*Parameswaran Pillai, J.*) PERUMAL NADAR *v.* BALASUBRAMONIO PILLAI. 28 T.L.J. 344.

LAND ACQUISITION—*Compensation —Assessment of—Price of nearest land sold or acquired previously—If relevant.*

In estimating the amount of compensation, regard may be had to the rates at which the nearest land with similar advantages have been sold within a short period either before or after the acquisition. Awards of Courts in previous cases of land acquisition come under the category of sales which may be relied on for the purpose of determining what the proper valuation ought to be. (*Gopal Menon and Sankarasubba Iyer, JJ.*) NARAYANA PILLAI *v.* THE DEWAN OF TRAVANCORE.
12 T.L.T. 774.

LAND IMPROVEMENT AND AGRICULTURAL LOAN REGULATION (IX OF 1094), S. 7 (1) *(e)—Loan under first charge—If created—"As if they were arrears of land revenue"—Construction of.*

S. 7 (1) (e) of Regulation IX of 1094 has not the effect of creating a first charge on the land on the security of which loans are granted by the Sirkar under the provisions of the said Regulation· such security will be subject to prior encumbrances, if any, in favour of strangers.

Per *Parameswaran, Pillai, J.*—"The expression, as if they were arrears of land revenue" does not impute a first charge as provided in S. 2 of the Revenue Recovery Regulation and the sale held under the provisions of the Agricultural Loan Regulation would not affect prior encumbrances in the manner provided in S. 39 of the Revenue Recovery Regulation.

Per *Sankarasubba Iyer, J.*—The very same words 'as if they were arrears of land revenue' are also used in sub-Cl. (*a*) of Cl. (1) of S. 7. Thus if the words 'as if they were arrears of land revenue' in sub-Cl. (*a*) were to be interpreted as indicating only the procedure to be adopted, there was no necessity for the legislature for introducing sub-Cl. (*e*) at all as the provisions would be a redundant one. (*Gopal Menon, Parameswaran Pillai and Sankarasubba Iyer, JJ.*) SIRKAR *v.* GOPALA PILLAI. 12 T.L.T. 721= 28 T.L.J. 185 (F.B.).

LIMITATION REGULATION, S. 3—*Duty of Court under—Suit* prima facie *barred—Duty to dismiss—Omission to plead limitation—Effect of*—Res judicata—*Execution proceedings.*

A point of limitation is one which, whether it is taken by the defendant or not, the Court is bound to entertain, whether there is no dispute as to facts and dates, necessary to determine the question of limitation, and even the second appellate Court is bound to do so. The obligation to dismiss the suit which is *prima facie* barred by limitation rests on each successive Court, and S. 3 makes it obligatory on the Court to which an application for execution of a decree is presented to consider and decide so far as it can do so whether the application is within time or is barred by limitation. Until a notice has been served on the defendant and he was made aware of the steps applied for and given an opportunity to put forward his objections to them, there can be no *res judicata* in execution against the defendant and it could not be said that he had abandoned the plea of limitation. Before there can be *res judicata* in execution against a defendant there must be an order in execution. (*Verghese, C. J. and Sankarasubba, Iyer, J.*) CHANDA PILLAI *v.* KUNCHERIA.
12 T.L.T. 853.

———S. 15—*Applicability—If confined to direct stay orders.*

S. 15 of the Limitation Regulation is not confined to cases of direct stay, but also applies to orders which indirectly but effectually cause a delay (*Parameswaran Pillai, J.*) KAILASAM IYEN *v.* NARAYANA IYER.
28 T.L.J. 338.

———S. 28—*Powers of Court to add or transpose party —Limits.*

The Court should not give leave to add a party or to transpose a party when the result thereof would be to introduce a new cause of action with which the person to be added or transposed has nothing to do. There is no clause in the section corresponding to S. 23 (2) of the Indian Limitation Act. (*Verghese, C. J. and Gopal Menon, J.*) 12 T.L.T. 746.

———Arts. 55 and 67—*Applicability—Unregistered bond—No date for payment specified—Term that interest to be paid twice a year—Limitation.*

Where an unregistered bond with no date fixed for payment provides that interest ought to be paid twice a year, that term applies only to the payment of interest and not the day when the bond becomes payable. To give the word "bond" the meaning, "interest as per the bond" cannot be justified. If there is no restriction whatever imposed as to the time of making demand as per the bond, and in the absence of a specified day for payment, Art. 55 must be applied. (*Joseph Thaliath and Gopal Menon, JJ.*) SIVARAMA NADAN *v.* RAMA-LEKSHMI. 28 T.L.J. 270.

———Art. 82—*Applicability—Execution sale—Application to set aside on ground of fraud.*

Where fraud is alleged, the period of limitation is to

be calculated from the date of the knowledge of the fraud. The proper article to apply in a case where sale in execution is sought to be set aside on the ground of fraud is Art. 82. (*Sankarasubba Iyer, J.*) PADMANABHA PILLAI *v.* PARAMESWARAN PILLAI.

28 T.L.J. 340.

——**Art. 164**—*Applicability—Application for delivery—Dismissal for non payment of process-fee—Subsequent application—Limitation.*

The special appellant purchased the properties of judgment-debtor in Court-action in execution and auction sale was confirmed on 14-4-1106. An application for delivery of possession was put in on 14-3-1109. Delivery was ordered and the Court to be paid. As this order was not application was rejected on 24 7-110 cation was put in on 27-12 1109 for objection was taken on the ground of limitation.

Held, Art. 164 of the Specific Article applying to applications by auction-purchasers for delivery of possession of property sold. It must be applied in preference to the general Art. 166. In view of Art. 164, time cannot be reckoned for the application of 27-12-1109

12 T.L.T. 740 = 28 T.L.J. 332.

——**Art. 166**—*Applicability—Original Court decree registered but appellate decree unregistered—Period of*

—Held, Court ppellate t been

three years under Art. 166 of the Limitation tion.

Per *Parameswaran Pillai, J.* which is sought to be executed execution is the appellate decree, applicable under Art. 166 is three years unless the appellate decree has been registered or filed as required under S. 15 of the Registration Regulation at any time during the period when the execution application or any step-in-aid of execution filed within six years of the date

MAHOMEDAN LAW—*Minor — Alienation by*

to convey to another, any right or interest in immovable property which the transferee can enforce against the infant. (*Parameswaran Pillai and Sankarasubba Iyer, JJ.*) PONNAN *v.* YUSSUFF. **12 T.L.T. 891.**

MARUMAKKATHAYAM LAW — *Alienation — Karnavan—Powers of—Sale for purpose of acquiring other properties—Tarwad—If bound—Necessity.*

Acquisition of fresh property for the Tarwad by alienating Tarwad properties is considered as binding on the Tarwad only under special circumstances when such fresh acquisition was to the manifest advantage of the Tarwad and the alienation of the Tarwad property for the purpose of the acquisition had the consent of all the adult members of the Tarwad. The alienation of the Tarwad property in such cases is justified, not because it entered into the special quisition of fresh property might be deemed to constitute sufficient necessity justifying such alienation. A transaction, be-

late with the family property even if he does so in good faith believing that his conduct of affairs will ultimately be of advantage to the family. (*Verghese, C J and Parameswaran Pillai, J.*) KALICHEERA *v.* VASUDEVA KAMMATHI. **12 T.L.T. 779.**

——*Tarwad—Decree against one member—Death of against other members as of latter to question vali-*

at when Tarwad properties ution of a decree obtained wad and when junior members of such Tarwad are impleaded in execution as the legal representatives of the deceased judgment-debtor, it is open to such junior members to question the validity of the decree and contest the right of the decree-holder to proceed against Tarwad properties. The principle is the same where the junior members are impleaded in execution as the legal representatives of the deceased judgment-debtor whether such judgment-debtor was the Karnavan or not. (*Joseph Thaliath and Parameswaran Pillai, JJ.*) KESAVA PILLAI *v.* GOURI.

12 T.L.T. 771.

ffect on rights of sub-mortgagee.

If the puisne mortgage is a necessary party in a suit by a prior mortgagee, the necessary corollary of the rule is that the sub-mortgagee must be considered to be a necessary party. This is so because the sub-mortgagee is entitled to redeem the first mortgage and to be sub- mortgagee is not bound by imilarly the mortgagee of a tgagee is not bound by im- The sub-mortgagee having and to the auction sales, his held to have been left un- s. The case of payment of the amount due to the mortgagee, by the mortgagor or

The last clause in S. 5 was added by the Newspapers Amendment Regulation IV of 1110 to prevent the publication of matter which is obscene in character. The meaning of the word obscene is as given in Bouvier's Law Dictionary, something offensive to chastity, delicacy or decency, presenting to the mind or view without delicacy and purity ; Se

JURISDICTION.

British Government, whether Courts may refer to such political documents—Travancore Tabacco Regulation of 1087, *S.* 25—*Bringing beedi tabacco from British India without permit to Kundara Railway Station—Travancore Courts, jurisdiction of—Criminal Procedure Code, S.* 167.

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Per *Joseph Thaliath, J.*—By virtue of the provisions of the S. 167, Cr. P. Code, the Travancore Courts have jurisdiction to try an accused even though the offence he committed might have begun, continued and completed outside Travancore. The policy of the Cr. P. Code as shown by Ss. 410 to 414 is to uphold in most cases the orders passed by the Criminal Court which was lacking in local jurisdiction or which had committed illegalities or irregelarities unless failure of justice has been occasioned or is likely to be occasioned through such want of jurisdiction or such illegalities or irregularities. (*Verghese, C. J., Joseph Thaliath and Kumaran, JJ.*) CHAKKO *v.* SIRKAR. **28 T.L J. 357 (F.B.).**

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There is nothing to forbid a Court exercising small cause jurisdiction in addition to its regular jurisdiction from trying a counter-claim exceeding small cause jurisdiction. (*Parameswaran Pillai, J.*) PERUMAL NADAR *v.* BALASUBRAMONIO PILLAI. **28 T.L.J. 344.**

LAND ACQUISITION—*Compensation —Assessment of—Price of nearest land sold or acquired previously—If relevant.*

In estimating the amount of compensation, regard may be had to the rates at which the nearest land with similar advantages have been sold within a short period either before or after the acquisition. Awards of Courts in previous cases of land acquisition come under the category of sales which may be relied on for the purpose of determining what the proper valuation ought to be. (*Gopal Menon and Sankarasubba Iyer, JJ.*) NARAYANA PILLAI *v.* THE DEWAN OF TRAVANCORE. **12 T.L.T. 774.**

LAND IMPROVEMENT AND AGRICULTURAL LOAN REGULATION (IX OF 1094), S. 7 (1) (c)—*Loan under first charge—If created—"As if they were arrears of land revenue"—Construction of.*

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Per *Parameswaran, Pillai, J.*—"The expression, as if they were arrears of land revenue" does not impute a first charge as provided in S. 2 of the Revenue Recovery Regulation and the sale held under the provisions of the Agricultural Loan Regulation would not affect prior encumbrances in the manner provided in S. 39 of the Revenue Recovery Regulation.

Per *Sankarasubba Iyer, J.*—The very same words 'as if they were arrears of land revenue' are also used in sub-Cl. (*a*) of Cl. (1) of S. 7. Thus if the words 'as if they were arrears of land revenue' in sub-Cl. (*a*) were to be interpreted as indicating only the procedure to be adopted, there was no necessity for the legislature for introducing sub-Cl. (*c*) at all as the provisions would be a redundant one. (*Gopal Menon, Parameswaran Pillai and Sankarasubba Iyer, JJ.*) SIRKAR *v.* GOPALA PILLAI. **12 T.L.T. 721= 28 T.L.J. 185 (F.B.).**

LIMITATION REGULATION, S. 3—*Duty of Court under—Suit* prima facie *barred—Duty to dismiss—Omission to plead limitation—Effect of*—Res judicata—*Execution proceedings.*

A point of limitation is one which, whether it is taken by the defendant or not, the Court is bound to entertain, whether there is no dispute as to facts and dates, necessary to determine the question of limitation, and even the second appellate Court is bound to do so. The obligation to dismiss the suit which is *prima facie* barred by limitation rests on each successive Court, and S. 3 makes it obligatory on the Court to which an application for execution of a decree is presented to consider and decide so far as it can do so whether the application is within time or is barred by limitation. Until a notice has been served on the defendant and he was made aware of the steps applied for and given an opportunity to put forward his objections to them, there can be no *res judicata* in execution against the defendant and it could not be said that he had abandoned the plea of limitation. Before there can be *res judicata* in execution against a defendant there must be an order in execution. (*Verghese, C. J. and Sankarasubba, Iyer, J.*) CHANDA PILLAI *v.* KUNCHERIA. **12 T.L.T. 853.**

——**S. 15**—*Applicability—If confined to direct stay orders.*

S. 15 of the Limitation Regulation is not confined to cases of direct stay, but also applies to orders which indirectly but effectually cause a delay (*Parameswaran Pillai, J.*) KAILASAM IYEN *v.* NARAYANA IYER. **28 T.L.J. 338.**

——**S. 23**—*Powers of Court to add or transpose party—Limits.*

The Court should not give leave to add a party or to transpose a party when the result thereof would be to introduce a new cause of action with which the person to be added or transposed has nothing to do. There is no clause in the section corresponding to S. 23 (2) of the Indian Limitation Act. (*Verghese, C. J. and Gopal Menon, J.*) **12 T.L.T. 746.**

——**Arts. 55 and 67**—*Applicability—Unregistered bond—No date for payment specified—Term that interest to be paid twice a year—Limitation.*

Where an unregistered bond with no date fixed for payment provides that interest ought to be paid twice a year, that term applies only to the payment of interest and not the day when the bond becomes payable. To give the word "bond" the meaning, "interest as per the bond" cannot be justified. If there is no restriction whatever imposed as to the time of making demand as per the bond, and in the absence of a specified day for payment, Art. 55 must be applied. (*Joseph Thaliath and Gopal Menon, JJ.*) SIVARAMA NADAN *v.* RAMALEKSHMI. **28 T.L.J. 270.**

——**Art. 82**—*Applicability—Execution sale—Application to set aside on ground of fraud.*

Where fraud is alleged, the period of limitation is to

be calculated from the date of the
fraud. The proper article to apply in
in execution is sought to be set aside
fraud is Art. 82. (*Sankarasubba Iyer, J.*) PADMANABHA PILLAI *v.* PARAMESWARAN PILLAI.

——Art. 164—*Applicability—Applicat*
very—Dismissal for non payment of
sequent application—Limitation.

The special appellant purchased the properties of the judgment-debtor in Court-action in execution and the auction sale was confirmed on 14-4-1106. An application for delivery of possession was put in on 14-3-1109.

of possession of property sold. It must be applied in prefer-

appellant. Such dismissal cannot therefore be treated as anything else than a judicial disposal. (*Verghese, C. J. and Sankarasubba Iyer, J.*) VERGHESE *v.* CHACKO.
12 T.L.T. 740 = 28 T.L.J. 332.

——Art. 166—*Applicability—Original Court decree registered but appellate decree unregistered—Period of limitation.*

—*Held*,
Court
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in three years of the date of the appellate decree is only three years under Art. 166 of the Limitation Regulation.

Per *Parameswaran Pillai, J.*—(*a*) When the decree which is sought to be executed and which is capable of

of such decree is kept alive. (*b*) When the appellate

The law is well-settled that, under Mahomedan Law,
person
to the
guar-
guardian,
to convey to another, any right or interest in immovable property which the transferee can
the infant. (*Parameswaran Pillai and*
Iyer, JJ.) PONNAN *v.* YUSSUFF.

MARUMAKKATHAYAM LAW—*Karnavan—Powers of—Sale for purpose of acquiring other properties—Tarwad—If bound—Necessity.*

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12 T.L.T. 779.

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It is well recognised law that when Tarwad properties are proceeded against in execution of a decree obtained against a member of the Tarwad and when junior members of such Tarwad are impleaded in execution as the legal representatives of the deceased judgment-debtor, it is open to such junior members to question the validity of the decree and contest the right of the decree-holder to proceed against Tarwad properties. The principle is the same where the junior members are impleaded in execution as the legal representatives of the deceased judgment-debtor whether such judgment-debtor was the Karnavan or not. (*Joseph Thaliath and Parameswaran Pillai, JJ.*) KESAVA PILLAI *v.* GOURI.
12 T.L.T. 771.

MORTGAGE—*Sub-mortgage—Suit by prior mortgagee impleading puisne mortgagee—Sub-mortgagee of latter—If necessary party—Court sale held without the sub-mortgagee as party—Effect on rights of sub-mort-*

rty in a suit
of the rule
gagee must be considered to be a
his is so because the sub-mortgagee
the first mortgage and to be subrogated to his rights.

stands on a different footing altogether. (*Parameswaran Pillai and Sankarasubba Iyer, JJ.*) ANNA *v.* OUSEPH.
12 T.L.T. 884.

NEWSPAPERS REGULATION, S. 5 (4)—*"Obscene in character"—Meaning of—Motive immaterial.*

The last clause in S. 5 was added
wspapers
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er. The
Bouvier's
delicacy or decency, presenting to the mind or view something without delicacy and purity: forbidden to be expressed

or which brings about corruption of morals. The Newspapers Regulation is not concerned with motive of the publication. It is only concerned with the fact whether there has been a publication of indecent matter, whether the motive be good or bad. (*Verghese, C. J., Joseph Thaliath and Sankarasubba Iyer, JJ.*) *In re* GOPALA PILLAI. 28 T.L.J. 317 (F.B.).

PENAL CODE, S. 332—*Public servant discharging his duty as such—Meaning of.*

In order that the offence may come under S. 332, it will do if it is proved that when hurt was caused the public servant was discharging his duty as such. It need not necessarily be that the hurt was caused in consequence of anything done or attempted to be done by a public servant. The duty need not be to do a specific act but merely keep a watch. (*Narayana Iyer and Sankarasubba Iyer, JJ.*) MUNICIPAL OVERSEER, ALLEPPEY *v.* PAREED ROWTHER. 28 T.L.J. 272.

———**S. 502, Excep. 3**—*Applicability—Conditions of.*

The 3rd Exception to S. 502 can apply only if the imputation is made in good faith and relates to the conduct of the complainant touching the public question and to his character, appearing from such conduct. The protection conferred by the Excep. 3 does not imply that the imputation may be based on nothing or that, if it is alleged to be based on a fact, it is protected, even though the fact alleged is not a fact. (*Verghese, C.J. and Sankarasubba Iyer, J.*) NETTO *v.* NETTO. 28 T.L.J. 305.

PRACTICE—*Relief—Subsequent events — Competency of Court to take notice of and afford relief on basis of altered conditions—Rule.*

It is no doubt well-settled that a Court may take notice of events which have happened since the institution of a suit and afford relief on the basis of altered conditions, where it is manifest that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to base the decision on the altered circumstances in order to shorten litigation or to do complete justice between the parties. There are obvious limitations to this principle. A plaintiff cannot be allowed to claim relief to which he was not entitled at the time of action, on a new title which accrued after. The question whether an amendment can be allowed is mainly a question of fact conditioned upon the circumstances of each case. (*Sankarasubba Iyer, J.*) NILAKANTA PILLAI *v.* NILAKANTAN. 28 T.L.J. 216.

RES JUDICATA—Execution proceedings—Omission to plead limitation—Effect. *See* LIMITATION. REGULATION, S. 3. 12 T.L.T. 853.

REVENUE RECOVERY REGULATION, Ss. 5 and 39—*Sale for arrears on land sold and other lands of defaulter—Validity—Effect on prior encumbrances.*

A sale held for arrears of revenue is valid and will extinguish prior encumbrances, even though it was held for recovery of arrears due on the land sold as well as other lands belonging to the defaulter. (*Gopal Menon, Parameswaran Pillai and Sankarasubba Iyer, JJ.*) NARAYANAN *v.* NAYINA MUHAMMATHU. 12 T.L.T. 783 = 28 T.L.J. 226 (F.B.)

REVIEW—*Powers of Court—Order dismissing suit for non-payment of deficient court-fee—Inherent powers.*

When a Court is called upon to review its order dismissing a suit for non-payment of deficient court-fee, what it has to consider is not whether the reason mentioned for non-payment of the deficient court-fee is well-founded, but whether there is sufficient ground for granting the review, taking all the circumstances into account, in deciding which the reason alleged for non-payment may also be taken as an element for consideration. In cases

like these the Court can exercise its inherent powers. In all such cases it is desirable that Courts bear in mind the principle that they ought not to be too technical as if one is anxious to find excuse for cutting short the work of the Court. (*Sankarasubba Iyer, J.*) SUBBARAYA KAMMATHI *v.* VARKEY. 28 T.L.J. 336.

TOBACCO REGULATION, S. 25 (e)—*Importing beedi tobacco without permit from British India to Travancore within South Indian Railway Limits—Jurisdiction—Travancore Court's jurisdiction to try offence—Cr. P. Code, S. 167—Applicability.*

The accused booked a parcel of beedi tobacco from Ambasamudram Railway Station in Tinnevelly District to Kundara Railway Station in Travancore. The accused had not taken a permit for the importation of this tobacco into Travancore. The parcel was booked to be carried, not in the Railway goodsvan, but in charge of the passenger (accused). At Kundara the accused did not remove it outside the Railway Station premises and it was therefore contended that Travancore Courts had no jurisdiction to try the offence.

Held,—the South Indian Railway area in Travancore was Travancore territory. R. 2 of the rules framed under the Tobacco Regulation provides that no tobacco, shall be imported in travancore from British India or from the Cochin State except under a permit. The importation of tobacco without permit into the Railway line west of Shencottah into Travancore territory is an offence under S. 25 of the Tobacco Regulation (I of 1087). The moment the accused booked this contraband tobacco at Ambasamudram Railway Station destined for Kundara Railway Station, he attempted to commit the offence of importing contraband tobacco into Travancore territory. As the contraband tobacco travelled mile after mile till it reached Shencottah, it cannot be disputed that in law it was a continuing offence of attempt to import the tobacco. From the moment the train passed the Shencottah Railway Station and entered into Travancore territory with the contraband tobacco in it, the accused committed the offence of importing contraband tobacco into Travancore territory. It is immaterial for the completion of the above offence whether the accused travelled with the tobacco or not. When a foreigner starts the train of his crime in a foreign territory and perfects and completes the offence within British limits, he is triable by the British Courts within whose jurisdiction he is found, and when a subject of a Native State starts his crime in british territory and perfects and completes his offence in the Native State, he is triable by the Court of the Native State within whose jurisdiction he is found, in which so ever manner he might have come there. Apart from the agreements between Travancore and British India with regard to the jurisdiction over the Travancore portion of the Tinnevelly-Quilon Railway, the Travancore Courts have jurisdiction to punish an offender like the accused where he is found. The Quilon Magistrate had jurisdiction therefore to try the accused.

Per *Joseph Thaliath., J.*—By virtue of the provisions of the S. 167, Cr. P. Code, the Second Class Magistrate Quilon, had jurisdiction to try the accused even though the offence he committed might have begun, continued and completed outside Travancore. The policy of the Cr. P. Code as shown by Ss. 410 to 414 is to uphold in most cases the orders passed by the Criminal Court which was lacking in local jurisdiction or which had committed illegalities or irregularities unless failure of justice has been occasioned or is likely to be occasioned through such want of jurisdiction or such illegalities or irregularities. (*Verghese, C.J., Joseph Thaliath and Kumaran, JJ.*) 12 T.L.T. 697.

III—COCHIN CASES.

—Refund of part by trial Court—Appeal by ... holder for more—If one for restitution or balance of decree debt—Mistake of Court not ... judice parties.

A obtained a decree against *V*. Under a compromise ...

to set aside the sale, a compromise was come to by which *V* agreed to pay the decree debt with interest before a certain date when the sale was to be set aside; or in default, the sale was to be confirmed. *V* deposited an amount and prayed that an account may be taken and the amount, much in excess may be refunded to the extent of the excess. The 1st Court refunded a portion,

the petition by *A* was really one for restitution and not for the balance of the original decree.

Held: the appellant who was a transferee from the judgment-debtor at a private sale by leave of the Court of properties charged with the payment of the decree-debt was a representative-in interest of the judgment-debtor and therefore competent to intervene under S. 241, C. P. Code. A deposit by judgment-debtor into Court would mean a deposit of money for payment to the decree holder, but where payment to the decree-holder is made dependent on an ascertainment by the Court of the amount due to him, the deposit would operate as a discharge only to the extent of the amount so ascertained and actually paid over by the Court to the decree holder. The decree debt should therefore be deemed to have been not satisfied in respect of the balance found due by the lower appellate Court. So that, the present execution petition was only a petition to real ... him. ... here, ... rights ... strictly ... proper ... debt, a ... *C.J. a*... ANNA. 5 Coch.L.J. 471.

———S. 379—*Scope—Suit by minor—Security for* ...

for costs. There is no provision of law nor is it the practice to ask the next friend to furnish security for costs of the defendant before he is allowed to proceed with the trial of the suit. (*Ouseph, C.J. and Neelakanta Menon, J.*) NARAYANAN *v.* RAGHUNATHA RAO. 5 Coch. L.J. 435.

CONTRACT ACT (1872), S. 60.

———S. 528—*Applicability—Absence of necessary respondent—Effect—Tarwad—Representation of.*

S. 528, C. P. Code, can be invoked only in the case ... in the Lower ... It does not ... necessary res... representation of a tarwad is not a question of mere form but one of ... respondent is not before ... so passed will not bind ... *and Narayana Iyer, J.*) VISALAKSHI *v.* RAMA PANICKAR. 5 Coch. L.J. 441.

———(XXIX OF 1111), S. 100—*Finding of fact—Question of custom—Interference in second appeal.*

The existence of a custom or usage having the force of law is a mixed question of fact and law, and S. 100, C. P. Code precludes interference in second appeal only with the findings arrived at by the lower Court, of ... of the custom has ... the existence and a ... being matters of ... *Ouseph, C.J. and Narayana Ayyar, J.*) NARAYANA MENON *v.* KUNCHU MENON. 5 Coch. L.J. 476.

———O. 7, R. 11—*Scope—Duty of Court—Plaint with deficit Court-fee—Procedure.*

Where a plaint is filed on the last day of limitation with a deficit Court fee with a prayer for time to pay up the deficit fee, the Court is bound to give the plaintiff time to pay up the deficit, when the plaint would be considered to have been validly presented from the time it was first filed. The Court is not justified in rejecting the plaint under S. 54 or O. 7, R. 11 unless and until the plaintiff is given an opportunity to supply the deficit Court-fee within a fixed time and the latter fails to comply with that order. The provision is mandatory and can be brought into play at any stage of the case. (*Ouseph, C.J. and Narayana Ayyar, J.*) RAMAN *v.* INKU THAMPAN. 5 Coch. L.J. 426.

———O. 21, Rr. 94 to 100—*Obstruction to delivery—Only decree-holder can move Court to adjudicate the* ...

... bstructed by a ... jurisdiction to ... either *suo motu* ... n the absence ... the resistance ... on to him. An ... thout jurisdiction and as such a nullity. (*Ouseph, C.J. and Narayana Ayyar, J.*) LONAN *v.* LEKSHMI. 5 Coch. L.J. 432.

... circumstance indicating, to which debt a payment is to be applied, the creditor may apply it at his discretion till the very last moment. S. 61 of the Contract Act can be invoked only when S. 60 is not ... *C.J. and Narayana Iyer, J.*) ... MENON.

Neelakanta Menon, J.) RANGASWAMI AYYAR *v.* NARAYANAN UNNI. 5 Coch.L.J. 454.

TRANSFER OF PROPERTY ACT—*Sale—Assignee undertaking to pay vendor's creditor — Failure — Vendor's right against vendee—Assignability.*

Where an assignee undertakes to pay his vendor's creditor but fails to do so, the vendor, is only to sue for damages, and such a right cannot be the subject-matter of assignment. Substitution on proper can be effected only by way of novation, the creditor also being a party to it, in which case the original debtor the vendor, would no longer be liable for the debt. (*Ouseph, C.J. and Neelakanta Menon, J.*) MATHU *v.* IYPE. 5 Coch.L.J. 463.

——(XVII of 1111), S. 65—*Right of consolidation —Covenant for consolidation—If clog on redemption.*

The right to consolidate could be created by express agreement between the parties though it is not available under the general law applicable. Such a covenant will not be regarded as a clog on redemption. Where it is agreed for simultaneous redemption of a subsequent mortgage, there is a contract for consolidation, and the mortgages cannot be redeemed separately. (*Ouseph, C. J. and Narayana Ayyar, J.*) KORU *v.* KRISHNA MENON. 5 Coch.L.J. 398.

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"THE YEARLY DIGEST"

OF

INDIAN AND SELECT ENGLISH CASES.

I—INDIAN DECISIONS.

ADMINISTRATION — *Suit for—Party claiming less share in plaint—Right to proper share.*

In a suit for the administration of the estate, the par-

... *and Dunkley, JJ.)* OON CHAN *v.* KHOO ZUN.
A.I.R. 1938 Rang. 254.

ADVERSE POSSESSION — *Acts of possession—Nature of.*

Acts indicative of possession must vary with the nature of the land over which possession is to be exercised and asserted. *(Davis, J.C. and Mehta, J.)* TAHILRAM TACKCHAND *v.* MT. MIRAL.
A.I.R. 1938 Sind 132.

——*Co-owners — Hostile possession by one—What amounts to.*

Where one co-owner asserts a title hostile to his co-owners, he must do so by an open and unequivocal assertion of a hostile title. The possession must be actual, visible, exclusive, hostile and continued for the statutory period. Mere intention to possession is not a substitute for actual possession, or actual possession of one survey number would not be possession of say, sixty. *(Davis, J.C. and Mehta, J.)* TAHILRAM TACKCHAND *v.* MT. MIRAL. A.I.R. 1938 Sind 132.

——*Hindu widow—Possession of mother-in-law—When on behalf of widow—If adverse.*

Where a Hindu dies leaving his widow, and her ...

possession only on behalf of her daughter-in-law. *(Varadachariar and King, JJ.)* RAMAYYA *v.* LAKSHMAYYA. A.I.R. 1938 Mad. 513.

——*Interruption—What amounts to entries in record of rights, or receipt for assessment—Effect of.*

Whether continuity of the possession be broken by flood or by draught, or because the nature of the land itself is such that it is not susceptible of continued acts of user or possession, once there is a breach in the continuity of adverse possession, the chain of years is broken and the land reverts to its rightful owner.

...

AGRA TENANCY ACT (1901), S. 58.

of cultivation, but used the lands, so far as they could be, for grazing purposes and appropriated the grazing ... by the plaintiff was for more than ... No ejectment suit was ever brought, ... who was entitled to such lands by ...e, got receipts for the payment of ...ent of boundary marks, got compensation money when some land was acquired by Government, and got the entries made in the Record of Rights,

Held that the defendant's possession was paper possession only, and the plaintiff had acquired a title by adverse possession. *(Davis, J.C. and Mehta, J.)* TAHILRAM TACKCHAND *v.* MT. MIRAL.
A.I.R. 1938 Sind 132.

AGRA PRE-EMPTION ACT (XI OF 1922), S. 4 (1) and (7)—*'Petty proprietor'—Who is—If a 'co-sharer'.*

Where by a deed of exchange a person acquires only a particular number, that is a particular field in a Mahal, he comes under the definition of 'petty proprietor' in S. 4, Sub-S. (7) of the Agra Pre-emption Act. He cannot claim to be a 'co-sharer' in the Mahal. *(Bennet and Verma, JJ.)* DIN DAYAL *v.* SHEO PRASAD. 1938 A.W.R. (H.C.) 348=1938 A.L.J. 534.

——**S. 12 (1) (v)**—*'Co sharers in the village'—If includes owner of a share in the mahal.*

The intention of the legislature in enacting the words 'co sharerers in the village', in S. 12 (1) (*v*) of the Agra Pre-emption Act was that the owner of a share in a ... sole proprietor of a mahal should have a ...mption in a different mahal in the same ...nce an owner of a half share in a mahal ... pre-empt property which is in another ... same village. *(Bennet and Verma, JJ.)* DIN DAYAL *v.* SHEO PRASAD.
1938 A.W.R. (H.C.) 348=1938 A.L.J. 534.

AGRA TENANCY ACT (II OF 1901), S. 58—*Suit under—Compromise admitting contesting defendant to occupancy holding—Effect on subsequent suit for division of holding by member of another branch.*

Where on the death of the holder of an occupancy holding, the zamindar filed a suit under S. 58 of the Old Tenancy Act against all his presumptive heirs, but it was contested only by a member of one branch and was ... which he was admit... d where later on the ... original holder sued ... it *held* that in view of the decision in the prior suit, it was the pl... in.

the later suit to prove possession, if they wished to prove their co-tenancy. (*Darling, S.M. and Bomford, J.M.*) RAM SUMER MISRA *v.* RAM NIRANJAN MISRA.

1938 A.W.R. (B.R.) 209.

——(III OF 1926), Ss. 44 and 95—*Ejectment—Plea of admission—Onus—Re-admission—Oral evidence—Admissibility—Ejected person re-entering into occupation—Position of.*

In a suit for ejectment if the defendant pleads that he is not a trespasser as he has been admitted to tenancy, the onus is on him to prove the admission. As regards re admission, it is the intention of the Act that there should be written consent in such cases and oral evidence is inadmissible. A person who re-enters into occupation after ejectment, without the written consent of the landlord remains liable to ejectment for 12 years as a trespasser. He takes possession at his own risk. (*Darling, S.M. and Bomford, J.M.*) BADRI NARAIN LAL *v.* SURJA RAM. 1938 A.W.R. (B.R.) 206.

——S. 95—Consent of landlord—Proof—Oral evidence—Admissibility. *See* AGRA TENANCY ACT, SS. 44 AND 95. 1938 A.W.R (B.R.) 206.

——S. 95—*Object of—Ejected tenant holding over—Liabilities of.*

Where a tenant after an order for his ejectment, holds on and retains possession of the holding, he thereby renders himself liable not only to criminal prosecution but also to a suit under S. 44 of the Tenancy Act. It is not open to such a person to take any technical point to prove re-admission for S. 95 was introduced in the new Act, to prevent trespassers from raising such points. (*Darling, S.M. and Bomford, J.M.*) SHEO GULAM LAL *v.* MAHARAJA OF BUMRAON.

1938 A.W.R. (B.R.) 211.

ARBITRATION — *Award—Criminal complaint of misappropriation—Disputes between parties referred to arbitration—Criminal Court not compounding case—Award acquitting accused holding that there was no misappropriation—Validity.*

After filing a complaint for criminal misappropriation the parties submitted their disputes, the chief one concerning misappropriation, to arbitration. One of the parties moved the Criminal Court to have the case compounded, but the application was rejected. The result was that while the arbitrators were engaged in settling the disputes, one of the main disputes concerning misappropriation was being agitated in the Criminal Court. The award delivered held that no amount had been misappropriated and acquitted the accused. The whole award mainly depended on the finding on the issue,

Held that under the circumstances although the reference did not succeed in stifling the criminal presecution, still the arbitrators did arrogate to themselves the powers of a Magisterial Court. Hence the award was invalid.

Held also that the rest of the award also could not be upheld. That would have been possible only if the arbitrators had acquitted the accused of the charge pending against him by merely stating that fact. (*Mehta, J.*) FAZAL ELLAHIE *v.* NAZIR AHMED.

A.I.R. 1938 Sind 130.

BENGAL FOOD ADULTERATION ACT (VI OF 1919), S. 14 (2)—*Article of food sent for analysis before case—Costs of analysis—Power of Court to order their payment.*

S. 14 (2) of the Bengal Food Adulteration Act applies only to cases in which an article of food is sent for analysis under an order of the Court before which a case under the Act is pending. It does not apply to a case in which such article was sent to the Chemical Examiner by the Health Officer of the Municipality before the institution of the case and without the intervention of any Court. In such a case, therefore, the Court cannot order for payment of the costs of analysis under S. 14 (2) of the Act. (*Patterson, J.*) ATUL CHANDRA MODAK *v.* EMPEROR. 42 C.W.N. 760.

BENGAL LANDLORD AND TENANT PROCEDURE ACT (VIII OF 1869)—*Agricultural lease—Forfeiture clause—Validity—Termination of lease on forfeiture—Form of notice.*

Act VIII of 1869 leaves landlords and agricultural tenants free to regulate their rights by contract. There is nothing in that Act which would render invalid a forfeiture clause in an agricultural lease. It cannot be contended that a forfeiture could be availed of by the landlord, in spite of a contract to the contrary contained in a written lease, only at the end of the agricultural year. This being the position, no particular form of notice is required under the law to terminate a tenancy forfeited according to a covenant contained in the lease. If the landlord intimates to the tenant before suit his election to determine the lease, there is a valid termination of the lease. (*Mitter and Biswas, JJ.*) PRAVAT CHANDRA SYAM *v.* BENGAL CENTRAL BANK, LTD.

42 C.W.N. 761.

BENGAL MUNICIPAL ACT (III OF 1884), S. 15—*Frame of suit.*

The fact that a suit is filed against the Chairman of the Municipality and not against the Municipal Commissioners is a technical flaw, and no importance should be attached to it if the commissioners duly appeared in Court and contested the suit. (*M. C. Ghose and Bartley, JJ.*) JOGENDRA NATH BANERJEE *v.* TOLLYGUNJ MUNICIPALITY. 42 C.W.N.

——Ss. 278 and 281—*Municipality not pro[illegible] adequate drainage—Suit, if lies—Proper remedy.*

No suit lies against the Municipality for non-feasance in respect of their duty under S. 278 of the Bengal Municipal Act to provide adequate drainage. The only remedy in such a case is under S. 281 of that Act, which gives a right of intervention to the Local Government. (*M. C. Ghose and Bartley, JJ.*) JOGENDRA NATH BANERJEE *v.* TOLLYGUNJ MUNICIPALITY.

42 C.W.N. 768.

——S. 535—*Suit for illegal omission of Municipality—Notice, if necessary.*

The words "for any act purporting to be done under this Act" in S. 535 of the Bengal Municipal Act include an illegal omission. Consequently a suit for a non-feasance or illegal omission of the Municipality would be bad, if the notice required by the section is not given. (*M. C. Ghose and Bartley, JJ.*) JOGENDRA NATH BANERJEE *v.* TOLLYGUNJ MUNICIPALITY.

42 C.W.N. 768.

BENGAL PUBLIC GAMBLING ACT (II OF 1867), S. 11—*Counterfoil receipts bearing names of horses—If instruments of gaming.*

It is doubtful whether the view that counter-foil receipts bearing names of certain horses on which bets had apparently been made which were found in the possession of the accused are instruments of gaming is sound. Accused in possession of such counterfoils was held not guilty when there was no clear evidence as to what the accused was doing at the time of arrest. (*Patterson, J.*) AMULYA DHONE GHOSE *v.* RAM SUNDAR SINGH. A.I.R. 1938 Cal. 422.

BENGAL TENANCY ACT (VIII OF 1885), S. 7—*Enhancement of rent of tenures.*

Once it is found that the lands do constitute tenures, S. 7 must necessarily be attracted if the rent is proved to be enhancible but that must always be subject to a con-

BENGAL TENANCY ACT (1885), S. 7.

tract between the parties. (*Mukherjea, J.*) BASANTA KUMAR DUTTA *v.* SUKUMARI DAS GUPTA.
A.I.R. 1938 Cal. 442.

——S. 7 (2)—*Landlord adducing evidence to show absence of customary rent—Tenant not rebutting this evidence—Enhancement of rent—Power of Court.*

In a suit for enhancement of rent the landlord in his plaint expressly stated that there was no customary rent in the locality and adduced evidence for the purpose of showing the absence of any customary rate. The tenant in his written statement did not challenge this position nor was any evidence adduced on his behalf to rebut the evidence adduced on behalf of the landlord.

Held, that under the circumstances it could be established that there was no customary r[illegible] the locality and as such the Court was at l[illegible] nce the rental up to such limit as it though[illegible] quitable under S. 7 (2). (*Mukherjea, J.*) [illegible]A KUMAR DUTTA *v.* SUKUMARI DAS GUPTA.
A.I.R. 1938 Cal. 442.

ADMINI[illegible]
less share i[illegible] *g hold-*

[illegible] lord in [illegible] ct of a [illegible] enancy [illegible] create a raiyati interest and not a mere under raiyati interest. Hence where a co sharer landlord in execution of rent decree against his tenant purchases the holding of the tenant which is transferable and sublets it to a third person, the third person acquires a raiyati interest and the purchaser in the subsequent sale in execution of a rent decree obtained by another co sharer landlord against the same holding would acquire nothing by his purchase. But if the holding is not transferable, the position of the co sharer landlord who purchased in the previous sale would be that of an unrecognized transferee of an occupancy holding and there would be no merger. Hence, in a subsequent sale in execution of a rent decree obtained by other co-sharer landlord, the entire holding would pass to the purchaser. (*Khundkar, J.*) KHIRABALA DEBI *v.* SURESH CHANDRA.
A.I.R. 1938 Cal. 452.

——S. 23—Tenancy for horticultural purposes—Structures erected by tenant—Suit for mandatory injunction by landlord dismissed as time-barred—Structures subsequently destroyed by fire—Transferee [illegible]

ing—Transfer fee levied and notice of transfer sent to landlord—Landlord allowing mutation of purchaser—If can question validity of transfer.

Where on a transfer of a portion of an occupancy holding, the transfer fee was duly levied from the purchaser and the notice of the transfer was sent to the landlord who far from denying the rights of [illegible]ser in due course allowed him mutation, th[illegible] must be deemed to have accepted the transfer [illegible] transfer and he cannot, therefore, question [illegible] from a [illegible] (*M. C*[illegible] MISRA *v.* [illegible] N. 755

——S. 26 F—*Application under—Money deposited into treasury on following day—Application, if barred.*

If at the time of making an application under S 26 F of the B. T. Act the applicant brings the money with him in Court but it could not be deposited into the

BENGAL TENANCY ACT (1885), S. 52.

Treasury until the next day owing to the rules of procedure, the Court cannot reject the application as time-barred. (*Henderson, J.*) MANILAL PAL *v.* GOUR CHANDRA DAS.
67 C.L.J. 80.

——S. 26 J—*Procedure under—Application or suit.*

There is no reason why the proceeding adopted by the landlord under S. 26-J of the B. T. Act to recover the balance of the transfer fee should not be by means of a suit. The section itself does not indicate whether recovery is to be by means of an application or by means of a suit or by some other means. (*Costello and Panckridge, JJ.*) KRISHNA CHANDRA *v* MANIKLAL.
42 C.W.N. 793.

[illegible] *as to* [illegible] l of the [illegible] om the transferee, the nature and character of the tenancy is in dispute the determination of the status of the tenancy is part and parcel of the question whether or not the money is due from the transferee. The question of the status of the tenancy is not merely incidental, ancillary, or subsidiary. It is a matter which is directly in question between the parties. Consequently the decision of that question by the Court in a proceeding before it, operates as *res judicata*, in a subsequent suit between the same parties instituted in a Court of concurrent jurisdiction. The fact that in the prior proceeding the High Court in revision has expressed an opinion as to the right of the unsuccessful party to institute a suit cannot in law prevent the application of the doctrine of *res judicata*. (*Costello and Panckridge, JJ.*) KRISHNA CHANDRA *v* MANIKLAL.
42 C.W.N. 793.

——S. 29—*Claim of excess rent—Burden of proof.*

Proviso (1) to S. 29 only dispenses with the necessity of a contract being in writing and registered but does not affect Cls. (*b*) and (*c*) of S. 29. Although S. 29 has no application where there are excess lands which are added to the original holding and a consolidated rent is assessed upon the whole, still it is incumbent on the Court to find in all cases, that this addition of excess land is not resorted to as a mere device to get round the provisions of S. 29 and that the lands which are said to have been added were real and not a fictitious addition. Where there is no proof that there has been an increase in area, the mere fact that the tenant agreed to pay enhanced rent beyond the limits prescribed by S. 29 and actually [illegible] nsiderable [illegible] e the case [illegible] and the [illegible] ss of that which is allowed by S. 29, the initial burden to justify the increase must always be upon the landlord The landlord can discharge the burden by showing that, in fact there has been an increase for which additional rent was assessed and it would also be open to him to rely upon any admission made by the tenant-defendant [illegible]

GOBINDA KISHORE *v.* JITENDRA CHANDRA.
A.I.R. 1938 Cal. 459.

——S. 52—*Abatement of rent—Right of tenant—Unlawful eviction.*

A landlord is bound to put his tenant in possession. If he fails to put his tenant in possession of the whole of the demised premises, he can only get [illegible] of the demised permises of which [illegible] tenant in possession. If he has [illegible]

AGRA TENANCY ACT (1926), S. 44.

the later suit to prove possession, if they wished to prove their co-tenancy. (*Darling, S.M. and Bomford, J.M.*) RAM SUMER MISRA *v.* RAM NIRANJAN MISRA.
1938 A.W.R. (B.R.) 209.

——— **(III OF 1926), Ss. 44 and 95**—*Ejectment—Plea of admission—Onus—Re-admission—Oral evidence—Admissibility—Ejected person re-entering into occupation—Position of.*

In a suit for ejectment if the defendant pleads that he is not a trespasser as he has been admitted to tenancy, the onus is on him to prove the admission. As regards re-admission, it is the intention of the Act that there should be written consent in such cases and oral evidence is inadmissible. A person who re-enters into occupation after ejectment, without the written consent of the landlord remains liable to ejectment for 12 years as a trespasser. He takes possession at his own risk. (*Darling, S.M. and Bomford, J.M.*) BADRI NARAIN LAL *v.* SURJA RAM. **1938 A.W.R. (B.R.) 206.**

——— **S. 95**—Consent of landlord—Proof—Oral evidence—Admissibility. *See* AGRA TENANCY ACT, SS. 44 AND 95. **1938 A.W.R. (B.R.) 206.**

——— **S. 95**—*Object of—Ejected tenant holding over—Liabilities of.*

Where a tenant after an order for his ejectment, holds on and retains possession of the holding, he thereby renders himself liable not only to criminal prosecution but also to a suit under S. 44 of the Tenancy Act. It is not open to such a person to take any technical point to prove re-admission for S. 95 was introduced in the new Act, to prevent trespassers from raising such points. (*Darling, S.M. and Bomford, J.M.*) SHEO GULAM LAL *v.* MAHARAJA OF BUMRAON.
1938 A.W.R. (B.R.) 211.

ARBITRATION — *Award—Criminal complaint of misappropriation—Disputes between parties referred to arbitration—Criminal Court not compounding case—Award acquitting accused holding that there was no misappropriation—Validity.*

After filing a complaint for criminal misappropriation the parties submitted their disputes, the chief one concerning misappropriation, to arbitration. One of the parties moved the Criminal Court to have the case compounded, but the application was rejected. The result was that while the arbitrators were engaged in settling the disputes, one of the main disputes concerning misappropriation was being agitated in the Criminal Court. The award delivered held that no amount had been misappropriated and acquitted the accused. The whole award mainly depended on the finding on the issue,

Held that under the circumstances although the reference did not succeed in stifling the criminal presecution, still the arbitrators did arrogate to themselves the powers of a Magisterial Court. Hence the award was invalid.

Held also that the rest of the award also could not be upheld. That would have been possible only if the arbitrators had acquitted the accused of the charge pending against him by merely stating that fact. (*Mehta, J.*) FAZAL ELLAHIE *v.* NAZIR AHMED.
A.I.R. 1938 Sind 130.

BENGAL FOOD ADULTERATION ACT (VI OF 1919), S. 14 (2)—*Article of food sent for analysis before case—Costs of analysis—Power of Court to order their payment.*

S. 14 (2) of the Bengal Food Adulteration Act applies only to cases in which an article of food is sent for analysis under an order of the Court before which a case under the Act is pending. It does not apply to a case in which such article was sent to the Chemical Examiner by the Health Officer of the Municipality before the institution of the case and without the intervention of any Court. In such a case, therefore, the Court cannot order for payment of the costs of analysis under S. 14 (2) of the Act. (*Patterson, J.*) ATUL CHANDRA MODAK *v.* EMPEROR. **42 C.W.N. 760.**

BENGAL LANDLORD AND TENANT PROCEDURE ACT (VIII OF 1869)—*Agricultural lease—Forfeiture clause—Validity—Termination of lease on forfeiture—Form of notice.*

Act VIII of 1869 leaves landlords and agricultural tenants free to regulate their rights by contract. The[re] is nothing in that Act which would render invali[d a] forfeiture clause in an agricultural lease. It canno[t be] contended that a forfeiture could be availed of b[y the] landlord, in spite of a contract to the contrary co[ntained] in a written lease, only at the end of the agr[icultural] year. This being the position, no particula[r] notice is required under the law to terminate a [lease] forfeited according to a covenant contained in [it]. If the landlord intimates to the tenant befo[re ...] election to determine the lease, there is a vali[d termina]tion of the lease. (*Mitter and Biswas, JJ.*) [...] CHANDRA SYAM *v.* BENGAL CENTRAL BAN[K].
42 C.W[.N. ...]

RENGAL MUNICIPAL ACT (III OF [...]), S. 15—*Frame of suit.*

The fact that a suit is filed against the Chairman o[f] the Municipality and not against the Municipal Commissioners is a technical flaw, and no importance should be attached to it if the commissioners duly appeared in Court and contested the suit. (*M. C. Ghose and Bartley, JJ.*) JOGENDRA NATH BANERJEE *v.* TOLLYGUNJ MUNICIPALITY. **42 C.W.N. 768.**

——— **Ss. 278 and 281**—*Municipality not providing adequate drainage—Suit, if lies—Proper remedy.*

No suit lies against the Municipality for non-feasance in respect of their duty under S. 278 of the Bengal Municipal Act to provide adequate drainage. The only remedy in such a case is under S. 281 of that Act, which gives a right of intervention to the Local Government. (*M. C. Ghose and Bartley, JJ.*) JOGENDRA NATH BANERJEE *v.* TOLLYGUNJ MUNICIPALITY.
42 C.W.N. 768.

——— **S. 535**—*Suit for illegal omission of Municipality—Notice, if necessary.*

The words "for any act purporting to be done under this Act" in S. 535 of the Bengal Municipal Act include an illegal omission. Consequently a suit for a nonfeasance or illegal omission of the Municipality would be bad, if the notice required by the section is not given. (*M. C. Ghose and Bartley, JJ.*) JOGENDRA NATH BANERJEE *v.* TOLLYGUNJ MUNICIPALITY.
42 C.W.N. 768.

BENGAL PUBLIC GAMBLING ACT (II OF 1867), S. 11—*Counterfoil receipts bearing names of horses—If instruments of gaming.*

It is doubtful whether the view that counter-foil receipts bearing names of certain horses on which bets had apparently been made which were found in the possession of the accused are instruments of gaming is sound. Accused in possession of such counterfoils was held not guilty when there was no clear evidence as to what the accused was doing at the time of arrest. (*Patterson, J.*) AMULYA DHONE GHOSE *v.* RAM SUNDAR SINGH. **A.I.R. 1938 Cal. 422.**

BENGAL TENANCY ACT (VIII OF 1885), S. 7—*Enhancement of rent of tenures.*

Once it is found that the lands do constitute tenures, S. 7 must necessarily be attracted if the rent is proved to be enhancible but that must always be subject to a con-

BENGAL TENANCY ACT (1885), S. 7.

tract between the parties. (*Mukherjea, J.*) BASANTA KUMAR DUTTA *v.* SUKUMARI DAS GUPTA.

A.I.R. 1938 Cal. 442.

——S. 7 (2)—*Landlord adducing evidence to show absence of customary rent—Tenant not rebutting this evidence—Enhancement of rent—Power of Court.*

In a suit for enhancement of rent the landlord in his plaint expressly stated that there was no customary rent in the locality and adduced evidence for showing the absence of any customary rat[illegible] [illegible]n his written statement did not challeng[illegible] [illegible]or was any evidence adduced on his beh[illegible] [illegible]dence adduced on behalf of the landlo[illegible], [illegible]*ld*, that under the circumstances it could be taken [illegible]established that there was no customary rate of [illegible] the locality and as such the Court was at liberty [illegible]nce the rental up to such limit as it thought fair [illegible]uitable under S. 7 (2). (*Mukherjea, J.*) [illegible]A KUMAR DUTTA *v.* SUKUMARI DAS GUPTA.

ADMINI[illegible]

less share i[illegible]

Hence where a co sharer landlord in execution of rent decree against his tenant purchases the holding of the tenant which is transferable and sublets it to a third person, the third person acquires a raiyati interest and the purchaser in the subsequent sale in execution of a rent decree obtained by another co sharer landlord [illegible] nothing by his [illegible]ransferable, the [illegible]purchased in the previous sale would be that of an unrecognized transferee of an occupancy holding and there would be no merger. Hence, in a subsequent sale in execution of a rent decree obtained by other co-sharer landlord, the entire holding would pass to the purchaser. (*Khundkar, J.*) KHIRABALA DEBI *v.* SURESH CHANDRA.

A.I.R. 1938 Cal. 452.

——S. 23—Tenancy for horticultural purposes—Structures erected by tenant—Suit for mandatory injunction by landlord dismissed as time-barred—Structures subsequently destroyed by fire—Transferee [illegible]

ing—Transfer fee levied and notice of transfer sent to landlord—Landlord allowing mutation of purchaser—If can question validity of transfer.

Where on a transfer of a portion of an occupancy holding, the transfer fee was duly levied from the purchaser and the notice of the transfer was sent to the landlord who far from denying the rights of the purchaser in due course allowed him mutation, the landlord must be deemed to have accepted the transfer as a valid transfer and he cannot, therefore, question its validity [illegible] from a [illegible] (*M. C*[illegible] [illegible]MISRA *v.* [illegible]N. 755

——S. 26 F—*Application under—Money deposited into treasury on following day—Application, if barred.*

If at the time of making an application under S 26 F of the B. T. Act the applicant brings the money with him in Court but it could not be deposited into the

BENGAL TENANCY ACT (1885), S. 52.

Treasury until the next day owing to the rules of procedure, the Court cannot reject the application as time-barred. (*Henderson, J.*) MANILAL PAL *v.* GOUR CHANDRA DAS.

67 C.L.J. 80.

——S. 26 J—*Procedure under—Application or suit.*

There is no reason why the procedure adopted by the landlord under S. 26-J of the B. T. Act to recover the balance of the transfer fee should not be by means of a [illegible]

——S. 26 J—*Proceeding under—Decision as to nature of tenancy—Whether* res judicata.

If in a proceeding by the landlord under S. 26-J of the B. T. Act for the recovery of the landlord's fee from the transferee, the nature and character of the tenancy is in dispute the determination of the status of the tenancy is [illegible] [illegible]hether or not the money [illegible] question of the status [illegible]illary, or [illegible] question [illegible]on of that [illegible] operates [illegible] the same [illegible]isdiction. [illegible] Court in revision has expressed an opinion as to the right of the unsuccessful party to institute a suit cannot in law prevent the application of the doctrine of *res judicata.* (*Costello and Panckridge, JJ.*) KRISHNA CHANDRA *v* MANIKLAL.

42 C.W.N. 793.

——S. 29—*Claim of excess rent—Burden of proof.*

Proviso (1) to S. 29 only dispenses with the necessity of a contract being in writing and registered but does not affect Cls. (*b*) and (*c*) of S. 29. Although S. 29 has no application where there are excess lands which are added to the original holding and a consolidated rent is assessed upon the whole, still it is incumbent on the Court to find in all cases, that this addition of excess land is not resorted to as a mere device to get round the provisions of S. 29 and that the lands which are said to have been added were real and not a fictitious addition. Where there is no proof that there has been an increase in area, the mere fact that the tenant agreed to pay enhanced rent beyond the limits prescribed by S. 29 and actually [illegible] or a considerable [illegible]t to take the case [illegible] known and the [illegible] in excess of that which is allowed by S. 29, the initial burden to justify the increase must always be upon the landlord The landlord can discharge the burden by showing that, in fact there has been an increase for which additional rent was assessed a[illegible] it would also be open to him to rely upon any [illegible] made by the tenant-defendant admitting the [illegible] of additional lands, in which case the burden will [illegible] the tenant to explain away the admission or to [illegible] by positive evidence that, as a matter of fact, there [illegible] no increase. (*Mukerjea, J.*) GOBINDA KISHORE *v* [illegible]DRA CHANDRA

A.I.R. 1938 Cal. 459.

——S. [illegible] [illegible] *rent—Right of tenant—Unlawful eviction.*

A landlord is bound [illegible] tenant in possession. If he fails to put his [illegible] of the whole of the demised premises, [illegible] get rent for so much of the demised [illegible] he had put his tenant in possession. If [illegible] discharged that duty

BENGAL TENANCY ACT (1885), S. 52.

and the tenant is actually put in possession, his duty is to maintain the possession of the tenant against all lawful evictions. The landlord's duty does not extend to protect the tenant from unlawful evictions, that is to say the evictions by persons who have not got any title or who have not derived any title from the landlord. If the tenant is unlawful evicted from any land of his tenancy, it is for him to recover the same from his dispossessor. If he does not choose to do so, he can not on any principal of law whatsoever claim abatement of rent. (*R.C. Mitter, J.*) SURENDRA NATH MONDAL *v.* BHUDAR CHANDRA SAFUIX. 67 C.L.J. 136.

——**S. 52**—*Excess area within boundaries described in kabuliyat—Landlord's right to additional rent.*

A tenant executed a kabuliat and agreed therein to pay certain rent for certain area assumed to be comprised within boundaries described in the kabuliat. He also agreed that if at the time of the survey there was an excess, the landlord would have a right to make a separate settlement for the excess land At the time of the kabuliat there had been no khas land of the landlord on any of the sides of any plots demised by the kabuliat so that there was no room for encroachment,

Held, that while entering into stipulation about payment of additional rent for excess area, the parties were not thinking of any land outside the boundaries mentioned in the kabuliat. The rent mentioned in kabuliat was not intended to be a consolidated rent for the entire land within the original boundaries for all time to come. It was taken to be the rent of the holding till after fresh measurement the actual area was assertained. The landlord was therefore entitled to get additional rent for excess area if there be any, within the original boundaries. (*S. K. Ghose and Nasim Ali, JJ.*) NANDA KISHORE LAL *v.* KHETABUDDIN AHMED.

A.I.R. 1938 Cal. 449.

——**S. 109, Proviso**—*Proceeding under S. 105 withdrawn before amendment—Suit instituted after amendment—If barred.*

S. 109 of the B. T. Act as amended in 1928 does not bar a suit for the assessment of a fair and equitable rent instituted after the amendment, although the withdrawal of the proceeding under S. 105 took place before the amendment. (*Patterson, J.*) KAMESHWAR SINGH *v.* HRIDOY NATH SAHOO. 67 C.L.J. 111.

——**S. 146-A (3)**—*Rent suit—Co-sharer tenant coming under any of four classes—If should be impleaded.*

Under S. 146-A (3), B. T. Act, the entire body of co-sharer tenants is to include the names of every one of the four classes enumerated therein and the landlord in order to get a proper rent decree must implead as defendants every co-sharer tenant who comes under the description of any of the four classes. In other words, if any co-sharer tenant comes under any of the four classes and he is not sued in the rent suit then the decree will not be a proper rent decree. (*M. C. Ghose, and Bartley, JJ.*) AMULYA CHARAN MISRA *v.* PRAN KRISHNA ADHIKARY. 42 C.W.N. 755.

BIHAR AND ORISSA MUNICIPAL ACT (VII OF 1922), S. 64—*Scope—Non compliance— Contract not in writing or under seal—Suit on—Maintainability—Implied contract—Limitation Act, Art.* 115.

Defendant took a lease or a license to collect the tolls of a Municipal Market and agreed to pay a sum of Rs. 4001 to the Municipality in consideration of the license giving him the right to collect the tolls. There was only a resolution of the Municipality, but no contract or document under seal as required by S. 64 of the Bihar and Orissa Municipal Act. Defendant, however, entered into possession of the market under the resolution. The Municipality through its representative sued

BIHAR TENANCY ACT (1885), S. 153.

to recover money due to it under the Contract from the defendant.

Held, (1) that there was no contract binding under the Act, and the contract not being in accordance with S. 64 could not be sued upon ; (2) that if the Municipality be held entitled to sue on the basis of an implied contract, Art. 115 of the Limitation applied to the case, and the suit brought more than three years after the breach was barred. (*Wort and Varma, JJ.*) GANESH PRASAD SAH *v.* SHEIKH JAWAD HUSSAIN.

17 Pat. 277.

——**Ss. 100 and 111**—*Unoccupied holder—Owner's liability for latrine-tax—Claim by Municipality against owner—Sustainability.*

"Occupier" as defined in the Bihar and Orissa Municipal Act includes an owner in actual occupation of his own premises, but in the absence of an occupier for a holding which is actually unoccupied, the owner thereof cannot be deemed to be the occupier for purposes of payment latrine-tax under S. 100 of the Act. The Municipality cannot therefore make the owner who has never been in actual occupation of his holding liable for latrine-tax under S. 111 of the Act.

Quære: Whether S. 111 of the Act applies at all to claims of the Municipality for latrine-tax. (*James and Agarwala, JJ.*) PATNA CITY MUNICIPALITY *v.* KRISHNAVATI BAHOO. 19 Pat. L.T. 405= 1938 P.W.N. 444.

——**S. 111**—Applicability — Latrine tax—Claim against owner of unoccupied holding—Sustainability. *See* BIHAR AND ORISSA MUNICIPAL ACT, Ss. 100 AND 111. 1938 P.W.N. 444.

——**S. 111**—*Holding unoccupied — Owner — If bound to apply for remission of latrine tax.*

When a holding becomes unoccupied and unproductive of rent, the owner of the holding must apply under S. 111 of the Bihar and Orissa Municipal Act for remission of liability for a portion of Municipal taxes other than latrine-tax ; but he is not bound to apply for remission of latrine-tax. (*James and Agarwala, JJ.*) PATNA CITY MUNICIPALITY *v.* KRISHNAVATI BAHOO.

19 Pat. L.T. 405=1938 P.W N. 444.

BIHAR TENANCY ACT (VIII OF 1885 as amended in 1934), S. 50 (2)—*Presumption under—When arises.*

S 50 (2) of the Bihar Tenancy Act only provides for the presumption that land is held at a uniform rent since the permanent settlement from proof that the rent has not been changed during the 20 years immediately before the institution of a suit 'until the contrary is shown.' Where the rent was changed in 1889 to double the previous amount, it is obvious that the contrary has been shown. (*Dhavle and Varma, JJ.*) KAMESHWAR SINGH BAHADUR *v.* KRISHNA CHANDRA JEW.

175 I.C. 316.

——**S. 148-A**—*Rent suit for part of holding—Maintainability—Money decree—If may be passed.*

A suit for rent with regard to a part of holding is not maintainable. In such suit the landlord is not entitled even to a money-decree. (*Wort, J.*) RAM CHANDRA MAHTON *v.* RAM GULAM MAHTON.

A.I.R. 1938 Pat. 305.

——**S. 153**—*Question as to amount of annual rent payable—Second appeal, if barred.*

Where the appellate Court has decided the question as to what the annual Jama of a holding was, it is only a question of the amount of rent payable annually by the tenant and comes under one of the exceptions mention in S. 153 of the Bihar Tenancy Act and a Second Appeal is not barred. (*Chatterji, J.*) SHIVA PRASAD SINGH *v.* DEOKI KUER. 175 I.C. 61= 4 B. R. 516.

BOMBAY LOCAL BOARDS ACT (VI OF 1923 as amended by Act XIII of 1935), Ss. 136 (2)—*Applicability—Sub-overseer of Local Board preparing false bills and overcharging Board in course of his duty of taking measurements of work and preparation of bill—Prosecution for—Limitation.*

A part of the duties of a sub overseer under a Board was the taking of measurements of repai other work done and the preparation of bills in r thereof. The overseer prepared false bills and charged the Board.

Held, that the acts which were alleged criminal offence on his part were acts dc in any case, purported to have been pursuance of the Local Boards Act, ar were *bona fide* or otherwise, he was immune from prosecution after a lapse of three months from the date of the act complained of. (*Davis, J.C and Lobo, J.*) TARACHAND PRIBHDAS *v.* EMPEROR.

A.I.R. 1938 Sind 116.

BUDDHIST LAW (Burmese)—*Gift—Validity—Gift affecting inheritance.*

No Burman Buddhist can, under the guise of making a gift, be allowed to make a will. He cannot set at

to are such as to affect the succession to, or

of, his property after his death, Budc

and 123, T. P. Act.

.L.T. 107, Rel. on. (*J*

U TA TE.

——(Burmese)—*Succession—Share of orasa son by first wife on father's remarriage.*

Where after the death of his wife the widower marries a second wife, his orasa son by the first wife is entitled to his share in the estate as it existed at the time of remarriage. (*Baguley and Mosely, JJ.*) A. L. A. CHETTYAR FIRM *v.* MAUNG PO TAW.

A.I.R. 1938 Rang. 250.

——(Chinese)—*Letters of administration—Estate of deceased chinaman—Right of his widow to obtain.*

So far as contested applications for letters of administration to the estate of a deceased chinaman are concerned, when the applicants are a widow and a son, it does not matter whether the deceased w a non-Buddhist, that is, whether the estate is governed by the Chinese cust the Succession Act, for in either case

A.I.R. 1938 Rang. 254.

BURMA COURTS MANUAL, Para. 791—*Fixing of date of birth—Option of Court.*

CAL. MUNCPL. ACT (1923), Sch. I.

Where there is evidence only of the year of birth it is at the option of the Court to fix the date other than 1st January under Para. 791 of Burma Courts Manual. (*Mosely, J.*) THE KING *v.* UNOOSE.

fishery; he does not erein from Government the property in the lessee's possession ers not that for his own convenience of catching them the lessee dams up the pond so that the fish cannot escape out of it. This operation is merely preliminary to catching the fish. Even after that has been done any member of the public may come to the fishery and, provided that he uses not more than four rods and lines, may catch fish therefrom without committing any offence of criminal trespass or theft. (*Mackney, J.*) MOHAMMAD CASSIM *v.* THE KING.

A I R. 1938 Rang. 220.

...A HIRED MOTOR VEHICLES RULES,

... the age of 18 be no provision eing registered motor vehicles. is a registered onvicted of the , in view of not only to under any special or local law, in the absence of special provisions to the contrary in such law. (*Baguley, J.*) THE KING *v.* BA BA SEIN.

1938 Rang.L R. 227.

BURMA PREVENTION OF CRIME (YOUNG OFFENDER'S) ACT (III OF 1930), Ss. 16 (e) and 24 (b) (ii)—*Offender between 15 and 16 years—Order detaining him in Training School for 4 years—*

Act for a period of 4 years, the order is illegal as the offender will have passed his 19th birthday by the time . The proper order there- detain him in the Training 9th birthday (*Mosely, J.*)

A.I.R. 1938 Rang. 228.

[OF 1923), *to assessment*

icipal Act pre- which are the essable to the have reference to those cases where the liability to assessment and an- has ses oli- AR- ... CORPORATION OF CALCUTTA.

42 C.W.N. 789.

——Sch. I—*Definition of Calcutta—'Fort William'—Meaning of.*

CANTONMENTS ACT (1924), S. 84.

The words 'Fort William' in Sch. I of the Calcutta Municipal Act bear their natural and ordinary meaning, that is to say the fortification and the area enclosed thereby. They do not mean the area defined from time to time by notification of the Governor-General in Council under the Fort Williams Act. (*Panckridge, J.*) GARRISON ENGINEER *v.* CORPORATION OF CALCUTTA 42 C.W.N. 789.

CANTONMENTS ACT (II OF 1924), S. 84—*Scope of—'Assessment' and 'levy',—Construction.*

It is a very narrow construction of the words 'assessment' and 'levy', if S. 84 is construed to mean that an appeal lies only against the quantum of the tax or against the legality of its imposition 'Levy' means imposition, but not merely general imposition of a tax but the particular imposition on the individual affected. It is difficult to hold that S. 84 applies only to valuations of immovable property or questions of the legality of a tax. S. 84 is a general section on giving a right of appeal in all cases. Nor is there any restriction on the grounds for such an appeal. (*Weston.*) KISHEN LAL *v.* CANTONMENT BOARD, NASIRABAD.
1938 A.M.L.J. 18.

———S. 259—*Magistrate acting under—Jurisdiction—Limits.*

A magistrate acting under S. 259 of the Cantonments Act has jurisdiction to decide whether the conditions under which the Cantonment Authority can resort to him are fulfilled or not. But he is not entitled to go into questions for which a separate remedy exists under the Act to the person from whom recovery is sought. (*Weston.*) KISHEN LAL *v.* CANTONMENT BOARD, NASIRABAD. 1938 A.M.L.J. 18.

CIVIL PROCEDURE CODE (V OF 1908), S. 2 (2)—*"Decree"—Memorandum of appeal—Rejection for non-compliance with O. 41, R. 1—Appealability—O. 43, R. 1.*

It cannot be laid down as a universal proposition that order rejecting a memorandum of appeal under O. 41, 3, C. P. Code, for failure to amend it so as to be in accordance with O. 41, R. 1 is appealable. Only in those cases in which it finally disposes of the disputes between the parties would it be appeable as a "decree" O. 43, R. 1, does not provide for an appeal from an order rejecting the memorandum of appeal for non-compliance with O. 41, R. 1. (*Wort and Varma, JJ.*) RAMDHARI AHIR *v.* KHEDU AHIR. 17 Pat. 245.

———S. 10—*'Matter in issue'—Meaning of.*

The expression 'matter in issue' in S. 10 of C. P. Code, has reference to the entire subject-matter in controversy between the parties, and is not equivalent to 'any of the questions in issue'. The section does not bar the trial of a suit for rent for a period subsequent to that included in the previously instituted suit which is pending, although the same question may be involved in both the suits. A.I.R. 1917 Cal. 248, Foll. (*Abdul Rashid, J.*) ROSHAN DIN *v.* MALAN BIBI.
A.I.R. 1938 Lah. 502.

———S. 11, O. 2, R. 2—*Cause of action distinct—Gift of certain property to wife in lieu of dower—Widow remarrying after husband's death—Suit for pre-emption by husband's brother dismissed—Subsequent suit for declaration of title to property on ground of remarriage of widow and for avoidance of gift—If barred.*

A Mahomedan gifted certain property to his wife in lieu of dower. After the death of the husband the widow remarried and the brother of her husband brought a suit for pre-emption alleging that the transaction was a sale and not a gift. The suit was dismissed.

C. P. CODE (1908), S. 11.

Subsequently he brought a suit for declaration that he had acquired a title to the property on the ground of remarriage of the widow and that the gift was null and void against him,

Held, that as the plaintiff was challenging in his previous suit what the husband had done in relation to the property and as in the subsequent suit he was basing his right of ownership on what had been done by the widow herself, the reliefs in the two suits were based on two separate causes of action and the subsequent suit was not barred either under S. 11 or under O. 2, R. 2.

Held further, that the plaintiff was debarred from challenging the gift in the subsequent suit as by bringing the suit for pre-emption he should be taken to have consented to the transaction in the eye of the law. A.I.R. 1914 Lah. 460, Foll. (*Din Mohammad, J.*) MT. ALAM KHATUN *v.* HAYAT KHAN.
A.I.R. 1938 Lah. 492.

———S. 11—*Conflicting decrees*—Res judicata.

Where there are two conflicting decrees *inter partes* the later decree must, for purposes of *res judicata*, be taken to prevail. (*Dhavle, J.*) HIRA LAL SINGH *v.* MATIKDHARI SINGH. 19 P.L.T. 456=
A.I.R. 1938 Pat. 359.

———S. 11—*Heard and finally decided—Rent suit—Issue as to constitution of holding—Decision on—If* res judicata *in subsequent suit as to actual holding.*

A decision in a rent suit in which the constitution of the holding is expressly put in question and pronounced upon would operate as *res judicata* in a subsequent suit between the parties on the question of the actual holding of the tenants. (*Dhavle, J.*) HIRA LAL SINGH *v.* MATIKDHARI SINGH. 19 P.L.T. 456=
A.I.R. 1938 Pat. 359.

———S. 11—*Litigating under same title—Former suit by* A *against trustees of temple that certain property attached to temple belonged to him—Suit decreed in favour of* A*—Subsequent suit by worshippers of temple against* A*'s heirs—If barred—Plea of collusion in former suit—Onus.*

A suit was brought by *A* against the trustees of a certain temple that certain property attached to the temple belonged to him. The trustees defended the suit on the ground that the title in the property in suit was in the temple. The suit was finally decreed in favour of *A*. Later on, the plaintiffs alleging themselves to be the worshippers of the temple brought a suit against *A's* heirs for a declaration that the property which was the subject-matter of the former suit was the property belonging to the temple. On a contention being raised by *A's* heirs that the former decision operated as *res judicata*, the plaintiffs contended that it was obtained collusively and could not therefore be *res judicata* and also because they were not the successors of the trustees-defendants in the former suit,

Held, that the plaintiffs being the worshippers of the temple were persons interested in it and had therefore the *locus standi* to sue to protect the property of the temple from being wrongfully claimed by third persons.

Held also, that though the plaintiffs were not the successors of the defendants in the former suit, the title litigated under in both the suits was the same, as they both claimed the title to the property in the temple. The plaintiffs were therefore litigating under the same title, even though the agency asserting the title in the former suit was different from the one in the subsequent suit. The suit was therefore barred by *res judicata*.

Held further, that the burden of proving collusion, negligence and want of *bona fides* on the part of the defendants in the former suit lay on the plaintiffs as they

C. P. CODE (1908), S. 11.

asserted that the decision in the former suit was not *res judicata*. (*Tek Chand, J.*) PIARE LAL v SHER GIR. **A.I.R. 1938 Lah. 499.**

——**S. 11**—*Miscellaneous proceedings — Decision under S.* 148, *B. T. Act —If* res judicata *in subsequent regular suit.*

A decision under S. 158 of the Bengal cannot be said to be a decree so as to *judicata* in a subsequent regular suit parties. (*Dhavle, J*) HIRA LAL SINGH v. MATIKDHARI SINGH. **19 P.L.T. 456 = A.I.R. 1938 Pat. 359.**

——**S. 11**—*Miscellaneous proceedings— Proceeding not susceptible of appeal—Doctrine of* res judicata.

There is no justification for holding that the doctrine of *res judicata* can have no application as a consequence of a decision in proceedings which are in themselves final in the sense that they are conclusive between the parties, because they are not susceptible of appeal. (*Costello and Panckridge, JJ.*) KRISHNA CHANDRA v. MANIKLAL. **42 C.W.N. 793.**

——**S. 11, Expl. (iv)**—*'Might and ought'—House sold in execution of decree against certain members of family—Suit by another member challenging sale on ground that house, on partition of joint family, belonged to him—Suit dismissed—Subsequent suit challenging sale on ground that debts in connexion with which*

the joint property, fallen to his share. The suit was dismissed. He brought a subsequent suit challenging the same sale on the ground that the debts in connexion with which the decree had been obtained were incurred

subsequent claim could not be considered to be so dissimilar that its union with the claim in suit would have led to confusion. The suit fore barred by constructive *res judicata.* GOBIND v. NARAIN SINGH. **40 P.L.R. 000 = A.I.R. 1938 Lah. 443.**

——**S. 20 (b)**—*Leave to sue—Granting of—Considerations.*

The leave under S. 20 (*b*) cann and when the defendants who res do not appear the Court is b

and object and seems to be the wants to proceed. ...AL v. MOTILAL. **A.I.R. 1938 Nag. 262.**

——**S. 35**—*Several plaintiffs — Separate costs—If can be awarded.*

It is not in any circumstances possible, in a case where there is more than one plaintiff, for such plaintiffs to appear and act separately. If any of them is not disposed to act with, and to appear by the same advocate as, the others then the only proper course open is to apply to strike him out as a plaintiff and to add him as a defendant. The plaintiffs are entitled to one set of costs only between them, and one plaintiff cannot ask for his costs to the exclusion of the others or other. "One set" means the amount of the costs which would have

C. P. CODE (1908), S. 48.

been incurred if the parties separately represented had appeared by the same solicitor. (*Braund, J.*) SEEDAT v. MARIAM BIBI. **1938 Rang. L.R. 252.**

——**S. 41**—*Jurisdiction of the transferee-Court—When terminates—Striking off of execution application —Effect.*

that such a certificate shall be prepared. Where a transferee Court on the application of the decree holder to strike off the execution in part satisfaction, did order it to be struck off and directed that the result be communicated to the Court which sent the decree, does not thereby put an end to its Jurisdiction, for the order does not amount to a certificate as contemplated S. 41, C. P. Code. (*Bennet and Verma, JJ.*) RAM BABU v. SANWAL DAS. **1938 A.L.J. 553.**

——**Ss. 42 and 145**—*Execution of decrees against surety—Jurisdiction of Transferee Court.*

The transferee Court has jurisdiction to execute the decree against the surety but it should in the first instance issue notice to him to show cause why this should not be done. (*Addison, J.*) RAHIM UD DIN v. MURLI DHAR. **40 P.L.R. 530.**

——**S. 47**—*Bar of suit—Excess delivery—Restoration —Remedy if in executing Court.*

itself must undo the wrong by ordering the decree-holder to restore it back under S. 47. (*Digby, J.*) CHAGANLAL v. MIRZA YAD ALI. **A.I.R. 1938 Nag. 276.**

——**S. 47**—*Parties and representatives—Mortgagee ... tive of*

On ... Later ... ortga-

out that it had purchased the property. The Court disallowed the objection by asking the firm to file a separate suit,

decree left anything at all to the partition as between *U* and his son. The firm therefore came under S. 47 and the executing Court should not have referred the firm to a separate suit. (*Baguley and Mosely, JJ.*) A. L. A. CHETTYAR FIRM v. MAUNG PO TAW. **A.I.R. 1938 Rang. 250.**

——**S. 48**—*Construction and Scope—"Decree"—If includes appellate decree dismissing appeal for want of prosecution—Starting point for execution—Date of decree of trial Court or appellate Court—Limitation Act, Art.* 182 (2).

The word "decree" in S. 48, C. P. Code, is not limited to the decree of the Court of first instance when there has been an appeal from the decree of the first Court, and the appeal is dismissed for want of prosecution, the date of the decree of the appellate Court dismissing the appeal is the starting point of limitation as

C. P. CODE (1908), S. 51.

provided by Art. 182 (2) of the Limitation Act, S. 48 only provides the maximum period during which an application for execution can be taken out, but the time from which limitation would run is that which is provided by the Limitation Act. (*Wort, C. J. and Manohar Lall, J.*) RAM RAN BIJAYA PRASAD SINGH *v.* KESHO PRASAD SINGH. **19 Pat. L.T. 424 = (1938) P.W.N. 449.**

——**S. 51, Proviso (a) (ii)**—*Fraudulent concealment or transfer of property—What amounts to.*

Where a defendant against whom a decree for price of plaintiff's car has been passed makes a hypothecation of the plaintiff's car along with other cars, that have been left with him for sale or for custody, to a third party, and he then brings a suit against the third party and abandons it, and the transaction of hypothecation appears to be fictitious, his conduct amounts to making a fraudulent concealment or transfer of his properties and comes within proviso (*a*) (*ii*) to S. 51 as amended by S. 2, C. P. Code (Amendment), Act XXI of 1936. (*Ameer Ali, J.*) ELLIS STELLA BEAUMONT *v.* ENGLISH MOTOR CAR CO. **A.I.R. 1938 Cal. 448 (2).**

——**S. 52**—*Principle of section—Decree for dower against all heirs of deceased taluqdar in Oudh—Decree realized only out of non-taluqdari property—Suit for contribution against succeeding taluqdar—If lies—Proper method of allocation of debts.*

The principle or method of which S. 52, C. P. Code, is an expression has always been so operated as not to prejudice the rights *inter se* of beneficiaries or legatees over whom the creditor has priority. In the ordinary case of a Muslim whose whole property descended according to his personal law it would be impossible to suggest that an heir was without remedy against his co-heirs if by the action of the judgment-creditor under a decree obtained under S. 52, C. P. Code, in a suit brought against all the heirs of the deceased Mahomedan, was left with less than his proper share of the nett of the deceased. His right to contribution would plain. As a beneficiary, he would have the right the deceased's estate should be duly administered, that it should be cleared of debts and valid legacies, and that he should be given possession of his share therein. For this purpose his suit could take various forms according to the circumstances of the case. It might be denominated an administration suit or a suit for partition or a suit for contribution, but the basis of his claim would be the same in each case, *viz.* the right to have due administration of the deceased's estate. This right might also be enforced in a proper case by an application for the appointment of an administrator under S. 218, Succession Act. A proper administration of the deceased's estate involves and requires a proper allocation of the debts as between properties to which different rules of descent apply. A Mahomedan widow of a taluqdar in Oudh obtained a decree under S. 52, C. P. Code for dower against all the heirs of the deceased including the taluqdar succeeding the deceased. The decree-holder realized the decretal amount only out of the partible or non-taluqdari estate in the hands of the heirs. The latter brought a suit against the existing taluqdar for contribution contending that as both taluqdari and non-taluqdari properties were liable for the debt, the taluqdari estate should be made to contribute according to its value. The taluqdar had obtained the necessary permission under S. 3, Oudh Settled Estates Act, and declared that certain portion of the taluqa was to be held subject to the provisions of the Act.

Held, that the rights of the plaintiffs could not be concluded by the choice of the execution creditor. Their claim to their proper share in the partible estate of the late taluqdar made them co-beneficiaries with the existing taluqdar in respect of assets all of which were answerable for the debts of the deceased and the fact that different portions of the assets devolved on different principles in no way defeated the plaintiff's right to contribution.

Held also, that for the purpose of the allocation of debts of the late taluqdar between taluqdari and non-taluqdari properties, the value of his interest in the taluqa was to be taken as it stood at the date of his death. The value of the property comprised in the declaration subsequently made by the talukdar under the Oudh Settled Estates Act could not be excluded, as "to be or to have vested" in S. 15 of the same Act could not be interpreted to be operating retrospectively. (*Sir George Rankin.*) MAHOMED KASIM ALI *v.* SADIQ ALI. **174 I.C. 977 = 1938 A.W.R. (P.C.) 138 = A.I.R. 1938 P.C. 169 (P.C.).**

——**S. 60 (1) (c) (as amended by Punjab Act. VII of 1934)**—*Applicability—Property vested in official Receiver in 1933.*

The amendment to S. 60 (1) (*c*), C. P. Code introduced by S. 35, Punjab Relief of Indebtedness Act, VII of 1934, which came into force in 1935 does not divest the Official Receiver of property which is validly and legally vested in him in 1933. Nor can the legal representatives of the insolvent claim exemption under S. 60 (1) (*c*) when succession to them opened out long after the vesting of the property in the Official Receiver. (*Tek Chand.*) KALA SINGH *v.* BOOTA SINGH. **A.I.R. 1938 Lah. 459.**

——**S. 73**—*Assets—Amount deposited by judgment-debtor under O. 21, R. 89—Liability to rateable distribution.*

Obiter. A deposit made by a judgment-debtor for the purpose of setting aside an execution sale under O. 21, R. 89, C. P. Code, is an asset liable to rateable distribution under S. 73, C. P. Code. 40 C. 619, Doubted. (*S. K. Ghose and Edgley, JJ.*) CHITTAGONG URBAN CO-OPERATIVE BANK, LTD. *v.* THE INDI BURMA TRADES BANK, LTD. **42 C.W.N. 840.**

——**S. 92**—*Sanction—Institution of suit, if should conform to—Appeal, if competent by one of the plaintiffs only.*

Where the consent in writing of the advocate-general, or collector has been obtained to a suit by three persons, the suit as instituted must conform to that consent. If after the institution by three persons as plaintiffs, two die, the suit does not become defective or incompetent. There is no provision at all in the code for recourse being had to the advocate-general or collector during the course of a suit or proceedings in appeal. The consent is a condition of the valid institution of a suit and has no reference to any other stage. The persons who filed the suit within the leave of the advocate-general or collector are not to be deemed to be one plaintiff and as such there is no reason why one of the plaintiffs in the case should not appeal alone on the same terms and conditions as are applicable to suits in general. (*Sir George Rankin.*) ALI BEGAM *v.* BADR-UL-ISLAM ALI KHAN. **1938 A.W.R. (P.C.) 131 = 174 I.C. 870 = A.I.R. 1938 P.C. 184 (P.C.).**

——**S. 100**—*Finding of fact—Interference—Failure to appreciate legal effect of recitals of necessity in ancient documents.*

A finding of the lower appellate Court based upon a failure to appreciate the true legal effect of recitals of necessity in ancient documents and omission to consider other documents of recent origin consistent with those

C. P. CODE (1908), S. 100.

recitals, cannot be supported in second appeal. (*Jack and Khundkar, JJ.*) LAKSHMI NARAYAN JIE *v.* JAGADISH CH. SUR. 42 C.W.N. 837.

——**S. 100**—*Question of fact—Question of adverse possession.*

It is a question of fact whether adverse possession has been proved, but where the decision is whether adverse possession shall be inferred from facts, it is not a question of fact; it is a question of the legal inference to be drawn from facts. (*Davis, J.C. and Mehta, J.*) TAHILRAM TACKCHAND *v.* MT MIRAL.

A.I.R. 1938 Sind 132.

——**S. 100**—*Question of fact—Rebuttal of statutory presumption.*

Whether a statutory presumption was rebutted by the rest of the evidence or not is a question of fact. A.I.R. 1930 P.C. 91, Foll. (*Addison and Din Mohammad, JJ.*) GHULAM MOHAMMAD *v.* SECRETARY OF STATE.

A.I.R. 1938 Lah. 445.

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See

A.I.R. 1938 Pat. 333.

——**S. 115**—*Award—Revision—Powers of Court.*

The powers of a Court of revision are strictly confined within the limits prescribed by S. 115, C. P. Code, and, unless a judgment is vitiated by any of the defects specified therein no interference with it can be made by the revising Court. This principle is all the more applicable in cases of revision from an order making an award a rule of Court. (*Addison and Din Mohammad JJ.*) TEJA SINGH *v.* ATMA SINGH.

A.I.R. 1938 Lah. 434.

——**S. 115**—Case decided—Final decision on application under O. 33, R. 1. *See* C. P. CODE, AND S. 115. 1938 O. ..

——**S. 115**—*Case decided—Order holdi reliefs claimed as time-barred.*

An order by Court holding the suit of a plaintiff time-barred in respect of certain reliefs claimed by him is a 'case decided' to that extent. (*Din Mohammad, J.*) DIWAN CHAND *v.* BEHARI LAL.

A.I.R. 1938 Lah. 507.

——**S. 115**—Jurisdiction— Failure to exercise — Refusal to enquire claim under O. 21, R. 58. *See* C. P. CODE, O. 21, R. 58—ENQUIRY. 1938 A.M L J. 23.

——**S. 115**—*Leave to sue* in forma pauperis—*Order*

C. P. Code

whether a

cause of action is disclosed as required by (cl.) (*d*) of R. 5 of O. 33, does commit an irregularity in relying on a statement made by the defendant contesting the application and in fact in permitting him, to be cross examined with a view to elicit such an admission, that would not be a sufficient ground for setting aside in revision an order granting leave to sue *in forma pauperis* where apart from the admission of the defendant there was in fact sufficient material in the plaintiff's "

justify the lower Court in coming to the

it did. (*Hamilton and Yorke, JJ.*) DU

v. GUR DULAREY. 175 I.C. 63=19

1938 O.W.N. 561.

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ference. *See* C. P. CODE, S. 151.

A.I.R. 1938 Rang. 241.

——**S. 144**—*Applicability—Order on appeal setting aside sale of judgment-debtor's property.*

C. P. CODE (1908), S. 151.

An order passed on appeal setting aside the sale of a judgment debtor's property is a decree and S. 144 is wide enough to cover such order. (*Jai Lal, J.*) TELU *v.* RAJA RAM. A.I.R. 1938 Lah. 456.

——**S. 144**—*Pre-emption suit—Order permitting creditors of pre-emptor to withdraw deposit in Court—Reversal—Liability to refund.*

Where the creditors of the pre-emptors were parties to an order permitting them to withdraw amount deposited in Court, when that order is reversed, are in justice and equity liable to make restitution and refund the amount withdrawn by them. They cannot resist restitution on the plea that they were not parties to the pre emption suit, for the word 'parties' in S. 144, C.P. Code must be taken to include their representatives and further representative does not mean only a party's legal representative but means his representative in interest. (*Thomas, C. J. and Zia Ul-Hasan, J.*) BADRI DAS *v.* RAJA BIRENDRA BIKRAM SINGH.

175 I.C. 169=1938 O.A. 461.

——**S. 151 and O. 7, R. 10**—*Applicability—Order returning plaint on ground of pecuniary jurisdiction—Appeal.*

O. 7, R. 10 is not restricted only to those cases in which the Court for want of territorial jurisdiction returns the plaint. A plaint returned on the ground of pecuniary jurisdiction is also to be considered as returned under this provision and not under S. 151. Hence the order returning the plaint on this ground for presentation to proper Court is appealable (*Dadiba C. Mehta and Lobo, JJ.*) KHIOMAL *v.* GOPALDAS.

A I R. 1938 Sind 124.

——**S. 151**—*Ends of justice—Objection that pleader engaged by opposite party should not be allowed to appear*

with the same litigation, and the lower Court after hearing both the parties, accepts the objection, an application by the pleader to set aside an order does not lie either under S. 151 or S. 115, C. P. Code or under S. 85, Government of Burma Act. (*Baguley and Mosely, JJ.*) MAUNG THA TUN *v.* BRAJAHORI WADDADER. A.I.R. 1938 Rang. 241.

——**S. 151**—*Inherent powers—Power to set aside wrong or illegal order—If limited to cases of fraud or deception practised on Court.*

A Court has always got an inherent power to vacate or set aside an order made by it when it is brought to its notice that the order is one which is null and void and should never have been made. Its power to so rescind or vacate such an order is not limited to cases of fraud or deception practised upon the Court. (*Davis, J. C. and Lobo, J.*) DHOLANDAS GIDUMAL *v.* SADHUMAL DOLUMAL. 32 S.L R. 215.

——**S. 151**—*Review—Order due to inadvertence—Power of Court.*

the Court having asked the purchaser to deposit the

becoming aware of the surety bond the Court reviewed and modified its order and directed the surety to pay the amount.

Held, that the Court had an inherent power to review

C. P. CODE (1908), O. 2, R. 2.

its previous order as the error was patent on the face of the record and the previous order was made by the Court *suo motu* through oversight (*Bhide, J.*) MOHAMMAD RAMZAN *v.* MT. KHADIJA SULTAN BEGUM.
A.I.R. 1938 Lah. 472.

——**O. 2, R. 2**—Gift of certain property to wife in lieu of dower—Widow remarrying after husband's death—Suit for pre-emption by husband's brother dismissed—Subsequent suit for declaration of title to property on ground of remarriage of widow and for avoidance of gift—If barred. *See* C. P. CODE, S. 11.
A.I.R. 1938 Lah. 492.

——**O. 7, R. 10**—Applicability—If confined to cases of return of plaint for want of territorial jurisdiction. *See* C. P. CODE, SS. 151 AND O. 7, R. 10.
A.I.R. 1938 Sind 124.

——**O. 9, Rr. 3 and 4**—*Applicability—Plaintiff's pleader stating that his client would not proceed with case—Court recording that plaintiff's pleader had no instructions and defendant was absent and dismissing suit—Application for restoration—If maintainable.*

Where the plaintiff's pleader appeared before the Court and made a statement to the effect that his client's agent had informed him that he would not proceed with the case, but the Court expressly recorded that the plaintiff's pleader had no instructions and no steps were taken by the plaintiff and that the defendant was absent and dismissed the suit for default, the order passed is clearly one under O. 9, R. 3, C. P. Code, and an application for restoration is, therefore, maintainable under O. 9, R. 4, C. P. Code. (*S. K. Ghose and Edgley, JJ.*) JAHARLAL *v.* JYOTI PROSAD.
42 C.W.N. 806.

——**O. 9, R. 4**—*Suit by shebait in name of idol dismissed for default—Application for restoration by another shebait—Maintainability.*

Where a suit brought by a shebait in the name of an idol is dismissed for default under O. 9, R. 3, C.P. Code, an application for restoration under O. 9, R. 4, C. P. Code, is maintainable by another shebait who is the [illegible] at the time of the application. The real plaintiff in the suit must be held to be the idol and not the shebait who was suing in his name. (*S. K. Ghose and Edgley, JJ.*) JAHARLAL *v.* JYOTI PROSAD.
42 C.W.N. 806.

——**O. 13, R. 2**—*Evidence admitted by trial Court—Power of appellate Court to refuse its admission.*

An appellate Court cannot refuse to admit evidence admitted by the trial Court on the ground that the evidence was produced late and was not admissible under O. 13, R. 2, C. P. Code. (*Jack, J.*) SM. SUNITI BALA DAS GUPTA *v.* MAHARAJA BAHADUR SIR PRODOYT KUMAR TAGORE.
67 C.L.J. 133.

——**O. 17, R. 3**—*Applicability—Suit for partnership accounts—Preliminary decree—Trial Court ordering plaintiff to deposit commissioner's fees—Deposit not made—Dismissal of suit—Appeal—Appellate Court admitting appeal on condition of plaintiff making required deposit—Propriety of.*

In a suit for taking partnership accounts a preliminary decree was passed and a commissioner was appointed for settling partnership accounts. The trial Court ordered the plaintiff to deposit a certain sum towards the commissioner's fees. The plaintiff did not make the deposit and obtained adjournment. On the adjourned date, the plaintiff was warned that if the deposit was not made within a week the suit was liable to the dismissed for want of prosecution. No deposit having been made within the time allowed, the Court dismissed the suit. On appeal against this order the Appellate Court admitted the appeal on condition that the plaintiff deposited the required sum.

C. P. CODE (1908), O. 21, R. 19.

Held, (1) that the order of the Appellate Court in so far as it interfered with the discretion exercised by the trial Court was unjustifiable; (2) that the order of the trial Court dismissing the suit fell under O. 17, R. 3. Hence in dismissing the suit because of the failure of the plaintiff to deposit the sum and without reference to the materials on the record the trial Court acted against the provisions of O. 17, R. 3; (3) that the preliminary decree having been passed, the Court had no jurisdiction thereafter to dismiss the suit; (4) that the suit should be restored to file on the deposit being made, and proceeded with. (*Mehta and Lobo, JJ.*) MENGHOMAL *v.* VARUMAL.
A.I.R. 1938 Sind 142.

——**O. 20, R. 12**—*Decree for mesne profits from date of suit until delivery of possession of property—Direction for its ascertainment in execution—Legality—Duty of Executing Court.*

If a Court passing a decree for delivery of possession of immovable property directs that an enquiry should be made in *execution* as to the amount of mesne profits from the institution of the suit till delivery of possession to the plaintiff, the Executing Court has no jurisdiction to question the propriety of the direction. It should enquire into the amount of mesne profits and forward its report to the court which passed the decree and it would then be the duty of that court to pass a final decree in conformity with the provisions of O. 20, R. 12 (2), C. P. Code.

Per *Derbyshire, C.J.—Mukherjea, J.* (*contra*). There is nothing improper or wrong in law in the suit Court directing that such an inquiry shall be made by the executing Court, and there is much to be said in favour of it from the point of view of convenience. (*Derbyshire, C.J. and Mukherjea, J.*) COMMISSIONERS FOR THE PORT OF CALCUTTA *v.* PROHLADRAI.
42 C.W.N. 748.

——**O. 21, R. 15**—*Joint decree-holders—Application by one to execute decree—Competency—Conditions.*

In order to comply with R. 15 of O. 21, C. P. Code, it is necessary to state in the application by one joint decree-holder that the application is taken out on behalf of the applicant and for the benefit and on behalf of the other persons entitled to the decree. (*Wort and Varma, JJ.*) SHEIKH MOHAMMAD ANAS *v.* BHUPENDRA PRASAD SHUKUL.
17 Pat. 223.

——**O. 21, R. 16**—*Construction—"Transferee"—Assignment of decree by deed in writing in name of one benami for another—Benamidar—If transferee—Application by real assignee—If one "in accordance with law"—Limitation Act, Art.* 182 (5).

Where a decree is transferred by a deed of assignment in writing the person named as the assignee in the deed is the "transferee" who is entitled to apply for execution under O. 21, R. 16, C. P. Code, though the assignment in his name is *benami* for another. The real or beneficial transferee is not the "transferee." An application by the real assignee for execution is not in "accordance with law" which would save limitation for a later application under Art. 182 (5) of the Limitation Act. The mere fact that the real assignee gets a decree in a suit declaring that he is the real owner of the decree or the real assignee cannot entitle him to apply in execution or to make his application one in accordance with law. (*Wort and Varma, JJ.*) SHAIKH MOHAMMAD ANAS *v.* BHUPENDRA PRASAD SHUKUL.
17 Pat 223.

——**O. 21, R. 19**—*Applicability—Creditors of parties also concerned.*

O. 21, R. 19 deals with a case in which only the two parties are entitled to recover sums of money from each other. As such it cannot cover a case in which the cre-

C. P. CODE (1908), O. 21, R. 32.

ditors of one of the parties are also concerned. (*Thomas, C.J. and Zia Ul Hasan, J.*) BADRI DAS v. RAJA BIRENDRA BIKRAM SINGH. 175 I.C. 169 = 1938 O.A. 461.

———**O. 21, R. 32 (5)**—*Applicability—Prohibitory injunctions.*

The act required to be done as contemplated by O. 21, R. 32 (5) has reference only to a positive act such as is required to be done under a mandatory injunction. Hence, Cl. 5 of R. 32 of O. 21 does not apply to prohibitory injunctions (*Thom, C.J. and Ganga Nath, J.*) ANGAD v. MADHO RAM. **1938 A L.J. 558.**

———**O. 21, R. 58**—*Deposit in connection with cash certificate attached—Application of Post Master General—Duty of Court to adjudicate.*

One *R* was the owner of cash cretificates of certain value in the custody of the Post Master General. He subsequently died but his heirs did not take any steps to obtain a transfer to them of the cash certificates in accordance with the provisions of the Post Office Rules. Later on certain persons obtained a decree against the assets of *R* in hands of his heirs. The Court thereupon called upon the
sum deposited

S. 214 of Succession Act, the Court should not have proceeded to execute the decree against the cash certificates in possession of Post Master General except on production by the decree-holders of one of the documents mentioned in the latter part of the section. (*Edgley, J.*) SECRETARY OF STATE v. GIRINDRA NATH. **A.I.R. 1938 Cal. 445.**

———**O. 21, R. 58**—*Enquiry—Necessity—Scope and extent—Refusal to enquire—Revision.*

Where an applicant under O. 21, R. 58 claims that he has a share in, and is in joint possession with the judgment-debtor along with c
the family, of the attached
R. 58, the Court should p[illegible]
claim. No doubt the extent of the investigation to be carried out would depend upon the circumstances of each case, but
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Court and is op
v. NASIRABAD

———**O. 21, R. 58**—Locus standi *to object—Mortgagee in possession—His proper remedy.*

A mortgagee in possession is not
under O. 21, R. 58, C. P. Code, to
the property at the instance of a pe
decree against the mortgagor. His proper remedy is to wait and to take action under O. 21, Rr. 100 and 103, C. P. Code, at the proper time, provided always that he does not in the meantime bring a suit to have the property sold. (*Addison and Din Mohammad, JJ.*) SANT LAL v. FIRM UDHO RAM-WALAIT RAM. **40 P L.R. 522.**

———**O. 21, R. 58**—*Objection lodged after execution sale—Competency.*

An objection under O. 21, R. 58, C. P. Code, lodged

C. P. CODE (1908), O. 23, R. 1.

after the execution sale which is subsequently confirmed is incompetent. (*Addison and Din Mohammad, JJ.*) SANT LAL v. UDHO RAM-WALAIT RAM. **40 P.L.R. 522.**

———**O. 21, R. 62**—*Claim on ground that property is subject to mortgage—Refusal by Court to investigate—Order that sale would be held with notice of mortgage—Legality.*

If a person prefers a claim on the ground that the properties attached in execution of a rent decree are subject to a mortgage in his favour, the Court must proceed to investigate the claim and cannot order simply without investigation that the sale would be held with notice of the mortgage. Such an order is not one contemplated by O. 21, R. 62, C. P. Code, and cannot be sustained. (*Bartley and Nasim Ali, JJ.*) KHAGENDRA NATH v. JORAD KUMARI DASI. **67 C L.J. 79.**

———**O. 21, R. 69**—*Non-compliance with—Sale, if nullity.*

The failure to comply with the provisions of O. 21, R. 69, C. P. Code, would not alone render a Court sale a nullity, but it would be necessary for a person who is

no steps to have
on compliance with
Court to treat the
JOGENDRA NATH
WAJ.
67 C L J. 96.

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should be allowed
inst the purchase-
money. (*Bhide, J.*) MOHAMMAD AMIR-MOHAMMAD SHAFI v. RABIB-UD DIN. **40 P L.R. 544 (1).**

———**O. 22, R. 3**—*Appeal by deity—Abatement against one of shebaits—Appeal, if competent.*

Per *Jack, J.*—An appeal by a deity is not incompetent merely by reason of its being allowed to abate as against the heirs of one of the shebaits who died pending the appeal. (*Jack and Khundkar, JJ.*) LAKSHMI NARAYAN JIE v. JAGADISH CH. SUR. **42 C.W.N. 837.**

———**O. 23, R. 1**—'*Sufficient ground*'—*Suit referred*

Where a suit in which some of the defendants are minors is referred to arbitration without the leave of the

KHAN v. MOHD. RAMZAN. **40 P.L.R. 498.**

———**O. 23, R. 1 (3)**—*Withdrawal of suit—Subsequent*
on different

) is that if the
subject matter as the previous suit the subsequent suit must be dismissed. It matters not whether the defendant concurred with the plaintiff in the withdrawal of the suit. In a previous suit between *A* and *B*, the basis of the claim was alleged tenancy of *B* under *A*. It was alleged that *B* was holding over and it was prayed that he should be ejected. The suit was withdrawn by *A* without permission to bring a fresh suit as being compromised. *A* subsequently sued *B* for being in wrongful possession of the

same property in his own right and not as tenant of *A*.

Held that the subsequent suit of *A* was not barred by O. 23, R. 1 (3). (*Mackney, J.*) MA PAN BU *v.* MAUNG LU THANT. **A.I.R. 1938 Rang. 210.**

——**O. 26, R. 15**—*Commissioner's costs—Order for—If can be made part of decree.*

The commissioner is not a party to the suit, and an order directing one of the parties to pay a certain sum to the commissioner cannot be made a part of the decree. If at the end of an enquiry there is money due to the commissioner, then that is due to non-observance of the provisions of O. 26, R. 15 by the Court and the failure of the commissioner to look after his own interests, because a sum sufficient to cover the commissioner's expenses ought to be deposited in the Court before the commission is taken. (*Mosely and Dunkley, JJ.*) OON CHAN *v.* KHOO ZUN. **A.I.R. 1938 Rang. 254.**

——**O. 30, R. 3, proviso**—*Suit against firm—Plaintiff having notice of dissolution—Decree obtained after service on one partner only—Validity and effect.*

A decree obtained against a firm after service of summons upon one of the partners only is a good decree against the firm, although the plaintiff had notice of the dissolution of the partnership and he had not served all the partners individually. The only effect would be that it could not be executed individually against the partner who had not been served, nor could the plaintiff get leave under O. 21, R. 50, C P.Code to have it executed against him personally. (*Ameer Ali, J.*) SATYA CHARAN *v.* CALCUTTA HARDWARE ENGINEERING CO.

42 C.W.N. 820.

——**O. 30, R. 6**—*Suit against firm—Right of each partner to defend.*

In an ordinary suit against the firm, each partner has a right to come in and defend. He has an individual right to come in and defend although he defends on behalf of the firm. Each partner may file separate defences, one partner may defend, while another admits. Though not clearly stated, this is involved in O. 30, R. 6, C.P. Code. (*Ameer Ali, J.*) SATYA CHARAN *v.* CALCUTTA HARDWARE ENGINEERING CO.

42 C.W.N. 820.

——**O. 32, R. 4(1)**—"*Adverse to that of the minor*"—*Mortgage by Hindu father—Suit on impleading minor son—Father appointed guardian* ad litem—*Propriety—Father's interests—If adverse to those of minor son.*

It cannot be stated as a universal proposition of law that in a suit on a mortgage executed by a Hindu father impleading his minor son as a defendant the father's interests are necessarily adverse to those ofthe minor and the father cannot properly represent the minor son in the mortgage suit. That is a question of fact; if the father-guardian fails to raise the defences open to the minor son, it follows that the minor is not properly represented and the decree made in the suit would not bind him. (*Wort and Varma, JJ.*) CHITRADHAR NARAIN DAS *v.* KHIDAR THAKUR. **17 Pat. 236.**

——**O. 32, R. 5**—*Scope—If mandatory—Order at instance of minor without next friend or guardian but beneficial to minor—Court—If bound to set aside.*

O. 32, R. 5, C. P. Code was made for the benefit and protection of a minor and not for his prejudice.

Quaere.—Whether R. 5 of O. 32, compels the Court in every case to discharge an order made at the instance of a minor without a guardian or next friend even when such order is for the benefit of the minor? (*Davis, J.C. and Lobo, J.*) DHOLANDAS GIDUMAL *v.* SADHUMAL DOLUMAL. **32 S.L.R. 215.**

——**O. 32, R. 7**—*Arbitration—Reference without leave of Court—Validity.*

Where a suit in which some of the defendants are minors is referred to arbitration without the leave of the Court being expressly obtained and recorded, the arbitration proceedings are voidable at the option of the minors although the petition for making the reference is signed by the *mukhtar* of their guardian *ad litem*. If the minors exercise their option in avoiding the proceedings, the award made by the arbitrators is liable to be set aside, if it is not separable. (*Tek Chand, J.*) SAMAND KHAN *v.* MOHD. RAMZAN. **40 P.L.R. 498.**

——**O. 33, R. 1 and S. 115**—*Application for leave to sue as pauper—Proceedings thereon—Nature of—Final decision on—Revision.*

When an application is presented under O. 33, R. 1, C. P. Code for leave to sue *in forma pauperis*, all proceedings thereon are in the nature of proceedings prior to, or before the commencement of, a suit and hence are not interlocutory proceedings. They constitute a separate case. Any final decision in such proceedings would amount to a 'case decided' and would be open to revision under S. 115 C. P. Code. (*Hamilton and Yorke, JJ.*) DURGA PRASAD *v* GUR DULAREY.

175 I.C. 63=1938 O.A. 487=1938 O.W.N. 561.

——**O. 33, Rr. 1 and 5 (d)**—Order granting leave to sue *in forma pauperis*—Revision—Grounds. *See* C. P. CODE, S. 115—LEAVE TO SUE IN *forma pauperis*.

1938 O.W.N. 561.

——**O. 37, R. 4**—*Decree against firm—One of partners deprived of opportunity for applying for leave to defend suit—Duty of Court to set aside decree.*

Each partner has a right to apply for leave to defend where a suit is brought against a firm under O. 37. There is, of course, a period of limitation for such application, but in a case where it is shown that a partner was deprived of an opportunity for applying for leave to defend, the Court ought to exercise its power under O. 37, R. 4, by setting aside the decree, restoring the suit and allowing leave to defend. (*Ameer Ali, J.*) SATYA CHARAN *v.* CALCUTTA HARDWARE ENGINEERING CO. **42 C.W.N. 820.**

——**O. 40, R. 1**—*Mortgage suit—Suit on simple mortgage—Appointment of Receiver.*

It is settled law that in the case of a simple mortgage without possession the intention of the parties is that the mortgagor shall ordinarily remain in possession of the mortgaged property till it is brought to sale in execution proceedings for the payment of the mortgage debt. Consequently a receiver will be appointed pending a suit on the basis of a simple mortgage only if there exist special circumstances in the case. (*Ram Lall, J.*) LADLI PARSHAD *v.* BANARSI DASS. **40 P.L.R. 541.**

——**O. 43, R. 1**—Order rejecting memorandum of appeal for non-compliance with O. 41, R. 1—Appealability. *See* C. P. CODE, S. 2 (2). **17 Pat. 245.**

——**O. 43, R. 1**—Scope—Order returning plaint on ground of pecuniary jurisdiction—Appeal. *See*

A.I.R. 1938 Sind 124.

——**O. 43, R. 1(s)**—*Order that receiver should be appointed—Appeal, if allowed.*

There can be no question that the order from which an appeal is allowed by the law is not one by which it is ordered that a receiver should be appointed but the order by which some person or persons are appointed receiver. (*M. N. Mukerji and S. K. Ghose, JJ.*) PHANI BHUSHAN PAL *v.* SM. NALINIBALA DASI.

67 C.L.J. 107.

——**Sch. II, Para. 17**—*Refusal to act after agreement to refer—Reference, if could be made.*

Though the arbitrators might have refused to act before the application for a reference under para. 17 of Sch. II, C. P. Code, yet, the Court has power under

COMPANY.

para. 17 to make an order of reference. (*Bennet and Verma, JJ.*) DATTA MAL v. AMAR NATH.
1938 A.L.J. 544.

COMPANY—*Surrender of shares—Validity—Conditions.*

Per *trial Judge, Rupchand, A.J C*—There can be no valid surrender of shares in a limited company, which are not fully paid up, so as to exonerate a subscriber from his liability to pay for the shares agreed to be purchased by him in accordance with the memorandum, except where shares are forfeited as it involves a reduction of capital; before this can be done the sanction of the Court must be obtained. A surrender which has the effect of releasing a share-holder from further liability in respect of his shares is equivalent to a purchase of the shares of the company and is illegal, and null and void. Such a surrender can only be supported under circumstances which would justify a forfeiture of the shares. (*Mehta and Lobo, JJ*) VAZIRMAL KEWALRAM v. MAKRAN COAST STEAM NAVIGATION CO., LTD.

COMPANIES ACT (VII OF 1

—*Signatories to memorandum* ... *lity to be included in list of* ... *entry in register of shares or actu*... —*If condition precedent.*

It is well-settled that the signatories to the memorandum of association of a company become the first members of the company as ... tion mentioned in the Registr... deemed to have become mem... on its registration, to be entered as members on its register of members. But neither this entry in the register nor the allotment of shares is a condition precedent. Each subscriber at once by subscribing irrevocably agrees to take from the company the number of shares placed opposite his signature unless all its share capital has already been allotted to other persons. The fact that no shares are allotted to him and that he has ceased

——S. 30 (2)—*Scope—Non-compliance—Effect of.*

Per *trial Judge, Rupchand A. J. C.*—S. 30 (2) of the Companies Act merely lays down a rule of procedure and does not purport to declare that a failure to comply with its provisions shall relieve a signatory to the memorandum of association of ... for his shares, which according to S. ... to have agreed to have purchased ... director is bound to see if the all... made. He cannot avoid his liabil... shares by pleading his own defa... making the allotment of shares to ... *Lobo, JJ.*) VAZIRMAL KEWALRAM ... STEAM NAVIGATION CO., LTD.

——S. 156 (1) (*i*)—*Past member—Director of company ceasing to be director—If ceases to be member also.*

A director of a company who ceases to be a director does not thereby cease to be a member of the company. He cannot be held to be a "past member" of the Company within the meaning of S. 156 (1) (*i*) of the Companies Act. (*Mehta and Lobo, JJ.*) VAZIRMAL KEWALRAM v. MAKRAN COAST STEAM NAVIGATION CO., LTD.
32 S.L.R. 167.

——S. 184—List of contributories—Persons signing memorandum of association—Liability to be included in list—Actual entry in register or allotment of shares—If condition precedent. *See* COMPANIES ACT, Ss. 30 AND 184.
32 S.L.R. 167.

CONTRACT ACT (1872), S. 73.

CONTRACT—*Offer and acceptance—Letter to member offering new shares to him and on his renunciation, to his nominee—Renunciation by member and acceptance by nominee—Contract if concluded.*

A letter addressed to a member of a company offered him new shares and in the event of his renouncing, to his nominee. The member renounced and his nominee accepted them.

Held, the contract with the nominee was completed even though the offer was made in the letter to the member. (*Panckridge, J.*) EZEKIEL v CAREW & CO., LTD.
A.I R. 1938 Cal. 423.

CONTRACT ACT (IX OF 1872), Ss. 23 and 27—*Monopoly—License granted by Zamindar entitling licensee to exclusively collect hides of dead animals within Zamindari—Enforceability.*

A contract or licence under which the licensee is ... hides of all dead ... Zemindari or raj ... under which the ... are bound to sell ... else, is one which ... is unenforceable. (*Wort and Manohar Lall, JJ.*) KAMESHWAR SINGH v. MD YASIN KHAN.
17 Pat. 255.

... amindar entitling ... all dead animals ... CONTRACT ACT,
17 Pat 255.

——S. 65—*Assignment of mortgagee rights—Mortgage declared void—Liability of mortgagee to refund consideration to assignee.*

Where after the assignment of mortgagee rights the mortgage is declared void *ab initio*, the consideration for the assignment fails, and the mortgagee is, therefore, liable to refund the money received by him to the ... I GHULAM MOHAM...
40 P.L R. 528.

...*nt—Right to contri*...

... between co-tenants, ... agreement between ... plaintiff alone had agreed to pay the entire rent due from the co-sharers jointly, the plaintiff is not entitled to claim contribution in respect of the rent paid by him in pursuance of the agreement. So also where in the suit for contribution the plaintiff impleads a transferee from one of the co- ... ords is not maintainable in ... as there is no mutuality ... one had and the co sharer ... hey do not come within the ... t Act. Nor can the plaintiff ... the transferee, when he was not impleaded as defendant to the rent suit and his jama was separately recognized by the landlord. Having once discharged his liability with respect to the portion which appertains to him he cannot be said to be a person within the meaning of S. 69, who was bound to pay what the plaintiff was required to pay. (*Khundkar, J.*) JOY KRISHNA v. KALI KRISHNA.
A.I.R. 1938 Cal. 413.

——S 73—*Breach of contract—Interest on damages—If can be allowed.*

The rule of law is that, in the absence of special cir-

cumstances, interest cannot be allowed on damages for breach of contract for sale of goods. (*Tek Chand, J.*) SUKH DIAL-BRIJ LAL *v.* KARKHANA JOINT HINDU FAMILY. **40 P.L.R. 531.**

——S. 135—*Auction-purchaser allowed to withdraw deposit on furnishing security to re-deposit when asked—Surety bond executed—Purchaser when asked to deposit amount asking for time which was granted—Consent of counsel for decree-holder—Surety, if absolved from liability.*

Where in an execution case, the auction-purchaser who had deposited the sale price in Court was allowed to withdraw it on furnishing security to re-deposit when asked to do so, and on so being asked he asked for a month's time to deposit the amount which was granted by the Court and was not objected to by the counsel for the decree-holder, but on subsequent date the Court being aware of the surety bond ordered the surety to deposit the amount and modified the previous orders.

Held that the surety was not absolved under S. 135, Contract Act. The bond was in favour of the Court and the Court had discretion to order the auction-purchaser to deposit the amount at any date it liked and the consent of the counsel for the decree-holder was immaterial. (*Bhide, J.*) MOHAMMAD RAMZAN *v.* MT. KHADIJA SULTAN BEGUM. **A.I.R. 1938 Lah. 472.**

——S. 178—*Applicability—'Good faith'—Meaning of.*

The words 'good faith' in S. 178, Contract Act before its amendment bear the same meaning as is given in sub-S. 20 of S. 3 of General Clauses Act, though in terms that sub-section may not apply to any Act earlier in date than the General Clauses Act. The general rule of English law is also to the same effect. In a suit by a motor dealer against his salesman and latter's pledgee (a bank) for recovery of a car or its value it was found that the salesman was in possession of the car and that he had at the same time shown and deposited with the bank a receipt granted by the motor dealer to the sales- n for the price of the car and that the enquiries made by the bank also showed that he (the salesman) was the owner of the car. There was nothing to put the bank on its guard. It was argued that the fact that the car bore a trade number should have put the pledgee on its guard and the bank by not insisting on the production of the 'C' certificate which would have shown the name of the owner was guilty of negligence and had therefore not acted in good faith.

Held that there was nothing suspicious in the conduct of the salesman so as to make any reasonable man suspect that he had no authority to pledge the car. The receipt granted by the motor dealer was sufficient evidence of the ownership of the car by the salesman and the 'C' certificate though *prima facie* evidence of ownership of the car not being the only evidence, the bank was not guilty of negligence in not insisting on the production of it and that the bank had acted in good faith and was therefore entitled to protection under S. 178. (*Pandrang Rao and King, JJ.*) MADRAS AUTOMOBILES *v.* MODERN BANK, LTD. COIMBATORE. **A.I.R. 1938 Mad. 545.**

——S. 178—*Object—Pledgee taking goods from person of whom he knew nothing—Pledge turning out to be offence and pledgor agent—Pledgee, if can retain property.*

S. 178 has been enacted in order to protect those

that the pledgor is a mercantile agent. The agent r ferred to is an agent such as the pledgee might w suppose had power to pledge, but if the pledgee did n know him to be an agent at all he cannot have any re son to suppose that he had power to pledge. If takes goods from a person of whom he knows nothi whatsoever and if it turns out that the person's pledgi of the goods with him was a criminal offence and tl the pledgor was a mercantile agent, then he can h no claim to retain the property. (*Mackney, J.*) CHEUNG *v.* AH WAIN. **A.I.R. 1938 Rang. 2**

——S. 182—*Agent—Person employed to sell un deemed articles from pawn shop.*

The definition of an agent in S. 182, is wide enou and covers a person employed to sell unredeemed arti from a pawn shop on behalf of the employer. Suc person although a servant or a shop assistant, is an a of the employer in the matter of selling such go (*Mackney, J.*) AH CHEUNG *v.* AH WAIN. **A.I.R. 1938 Rang. :**

CONTRIBUTION — *Liability for—Mahomedan heirs—Realisation of dower decree from non-Taluq property—Taluqdari property, if liable to contribu*

Where a shia Mahomedan died leaving both Ta dari and non-taluqdari property and one of the wic obtained satisfaction of her decree for dower from of the non-taluqdari property alone, and where an widow and her children subsequently sued the Talu for contribution and claimed that the Taluqdari pro should contribute to rehabilitate their shares to extent to which execution was levied against the taluqdari property in respect of the dower debt, i *held* that the plaintiffs had a right to contributi respect that the Taluqdari property was liable fo debts of the deceased Taluqdar along with non-talu property, and that the values of both the kinds o perty should be estimated as at the date of the de the Taluqdar. (*Sir George Rankin.*) MAH KAZIM ALI KHAN *v.* SADIQ ALI KHAN. **174 I.C. 977=1938 A.W.R. (P.C.)** **A.I.R. 1938 P.C. 169 (**

CO-SHARER—*Exclusive possession by one—Ri other co-sharers to dispossess him.*

In a case of a joint khata, where one co-shar been in exclusive possession for a long time of a p of the joint land, which does not exceed his share entire holding another co-sharer cannot disposse against his will from the portion of which he ha in possession. (*Tek Chand, J.*) KARAM CHA KARAM DAS KHAN. **A.I.R. 1938 Lal**

——*Mutual relation—Person opening dooru wall of his house abutting on common courtyard for injunction—If lies.*

Where a person opens a door-way in the wal own house abutting on a courtyard which is th property of the parties and each one has a doo house opening in the courtyard, the opening d amount to an ouster of the other co-owners fr court-yard and the other co-owners cannot brin for injunction to restrain him from opening t unless an excessive user or a user inconsistent wi to which it has been put before, has been proved Chand, J.) KHOTA RAM *v.* TIMKU RAM. **A.I.R. 1938 L**

COURT-FEES ACT (VII OF 1870), S. 17—*bility—Suit by assignee of mortgagee rights mortgagee, mortgagor and his surety—Separat*

action
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Rashid,
J.) HAJI GHULAM MOHAMMAD *v.* FEROZE.
40 P L R. 528.

CRIMINAL PROCEDURE CODE (V OF 1898), S. 107—*Petition under—Reference to police for preliminary enquiry—Power of Magistrate.*

There is nothing in the Cr. P. Code, which forbids a Magistrate before whom information has been lodged for taking proceedings under S. 107, to refer the matter to the police for preliminary enquiry. A.I R. 1928 Lah. 694, overruled. (*Young, C.J. and Tek Chand, J.*) ISMAIL *v.* JAGAT SINGH. 40 P L R 579.

———**Ss. 109 and 112**—*Appellate Court, if can alter section under which security is to be taken—Entering of actual section and clause, if imperative.*

Where the Appellate Court has considered that what is set out in the body of the order under S 112 brings the matter within the terns of Cl. (*a*) of S. 109 and not under Cl. (*b*), and it has in effect corrected what it considers either to be a misconception of the trying Magis-

after havi
is to be c.
section and clause which he considers appropriate. (*Grille, J.*) HAFIZ AHESANALI *v* EMPEROR.
A I R 1938 Nag. 303.

———**S. 109**—*Order under—When not justified.*

An order under S. 109, Cr P. Code, cannot be passed against a person on the ground that it is not safe in the interest of justice to allow him unrestricted personal liberty. Such a ground is not one contemplated by the section. (*Bartley and Edgley, JJ.*) KALI PADA DAS *v.* EMPEROR. 42 C W N. 816.

———**S. 109 (a)**—*'Concealing his presence'—Meaning.*

Held, that this could not be considered as concealing his presence. (*Grille, J.*) HAFIZ AHESANALI *v.* EMPEROR. A I R. 1938 Nag. 303.

———**S. 109 (a) and (b)**—*Scope of—Satisfactory account of one's self—What may not amount to.*

The preliminary words of Cls. (*a*) and (*b*) are so different that they cannot be read together and again within Cl. (*b*) itself the circumstances are mentioned in the alternative, and not in a concurrent sense. The wording of Cl. (*b*) is such that the conditions must of

of himself but an account of himself in relation to the circumstances in which he is called on to give such account. The wording of S. 109 is not otherwise from that of S. 55 A person cannot be considered to have given a satisfactory account of himself if, being found with unmistakable burgling instruments in his possession, in the middle of the night, he says that he is a respected house holder, following an honourable profession in the daytime, still less can he be said to have given a satisfactory account of himself when on being accosted, he flings away a bundle of house-breaking implements and runs to his own house by a devious route, and when forced to open his door to the police, denies that he had left his house that night. (*Grille, J.*) HAFIZ AHESANALI *v.* EMPEROR.
A.I R. 1938 Nag 303.

———**Ss. 133 and 139-A**—*Absence of conditional order—Failure to make enquiry under S. 139 A—Final order—Legality.*

Where a Magistrate without making a conditional order under S. 133, Cr. P. Code, issued a notice calling upon the opponents to show cause why action under S. 133 should not be taken, and where the opponents appeared and denied the allegations and the Magistrate even then did nof issue a conditional order, nor did he make an enquiry under S. 139-A but recorded evidence and passed what purported to be a final order restraining the opponents from committing the acts complained of it was held that the Magistrate had disregarded
down by the Code and
the order. (*Weston.*)
1938 A M L J. 4.

'ten statement—Failure

filed by the opponent,
of the Magistrate to question him as
9-A Cr. P. Code, on points to which he had already replied, is not the omission of an essential formality justifying interference on a reference, (*Weston.*) HANUMAN DAS *v.* DISTRICT BOARD ENGINEER, AJMER. 1938 A M.L.J. 2.

———**S. 145 (1)**—*Non-compliance with—Proceedings, if vitiated.*

The Magistrate, when making an order on an application under S. 145 must comply with the provisions of S 145 (1) of the Code and he must make an order in writing stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace existed.
s whatever of the
of the facts, and
ply with the provi-
whole proceedings
and are rendered
. (*Mackney, J.*)
, LTD.
A I R. 1938 Rang. 229.

———**S. 145 (4)**—*Summoning of witnesses—Duty of Magistrate.*

The duty of the Magistrate acting under S. 145 is to decide whether there is likely to be a breach of peace and whether one party although recently dispossessed, is to be regarded in possession. To do this, he must take such evidence as he finds necessary and it rests with him and not with the parties to decide what evidence is necessary to be called. In S. 145 there is no such
ound in Cl. 2 of S. 252 of the
t to Cl. 4 of S 145 does not
han that the Magistrate must
put before him by the parties
n to summon witnesses at the
who are unable to bring their witnesses to Court. It is the duty of the Magistrate to obtain such evidence as is requisite, to enable him to form a reasonable opinion on the matter before him; it may be that this will entail his summoning the witnesses mentioned by the parties and if so, then it is certainly his duty to summon them.

CR. P. CODE (1898), S. 164.

of him that he should summon the witnesses whether or not he thinks he needs them. (*Mackney, J.*) A. MEAH *v.* STEEL BROTHERS & CO., LTD.

A.I.R. 1938 Rang. 229.

——**S. 164**—*Duty of Magistrate recording confession—Reasons for believing confession voluntary—If to be stated.*

It is not enough for a Magistrate recording the confession of an accused to give him a warning, but it is essential that he should put questions to satisfy himself that the confession was in fact voluntary, and the question with its answer must be recorded. It is not enough that the Magistrate was satisfied as to the confession being voluntary, but the Courts before whom the confession is used must have materials on which they can be satisfied that the confession was in fact voluntary. Hence the Magistrate who records the confession must record a brief statement of the reasons for his believing that the statement was voluntarily made. (*Mohammad Noor and Varma, JJ.*) EMPEROR *v.* RAMSIDH RAI. **A.I.R. 1938 Pat. 352.**

——**S. 164**—*Proof that maker of statement is person in Court—Need for examination of Magistrate.*

The fact that the person who made the statement under S. 164 is the person in Court can be proved by the police officer who had the statement recorded and the trying Magistrate need not be examined. (*Coldstream, J.*) SADULLA *v.* EMPEROR. **A.I.R. 1938 Lah. 477.**

——**S. 190**—*Taking cognizance on report from a Judge of Civil Court—Legality.*

There is nothing in S. 190, Cr. P. Code, which prevents a sub-Divisional Magistrate from taking cognizance of an offence that happens to be reported to him by an officer who presides in a Court of Justice. (*Allsop, J.*) TARA SINGH *v.* EMPEROR.

1938 A L.J. 528=1938 A. Cr. C. 45.

——**Ss. 198 and 199**—*Object of—Husband himself not complaining of offence under S. 494, I. P. Code—Power of Court.*

The purpose of Ss. 198 and 199 is to make sure that the offences to which they refer are not made the subjects of complaint except by aggrieved persons.

Where therefore the husband files a complaint under Ss. 363, 342 and 506, I. P. Code, and does not himself complain of an offence under S. 494, I. P. Code, it is not open to the Court to force upon him, as a complainant, the character of an aggrieved husband, which he does not wish to assume. (*Davis, J. C. and Haveliwala, J.*) EMPEROR *v.* GULAB.

A I.R. 1938 Sind 141.

——**S. 200**—*Examination of complainant—Necessity—Report by Judge of Civil Court.*

According to S. 200, Cr. P. Code, it is unnecessary for a Court to examine the complainant when the complaint is made in writing by a Court or a public servant acting or purporting to act in the discharge of official duties. Hence when a Magistrate takes cognizance on a report from a Judge of a Civil Court, who is a public servant, his examination is unnecessary. Even otherwise, failure to examine would only amount to an irregularity. (*Allsop, J.*) TARA SINGH *v.* EMPEROR. **1938 A.L.J. 528=1938 A. Cr. C. 45**

——**S. 202**—*Construction and scope—Complaint referred to police—Powers of police to arrest accused and to act independently of Magistrate.*

There is nothing in S. 202 which debars the police from exercising their powers under S. 54 and arresting the accused, merely because the Magistrate had referred a case for investigation by them under S. 202. But when a Magistrate has referred a complaint of an offence to the police for investigation under S. 202, it is not competent to the police to investigate the offence complained of independently of the Magistrate's directions and to send up the accused for trial for the offence complained of upon a charge sheet. (*Davis, J. C., Mehta and Lobo, JJ.*) EMPEROR *v.* BIKHA MOTI.

A.I.R. 1938 Sind 113 (F.B.).

CR. P. COEE (1898), S. 252 (2).

——**S. 206**—*Committal for trial—Power of Sessions Judge to direct Magistrate to commit accused to Sessions.*

Where an accused, who is being tried by a Magistrate for an offence under S. 409, Penal Code, makes an application to the Sessions Judge claiming a Sessions trial, the Sessions Judge has no jurisdiction to direct the Magistrate to commit the accused to Sessions, and such an order if passed is entirely without jurisdiction. All that the Sessions Judge can do is to make a reference to the High Court in case he thinks that an interference is necessary. (*Henderson and Khundkar, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* NABIN CHANDRA HUR.

A.I.R. 1938 Cal. 416.

——**Ss. 233 and 537**—*Offences of kidnapping and abducting in respect of same occurrence—Separate charges—If necessary.*

It is always wise, where a charge is made in respect of same occurrence both of kidnapping and abducting, that the charge should be framed under two heads. It is not however illegal to make the two charges under one head. The point to be seen in each individual case is whether the accused was prejudiced thereby. If the Judge has carefully explained to the jury the difference between abduction and kidnapping and the jury have fully understood the position, the defect in the charge cannot be said to have prejudiced the accused. A.I.R. 1927 Cal. 644, Diss. (*M. C. Ghose and Bartley, JJ.*) EBADI KHAN *v.* EMPEROR. **A.I.R. 1938 Cal. 460.**

——**S. 242**—*Scope—Prosecution under Sugar Excise Duty Act—Charge—Necessity—Duty of Magistrate to explain ingredients of offence.*

In a case tried as a summons case, it is of course not incumbent on the Magistrate under S. 242, Cr.P. Code, to frame a formal charge against the accused. But when the prosecution is under an Act of very recent date (the Sugar Excise Duty Act of 1934), with the provisions of which the litigants as well as the lawyers are not quite familiar, it would be proper if the Magistrate actually frames a charge or summarises the ingredients of the offence which the accused is required to meet and also reads therein over to the accused before the trial begins. (*Manohar Lall, J.*) BEHARI RAM *v.* EMPEROR. **19 Pat.L.T. 415=1938 P.W.N. 426.**

——**S. 250**—*Order for compensation—Parties on bad terms—If proves falsity of charge.*

The fact that the parties are on bad terms is not a sufficient ground for holding that a charge brought by one against the other is a false one, and consequently an order for payment of compensation merely on such ground is without justification. (*Mackney, J.*) YAUNG PAN *v.* MAUNG MYA DIN.

A. I. R. 1938 Rang. 209.

——**S. 252 (2)**—*Summoning of witnesses—Discretion of Magistrate.*

A Magistrate is bound to summon under S. 252 (2) at the expense of Government such of the complainant's witnesses as he considers necessary. Mere fact that the same case was investigated by the police and no challan was put up by them against the accused is no ground for refnsing to summon the witnesses unless the Magistrate considers any of the witness to be unnecessary. He can

CR. P. CODE (1898), S. 257.

efuse to summon the witnesses on the latter ground but ot on the former. (*Blacker, J.*) GHULAM MOHIYUD-DIN v. SARDARA. A.I.R. 1938 Lah. 444.

——S. 257—*Process issued to defence witness—Duty of Magistrate to secure his attendance.*

When once a Magistrate issues process to a defence witness, he is bound to follow up that process if the defence so desires, and to take all possible steps to ecure the attendance of that witness. The failure of the Magistrate to follow this procedure and to record any order whatever on the petition filed by the defence for e-summoning the witness, ... eedings. (*Patterson, J.* ... GIRDHARI MONDAL ...

——Ss 326 and 327— ...

ssessors not present—Trial with assessor included in ist but not summoned—Legality.

Where the requisite number of assessors ... ent, the Court asked another man who wa ... the Court to serve as an assessor to make ... er This person's name was included i ... assessors and jurors but he was not summoned for any case on that date.

Held, that the trial was not illegal. (Necessity for following strictly the provisions regarding choosing of assessors explained by Mohamad Noor, J.) (*Mohammad Noor and Varma, JJ.*) EMPEROR v. RAMSIDH RAI. A I R 1938 Pat. 352.

——S 342—*Applicability—Summons case.*

The provisions of S. 342, Cr. P. Code, apply to summons cases. (*Weston.*) HAMIRA v. MOOL CHAND. 1938 A.M L.J. 1.

——S. 342—*Examination of accused after further cross-examination of prosecution witnesses—Duty of Magistrate.*

Under S. 342, Cr. P Code, the Magistrate must examine the accused after ... the prosecution witnes ... ed upon to enter upon ... revision will order ret ... pliance with the provis ... he accused. (*Abdul* ... EMPEROR ...

——S 356—Non-compliance with—Record, if can be used as basis for prosecution for perjury. *See* PENAL CODE, S. 193. 1938 A.M L J. 17.

...

ment or fine under S. 395 (1), but he has no power to take a bond under S 562 from the accused. (*Mosely, J.*) THE KING v. BA KYWAY. A.I.R. 1938 Rang. 218.

——S. 403 (4)—'*Competent to try*'—*Interpretation—Acquittal under S. 211, I P Code—Subsequent trial under S 182, I. P. Code—If barred.*

Under S. 403 (4), Cr. P. Code, the 'competency' of the Court to try an offence means not only the status or character of the former Court to try the offence with which the accused is subsequently charged but also includes within its purview cases in which the Court, though otherwise qualified to try the case could not ...

... if at the time of the previous trial there was no com-

CR. P. CODE (1898), S. 526.

plaint in writing of the public servant concerned as required by S. 195, Cr. P. Code. (*Young, C. J. and Tek Chand, J.*) EMPEROR v. RAM RAKHA. 40 P L R. 501.

——S. 413—*Costs of Court fee awarded under S. 546 A—If form part of fine.*

The amount awarded as costs of the court-fees under S. 546-A, Cr. P. Code, ought not to be regarded as forming part of the fine for purposes of appeal. (*Paterson, J.*) ATUL CHANDRA MODAK v. EMPEROR. 42 C.W.N. 760.

... 1) (b)—*Conviction by magistrate under ... 3, I. P. Code—Sessions Judge on appeal ... guilty under S. 498 only—Power to* ...

A Magistrate convicting the accused under Ss. 363 and 498, Penal Code, sentenced them under S. 363 to ...

what sentence was to be passed.

Held, that the Sessions Judge had jurisdiction under S. 423, Cr. P. Code, to alter the finding of the lower Court and to pass appropriate sentence under S. 498 subject to the limit of one year and six months which the Magistrate had imposed. (*M. C. Ghose and Bartley, JJ*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL v. HOSSEIN ALI. A.I.R. 1938 Cal. 439.

——S. 476—*Scope—Defamatory statements in affidavit in course of judicial proceedings—Complaint of defamation—Sanction—Necessity.*

It cannot be said that where defamatory statements are made in an affidavit in the course of judicial proceedings a complaint of defamation cannot in any case be ... ere it is a ... of consti- ... ministration ... e, or one of ... not thereby ... 500 of the ... g necessary in such a case, the filing of the complaint under S. 500 does not amount to an evasion of law. (*Davis, J.C. and Lobo, J.*) KALUMAL MOTIRAM v. MULCHAND 1938 Sind 129.

... *report—Proof* ...

... case is a little ... en in somebody's ... ner's report shows that certain packets contained cocaine, it is not legal evidence and cannot be a substitute for the original certificate or at least for a copy of it certified by the Magistrate as being a true copy. The provisions relating to the production of a report by the Chemical Examiner in place of the Chemical Examiner's own personal appearance in Court are special provisions of the Code and must be strictly adhered to. (*Blacker, J.*) PEARY LAL v. EMPEROR. A.I.R. 1938 Lah. 496.

——S. 526—*Grounds for transfer—Apprehension—Explanation of magistrate—What should contain—Putting up with the complainant's friend—Reasonable apprehension.*

... the petitioner believes is not evidence' and so on.

CR. P. CODE (1898), S. 526.

Where an allegation is made that the magistrate was staying with a person who had endorsed the complaint, and it is not denied, then the only question is whether or not the petitioner has reasonable apprehension of prejudice from such conduct. It was held that such conduct was undesirable and that the case should be transferred. (*Dhavle, J.*) BINDESHWARI MISSIR *v.* EMPEROR. 175 I.C. 49=4 R.B. 519 (1).

——**S. 526**—*Ground for transfer—Communal bias of magistrate—Reasonable apprehension.*

A Magistrate is not barred from trying cases between members of two communities by reason of his belonging to one of them. But when a Magistrate finds himself placed in such a position it is incumbent upon him to exercise the greatest tact and discretion in handling the case. If the Magistrate has been guilty of errors of procedure the effect of which has been against the interests of the party belonging to the community to which he does not belong, it is impossible to escape the conclusion that that party has a reasonable apprehension that it is not likely to get an impartial trial. The case in such circumstances should be transferred from the file of the Magistrate, although there is actually no communal bias in his mind. (*Blacker, J.*) LAL SINGH *v.* EMPEROR. 40 P.L.R. 505.

——**S. 539-B**—*Non-compliance with — Trial, if vitiated.*

Non-compliance with the direction in S. 539-B, Cr. P. Code, to make a memorandum of local inspection does not vitiate the trial, and such an omission is an irregularity, unless it was proved that the accused was prejudiced or that the conviction was based on the local inspection. (*Thomas, C.J.*) SHAKURA *v.* NASIRA. 175 I.C. 259.

CRIMINAL TRIAL—*Duty of Judge—Perverse attitude—Test.*

Where a Judge has said that, as it is a matter of doubt whether the questions asked in the examination-in-chief of certain defence witnesses were leading questions or not, he would presume the point in favour of the accused, it is difficult to see how the accused can call this attitude of the Judge perverse when the interpretation has been entirely in his own favour. (*Grille, J.*) HAFIZ AHESANALI *v.* EMPEROR. A.I.R. 1938 Nag. 303.

——*Evidence—Admissibility—Person neither accused nor witness.*

The evidence of statements of a person, who is neither an accused nor a witness is inadmissible. (*Bartley and Henderson, JJ.*) SK. ASABUDDIN *v.* EMPEROR. A.I.R. 1938 Cal. 399.

——*Sentence—Considerations—Moral indignation of offence.*

In awarding sentence one need not take into consideration the moral indignation which may be felt on looking at the offence committed; all that is necessary to consider is what sentence is likely to prevent the offender from committing the offence again and to prevent other persons similarly situated from committing similar offences. (*Mackney, J.*) MOHAMMAD CASSIM *v.* THE KING. A.I.R. 1938 Rang. 220.

CUSTOM—*Abrogation—Proof.*

It cannot be said that once a custom is proved to exist, it cannot be altered except by subsequent legislation. It is well settled that just as the will of the community established a custom in the first instance, so the same community may by expression of its collective will, evidenced by well-established practice extending over a sufficiently long period, abrogate or change the custom. (*Tek Chand, J.*) ABDUL MAJID *v.* SUBA KHAN. 40 P.L.R. 588.

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——*Proof—Few instances of recent times—Sufficiency.*

A custom can be established only by proof of 'ancient' instances and a few instances of recent times are not sufficient. A.I.R. 1937 Lah. 451 F.B.). Foll. (*Tek Chand, J.*) NOTAN DAS *v.* KARAM HUSSAIN SHAH. A.I.R. 1938 Lah. 447.

——**(Jammu and Kashmir)**—*Alienation—Powers of—Chib Rajputs of Panjari Village.*

A childless Chib Rajput of Panjari Village enjoys unrestricted powers in the matter of alienation of his ancestral landed property. (*Abdul Qayoom and Wazir, JJ.*) WALIDAD KHAN *v.* MAHOMED KHAN. 40 P.L.R. J. & K. 47.

——**(Punjab)**—*Alienation — Ancestral property—Alienation in lieu of dower debt—Validity.*

Under Mahomedan law dower is to be regarded as a debt due from the husband to the wife. This debt is payable on demand. Such debt being a just antecedent debt arising out of the contract of marriage the husband is fully entitled to alienate ancestral land in favour of his wife in lieu of this debt provided it is not unreasonably high. The question as to what is regarded as a reasonable amount of dower is a question of custom and it is incumbent on the party to raise this point in its pleadings and to lead evidence thereon. Where a person wants to show that a custom does not permit the alienation of a good deal of ancestral property in lieu of dower, it is open to him to get an issue framed on this point and to lead evidence to prove the custom. If he fails to do so, such point cannot be raised in appeal for the first time. (*Abdul Rashid, J.*) NAWAB DIN *v.* MAULA BAKHSH. A.I.R. 1938 Lah. 431.

——**(Punjab)**—*Alienation — Right to challenge—Sale by plaintiff's grandfather long before plaintiff was begotten—Consent given to sale by plaintiff's father.*

The alienation by sale of the ancestral land was effected in 1888 by the grandfather of the plaintiff who was born 26 years after the alienation and 25 years after the death of the alienor. At the time of such sale, only two reversioners were alive, who could have contested the sale. Of these, one was the father of the plaintiff who had attested the sale deed. The other brought a suit in 1901, for setting aside the alienation but the suit was dismissed. To this the plaintiff's father was made a defendant and he had supported the sale. In 1934, the plaintiff brought a suit for setting aside the alienation, on the grounds that the sale had been effected without consideration and legal necessity. It was not proved that the plaintiff's father gave consent to the sale *mala fide* with a view to injure the interests of the reversioners.

Held, that the sale having become indefeasible at the instance of any reversioner long before the plaintiff was begotten, the plaintiff had no *locus standi* to sue.

Held further, that the plaintiff's suit was barred by the consent given by his father to the sale. (*Tek Chand, J.*) SOHAN SINGH *v.* DANU. A.I.R. 1938 Lah 467.

——**(Punjab)** — *Applicability—Mahajans of Hissar town.*

The Customary law of the District is based on enquiries made in rural areas at the time of the settlement and no representatives from towns are consulted as a rule. The Mahajans of Hissar town, whose main source of livelihood is business and not agriculture, are not governed by the Customary law, but by the Hindu law. And the mere fact that Mahajans were consulted at the time of preparation of *riwaj i-am*, would not

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show that the *riwaj-i am* was evidence of customs obtaining amongst all Mahajans of the Hissar District particularly amongst residents of towns. (*Bhide, J.*) PATRU MAL v. BADRI PARSHAD.

A.I.R. 1938 Lah. 461

——(Punjab)— *Gift— Ancestral land—Arains of Jullundur Tahsil.*

Among Arains of Jullundur Tahsil, a gift of ancestral land made by a sonless proprietor to relations without the consent of the legal heirs is valid. (*Addison and Din Mohammad, JJ.*) UMRA v. FATEH UD DIN.

40 P.L.R. 512.

——(Punjab)— *Succession—Delhi Province— Property inherited by daughter—Devolution.*

According to the custom recorded in the *riwaj i am* [illegible]

rule in *riwaj-i am* that the husband inherits the property of the wife, merely refers to land which is the absolute property of the wife, as, for instance, property gifted to her or property which is her stridhan. It does not relate to property inherited by her as a daughter. In the absence of a clear indication to the contrary, she must be deemed to succeed to an ordinary estate of a female, if not under the Customary law, under the Hindu law. To such property the heirs of her father are entitled to succeed in preference to her husband because on her death the property must be deemed to revert to such heirs. The proprietors of the thulla need not be the descendants of the common ancestor as no such restriction is found in the *riwaj i am.* (*Jai Lal J*) KALI RAM v. BHIKU. **A.I.R. 1938 Lah. 468.**

——(Punjab)—*Succession—Right of—Sameness of got.*

The circumstance that a per[illegible] the deceased cannot give him [illegible] property of the deceased, even [illegible] no issue or near relations. (*Tek Chand, J.*) NAURATA v. RAN SINGH. **40 P.L.R. 544 (2).**

——(Punjab)—*Succession—Sayeds of Dera Ghazi Khan District*

In the Customary law of the Dera Ghazi Khan District, Sayeds are described as following Mahomedan law in matters of succession (*Tek Chand, J.*) NOTAN DAS v. KARAM HUSSAIN SHAH [illegible]

DEBTOR [illegible]

—*Negotiable* [illegible]

The ordina[illegible] his creditor does not apply in the case of a negotiable instrument (*Vivian Bose, J.*) DALSUKH NATHMAL v. MOTILAL. **A.I.R. 1938 Nag. 262.**

DECREE—*Instalment decree— Default clause — Waiver— Right of decree-holder.*

A provision in a decree payable in instalments that on [illegible]

— *Recitals in—Effect of.*

A recital in a decree taken apparently from the plaint and not contained in the operative portion, is merely descriptive of the plaintiff's case, and is not a part of the declaration granted by the decree (*Jack and Khundkar, JJ.*) LAKSHMI NARAYAN JIE v. JAGADISH CH. SUR. **42 C.W.N. 837.**

EVIDENCE ACT (1872), S. 30.

DEED—*Construction—Single or different tenancies—Dakhila mentioning one rent and giving two names as tenants.*

Where a Dakhila mentions one rent and gives the names of two persons as tenants, there are no two tenancies but the tenancy belongs jointly to two persons. (*R. C. Mitter, J.*) SURENDRA NATH MONDAL v. BHUDAR CHANDRA SAFUI. **67 C.L.J. 136.**

EVIDENCE ACT (I OF 1872), S. 13—*Orders under S. 145, Cr. P. Code—Judgment relating to—Admissibility.*

Orders under S. 145 relate essentially to the possession of land and partake something of the nature of *interim* proceedings in a Civil Court; and the order itself partakes something of the nature of a decree, so that a [illegible]

[illegible] *and Mehta, J.*) TAHILRAM TACKCHAND v. MT. MIRAL.

A.I.R. 1938 Sind 132.

——S. 13—*Recital in decree—Admissibility.*

A recital in a decree is admissible as assertion of a right claimed by a party under S 13 of the Evidence Act (*Patterson, J.*) KAMESHWAR SINGH v. HRIDOY NATH SAHOO. **67 C.L.J. 111.**

——S. 13—*Scope and effect of—Findings of fact in previous suit—Admissibility.*

The purpose of S. 13 is to enable a right which may be constituted by a number of acts by the exercise of the right itself *animo domini*, on numerous occasions, to be proved by transactions or particular instances in which the right or custom in question was asserted or denied, but by evidence otherwise admissible. A judgment is admissible because it is the evidence or integration of a [illegible]

Court, but not for the purpose of proving the reasons for the Court's decision and for using its findings of fact as evidence of those facts in another case. Thus, though a judgment in other proceedings even though not *inter partes* is admissible in evidence as what has been described as an integration of judicial proceedings, themselves held to be a transaction within the meaning of S 13, its admissibility is subject also to other provisions [illegible] the overriding [illegible] make a finding [illegible] one Court in [illegible] case. (*Davis, J.C. and Mehta, J.*) TAHILRAM TACKCHAND v. MT. MIRAL. **A.I.R. 1938 Sind 132.**

——S. 30—*Joint trial of two persons one for rape and other for abduction—Confession of one—If admissible against other.*

When two persons are jointly tried, one for the offence [illegible] the abduction of that [illegible] same offence. Conse[illegible] one of them affecting [illegible] admissible in evidence [illegible] of the Evidence Act. [illegible] *erjea, J.*) NARESH CHANDRA v. EMPEROR. **42 C.W.N. 814.**

——S. 30—*Retracted exculpatory confession—Admissibility against co-accused.*

A confession by an accused of an exculpatory nature and subsequently retracted cannot be used against a co-accused though it may be admissible as against himself

EVIDENCE ACT (1872), S. 35.

(*Mohammad Noor and Varma, JJ.*) EMPEROR *v.* RAMSIDH RAI. **A.I.R. 1938 Pat. 352.**

——S. 35—*Copies of Shaira and Khasra of Municipal Committee—Admissibility.*

The copies of Shajra and Khasra of the Municipal Committee are documents falling under S. 35 of the Evidence Act having been prepared by the employees of the Municipal Committee in the discharge of their official duties. Such documents are, therefore, admissible in evidence, although no presumption of correctness attaches to them. (*Addison and Din Mohammad, JJ.*) JASSA RAM *v.* PURAN BHAGAT.

A.I.R. 1938 Lah. 440.

——**S. 92**—Mistake— Palpable error — Equity, if sanctions admission of evidence to expose error. *See* SURETY BOND—CORRECTION.

A.I.R. 1938 Nag. 259.

——**S. 92, Proviso 2**—*Document containing only some terms of tenancy—Evidence of separate oral agreement containing other terms—Admissibility.*

Where a document contains only some of the terms of a contract of tenancy, evidence of a separate oral agreement containing other terms which were not reduced to writing can be given under Proviso 2 to S. 92. (*Khundkar, J.*) CHAMPARAN JAIN *v.* SRIPATHI NATH DEB.

A.I.R. 1938 Cal 430.

——**S. 115**—*Representation—Mortgage of holding by tenure-holder—Decree obtained by mortgage—Execution by sale of holding—Plea of non-transferability of tenure—If open in execution.*

It is not open to a tenure-holder judgment-debtor, who has obtained advances on mortgages of his holdings on the representation that he was in enjoyment of a transferable interest in land, to object to a sale of his holding in execution on the ground that his interest is one which is not transferable. The landlord may be entitled to object to the transfer; but the tenant cannot in execution prevent the sale of his own right, title and interest by putting forward the plea that the landlord's consent would be required to complete the title of the purchaser. That is a matter between the purchaser and the landlord. (*Courtney Terrell, C J and James, J*) SOMAR RAM *v.* BUDHU RAM. **19 Pat.L T. 421.**

——**S. 116**—*Denial of lessor's title—When permissible.*

A tenant is not estopped merely because by the tenancy he acknowledges the title of his landlord and a tenant may always explain and thereby render inconclusive acts done through mistake or misapprehension. It is permissible to a tenant to deny his lessor's title if it is shown that he executed the lease in ignorance (*Mosely, J.*) ALAGAMMAI ACHI *v.* P.L.P.R P.R. FIRM.

A.I.R. 1938 Rang. 227.

EXECUTION—Objection by debtor—Mortgage by tenant of holding—Decree on—Sale of holding in execution—Plea by tenant that holding is non-transferable—If open—Estoppel. *See* EVIDENCE ACT, S. 115.

19 P L.T. 421.

FAMILY SETTLEMENT—Upholding and setting aside—Considerations. *See* MINOR—COMPROMISE OF DISPUTES IN FAMILY. 1938 A.L.J. 519 = **A.I.R. 1938 P.C 181 (P.C.).**

GOVERNMENT OF BURMA ACT, S. 85—Objection that pleader engaged by opposite party should not be allowed to appear—Objection accepted in lower Court—Interference. *See* C. P CODE, S 151.

A.I.R. 1938 Rang. 241.

GOVERNMENT OF INDIA ACT (1935), S 224 (2)—*Interlocutory order—Revision.*

S. 224 (2) limits the High Court's powers to question judgments of inferior Courts to those given under the ordinary law. Hence High Court cannot entertain a revision from an interlocutory order which is not a decided case. (*Skemp, J.*) AMAR SINGH *v.* SECRETARY OF STATE **A.I.R. 1938 Lah 442.**

GUARDIAN AND WARD—*Transfer by guardian—Remedy of ward—Suit to set aside—If essential—Repudiation—What amounts to.*

A transaction which is voidable at the instance of the minor may be repudiated by any act or omission of the late minor, by which he intends to communicate the repudiation, or which has the effect of repudiating it, for instance, a transfer of land by him avoids a transfer of the same land made by his guardian before he attained the age of majority. It is not necessary that he should bring a suit; but a suit to set aside the acts of his guardian during his minority amounts of course to an express repudiation. (*Wort and Manohar Lall, JJ.*) JAGDAMBA PRASAD *v.* ANADI NATH. **A.I.R. 1938 Pat. 337.**

GUARDIANS AND WARDS ACT (VIII OF 1890), S 19—Scope—If controls S. 3 of the Majority Act—Father a minor alive and fit—Order appointing guardian—Legality—Effect on period of minority. *See* MAJORITY ACT, S. 3. **32 S.L R. 215.**

——**Ss 29 and 30**—*Applicability—Release by guardian of minor mortgagee's sub-soil rights—If void—Suit to set aside—Limitation.*

A deed executed by a guardian of a minor mortgagee releasing from operation of mortgage the sub-soil rights of the mortgage land in favour of lessee of the mortgagor in consideration of certain sum is a transfer of the equity of redemption and is covered by the wording of S. 29. The fact that the consideration mentioned in the deed was neither adequate nor reasonable nor for the benefit of the minor is no ground whatsoever for holding that the deed is void. Such deed is only a voidable transaction and requires to be avoided or set aside within the period of limitation and by the person affected thereby. The suit to set aside the deed is governed by Art. 44, Limitation Act (*Wort and Manohar Lall, JJ.*) JAGDAMBA PRASAD *v.* ANADI NATH.

A.I.R. 1938 Pat. 337.

——**Ss. 41 (3) and 45**—*Powers of Court under—If exercisable after termination of guardianship—Accounts filed prior to removal—If deemed to be passed.*

The power of a Court under S. 41 (3) of the Guardian and Wards Act to direct a guardian on termination of his guardianship to deliver any property belonging to the ward extends to monies belonging to the minor. S. 45 is not inapplicable to a guardian after his removal. In view of the above, it cannot be contended that the accounts filed by a guardian prior to his removal should be deemed to have been passed by the Court (*Dhavle, J.*) MUNNI LAL *v.* MUKHTESHWAR PRASAD.

175 I O. 173 = 4 B R. 535.

——**S 45**—Applicability—Removed guardian. *See* GUARDIAN AND WARDS ACT, SS. 41 (3) AND 45

175 I O. 173.

——**S. 45**—Ex parte *order imposing fine—Legality.*

An *ex parte* order imposing a fine under S. 45 of the Guardians and Wards Act for not producing a minor in Court is bad. Courts should not take proceedings, especially of a punitive kind, without giving the party concerned notice to show cause against such proceedings. (*Skemp, J.*) Mr. ALLAHDI *v.* ABDUL GHANI.

40 P.L R. 532.

HINDU LAW—*Debts—Father—"Antecedent debt"—Purchase of property by father—Subsequent mortgage to pay off purchase price—If binding on son as antecedent debt.*

To constitute a debt an antecedent debt it must be antecedent both in point of fact as well as in time. Where

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a Hindu father purchases a property and subsequently executes a mortgage for the purpose of raising money to pay the purchase money, it cannot be said that the mortgage debt is an antecedent debt so as to be binding on the mortgagor's son, although there may be antecedency so far as time is concerned. (*Wort and Varma, JJ.*) CHITRADHAR NARAIN DAS *v.* KHIDAR THAKUR. 17 Pat. 236

——*Joint family—Coparcener—Right to renounce interest in part of joint family property.*

There is no authority that a coparcener can renounce his interest in part of the joint family property in favour of one or all other co-parceners. (*Addison and Din Mohammad, JJ.*) MT. TULSI BAI *v.* HAJI BAKHSH. A.I.R. 1938 Lah. 478.

——*Joint family—Family trade—Manager admitting stranger to partnership—Effect on status and liability of the other members of the family.*

Where the manager of a trading family admits a stranger into the business partnership, the other members of the family who were partners in the business till then, do not thereby cease to be partners and to be liable for the debts of the business. (*Agarwala and Varma, JJ.*) DEBI PRASAD CHOWDHARY *v.* TARA PRASANNA NAIL. 175 I.C. 68 = 4 B.R. 519 (2).

——*Joint family—Karta—Agreement to refer to arbitration signed by—If on behalf of the family.*

[illegible] Hindu family has [illegible]

1938 A.L.J. 544.

——*Partition — Proof — Jointness or otherwise— [illegible] Factors to be taken note of—Actual* [illegible]

[illegible] wise of a family. There is no doubt that there can be a partition of the joint property without an actual division of the property by metes and bounds. According to the Mitakshara Law, partition consists in defining shares of the coparceners in the joint property and a physical division of the property is not necessary. Once the shares are defined, there is a severance of the joint status and thenceforth the parties hold as tenants-in-common. (*Sir Shadi Lal*) HARKISHAN SINGH *v.* PARTAM SINGH. 175 I.C. 332 (P.C.).

——*Migrating family—School of law applicable—Presumption—Family migrating to Bengal—Dayabhaga—Applicability.*

Per *Wort, J.*—Ordinarily speaking, a Hindu family in Bengal would be governed by the Dayabhaga school. It is true that the fact that a family has migrated to Bengal raises a presumption in law that the family is governed by the school of law from that part of the country from which it came. But the mere fact that the family history can be traced back in Bengal for five or six generations does not necessarily raise the presumption that the family migrated to Bengal. (*Wort and Manohar Lall, JJ.*) JAGDAMBA PRASAD *v.* ANADI NATH. A.I.R. 1938 Pat 337.

——*Succession — Widow — Co-widows—Right of survivorship—If may be relinquished.*

Under Hindu Law, when there are two or more widows succeeding as co heirs to the estate of their deceased husband they take as joint tenants with rights of survivorship and equal beneficial enjoyment. The right of survivorship may be relinquished by agreement between the widows. (*M. C. Ghose J.*) UCHMATAN *v.* RAJENDRA NATH SANYAL. 67 C.L.J. 115.

——*Widow—Alienation by—Alienee in possession—Acquisitions by out of income—If accretions to estate.*

It is impossible to extend the doctrine of accretion to cases where a stranger, claiming title to a portion of a limited owner's estate by reason of an alienation by the widow, makes acquisitions out of the income of the properties thus coming into his possession; he is not a representative of the estate and no question of accretion can therefore arise. (*Varadachariar and King, JJ.*) RAMAYYA *v.* LAKSHMAYYA. A.I.R. 1938 Mad. 513.

——*Widow — Surrender — What amounts to—Arrangement between widow and her mother-in law in nature of vibhaga—Mother-in law taking larger share—Widow reserving to herself interest in remainder in certain items and asserting claim to certain share—Nature of.*

Where a widow and her mother-in-law enter into an arrangement in the nature of a vibhaga or division, the fact that the mother in law takes a larger share than that taken by the widow cannot alter the nature of the arrangement and turn it into one in the nature of a surrender by the widow. Similarly if the widow reserves to herself an interest in remainder in certain items of [illegible] asserts her rights to [illegible] other-in law during her [illegible] not be treated as a [illegible] of her mother-in-law. [illegible] RAMAYYA *v.* LAKSHMAYYA. A.I.R. 1938 Mad. 513.

——[illegible] *render by daughter-in-law in favour of aged mother-in-law—Validity—Presumption against.*

Consistently with the spirit of the Hindu Law, it is [illegible] woman making a [illegible] down in the line of [illegible] reversioner. But, it is [illegible] daughter in-law, who was not even aged 20 at the time, even assuming that she was a major, could be anxious to efface herself and surrender the estate in favour of her aged mother-in-law. (*Varadachariar and King, JJ.*) RAMAYYA *v.* LAKSHMAYYA. A.I.R. 1938 Mad. 513.

INCOME TAX ACT (XI OF 1922) (Burma)—*Construction—English decisions—Value of.*

Extreme care must be taken in applying English decisions to cases under the Burma Income tax Act, because the Scheme of the English Income-tax Act, 1918 and the Scheme of the Burma Income tax Act, 1922, are entirely different. (*Roberts, C. J., Mya Bu and Dunkley, JJ.*) COMMISSIONER OF INCOME TAX, BURMA *v.* N. S. A. R. CONCERN. 175 I.C. 287 = A.I.R. 1938 Rang. 151 (S.B.).

——(Burma), S. 10, (2) (ix)—*Construction—"Such profits or gains"—If covers 'agricultural income'.*

The expression "such profits or gains" in Cl. (*ix*) of S. 10 (2) does not include "agricultural income" and consequently when the business of an assessee comprises both agricultural income, as defined in the Act, and other (taxable) income, the assessee is not entitled, under S. 10 (2) (*ix*), to deduct from such other income the expenditure incurred for the special purpose of earning the agricultural income. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) [illegible] OF INCOME-TAX, BURMA *v.* [illegible]

——**Ss. 13 and 66 (3)**—*Rejection of assessees' books—Amount of flat rate—If entirely discretionary—Computation of profits at a high rate—If a ground to direct Commissioner to state a case.*

Under S. 13 of the Income-tax Act, the Income-tax Officer has a discretion to accept or reject the assessees' books. If he rejects them, as he is entitled to do and if the principle of flat rate thereby becomes applicable, the amount of such rate is entirely in the discretion of such officer. The mere fact that a high rate of profits has been applied by the department will not by itself warrant the High Court in directing to Commissioner to state a case. (*Collister and Bajpai, JJ.*) GANESH LAL & SONS, *In re.* **1938 A.L.J. 507 = 1938 A.W.R. (H.C.) 332 = A.I.R. 1938 All. 367.**

——**S. 23 (4)**—*Determination of tax—Power of Income tax Officer.*

Even if the power to determine the tax payable by the tax-payer be not given expressly by the directions to "make the assessment", such power is plainly implied, reading the section as a whole. (*Lord Romer.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* KHEMCHAND RAMDAS. **175 I.C. 1 = A.I.R. 1938 P.C. 175 (P.C.).**

——**Ss. 23 (4), 33, 34 and 35**—*Final assessment under S. 23 (4)—When can be reopened—Powers of Commissioner.*

It is true that the Act nowhere imposes any limit of time within which an assessment under the provisions of Ss. 23 and 29 is to be made, and that the service of the notice of demand can therefore be made at any time. But it is not true that after a final assessment under those sections has been made, the Income-tax Officer can go on making fresh computations and issuing fresh notices of demand to the end of all time. When once a final assessment is arrived at, it cannot be reopened except in the circumstances detailed in S. 34 and S. 35 of the Act and within the time limited by those sections. It is quite impossible to suppose that the Income-tax Officer may in every kind of circumstance and after any lapse of time make fresh assessment or issue fresh notices of demand; or that the Commissioner can direct him to do so. The Commissioner's powers under S. 33 can only be exercised subject to the provisions of the Act, of which the provisions in Ss. 34 and 35 are in this respect of the greatest importance. Where therefore an assessment is made under S. 23 (4) of a registered firm assessing it only to income-tax, the assessment is final in respect of income-tax and super-tax. If on the discovery of a mistake the registration is cancelled by the Commissioner under S. 33, the order assessing the firm to super-tax more than one year after final assessment under S. 23 (4) is beyond the powers of Income-tax Officer. (*Lord Romer.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* KHEMCHAND RAMDAS. **175 I.C. 1 = A.I.R. 1938 P.C. 175 (P.C.).**

——**S. 30, Proviso**—*Assessment purporting to have been under S. 23 (4)—Appeal.*

The mere fact that the assessment purports to have been made under sub-S. 4 of S. 23 does not shut out the appeal; it must be shown that the circumstances of the case bring it within the scope of that sub section. A.I.R. 1929 Lah. 593, Appr. (*Lord Romer.*) COMMISSIONER OF INCOME TAX, BOMBAY *v.* KHEMCHAND RAMDAS. **175 I.C. 1 = A.I.R. 1938 P.C. 175 (P.C.).**

——**Ss. 33 34 and 35**—Final assessment under S. 23 (4)—When can be reopened—Powers of Commissioner. *See* INCOME-TAX ACT, SS. 23 (4), 33, 34 AND 35. **A.I.R. 1938 P.C. 175.**

—— **Burma), S. 54**—*Object of—Copies of income-tax returns and statements—Power of Court to compel party to produce.*

The object of S. 54 of the Income tax Act clearly is to make the income-tax returns and statements confidential as between the assessee and the income-tax department, and against the whole world, except for certain limited purposes provided by the section itself. A Court cannot, on the application of a defendant, order the plaintiff under the provisions of O. 11, R. 11, C. P. Code, to obtain certified copies of his returns and statements of his agent made before the Income-tax Officer, as that would clearly be an evasion of the prohibition contained in the section. Such copies are inadmissible in evidence unless the plaintiff desires their retention. (*Mosely and Dunkley, JJ.*) MA HLA MRA KHINE *v.* MA HLA KRA PRU. **1938 Rang. L.R. 243.**

——**S. 59 (2) (a) (ii)**—*Rules under R. 30—Construction—'May be treated as expenditure'—Meaning of—If confers option on Income tax Officer—Right of assessee—Sums set aside towards depreciation—If to be brought back in time of appreciation of securities.*

The words "may be treated as expenditure" in R. 30 of the rules framed under S. 59 (*a*) (*ii*) of the Income-tax Act cannot be interpreted as conferring upon the Income-tax Officer and upon him alone the option to treat sums written off to meet depreciation of, or loss on securities or other assets, or carried to a reserve fund formed for that sole purpose, and not used for any other purpose, as expenditure incurred solely for the purpose of earning the profits of the business. Such a construction would do violence to the plain words of the rule. The rule really confers an option on the assessee to write off in his accounts to meet depreciation or to carry to a reserve fund to meet depreciation any amount which is justified by an actual loss in any particular year. In 1930 and 1931, there was a substantial depreciation in the investments held by a life assurance company, and the company set aside to a special depreciation account sums considerably less than the amounts of the depreciation out of the profits. The reserve fund was formed for the sole purpose of meeting the depreciation. In 1932, there was an appreciation with the result that the losses of the previous two years were wiped out, and there was a small appreciation in the three years. The Income-tax Officer refused to grant any deduction from income liable to tax on account of the sums set apart towards the reserve fund as an item of expenditure.

Held, that the sums having been properly placed to the special reserve in the first two years of the triennial period, there was nothing in the rules which required that they be brought back into the revenue account as soon as the depreciation which they were designed to meet had been made good. R. 30 plainly permitted the assessee company to treat the amount so written off or set aside as expenditure incurred solely for the purpose of earning the profits of the business, and there was nothing in the rule to compel the assessee who has exercised his option to bring back the sums properly set aside under the rule. The mere fact that there was any appreciation in the securities in the third year was entirely irrelevant. (*Beaumont, C. J. and Blackwell, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* WESTERN INDIA LIFE ASSURANCE CO., LTD. **40 Bom L.R. 447.**

——**S. 66 (2) and (3)**—*Competency of appeal to Assistant Commissioner in question—Decision of Commissioner adverse to assessee—Assessee's right to get question decided by Court.*

INCOME TAX ACT (1922), S. 66.

Where one of the questions of law arising out of the order of t e Assistant Commissioner was whether the appeal to him was competent in view of the proviso to S. 30(1), by deciding this question himself adversely to the assessee, the Commissioner cannot deprive the assessee of the right of having the question decided by the Court. (*Lord Romer.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* KHEMCHAND RAMDAS.
175 I C 1 = A.I.R. 1938 P.C. 175 (P.C.).

——S. 66 (3)—Question of law—Computation of profits at a high rate—If a ground to direct Commissioner to state a case. *See* INCOME TAX ACT, SS. 13 AND 66 (3). 1938 A W R (H C) 332 = A.I.R. 1938 All. 367.

INDEMNITY—*Principle underlying—Nature and extent of protection.*

"It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party the person doing it is entitled to an
it should be d
contract implie
to indemnity t
him of acting

on the basis
request is the
er party acts
that request to his damage. (*Lord Wright.*) SECRE-

sactions with such property—Valid
When the Official Assignee do
transactions in respect of property
insolvency with any person dealing
bona fide and for value are valid
Assignee. (*Shaw, J.*) SOLOMO
KING. A.I

INSURANCE—*Life insurance—*
answers by assured to questions by company—Liability of company.

A policy of life insurance stated that the policy was based on statements made by the assured, which should, in the absence of fraud, be deemed representations and
gative replies to
to whether any
from consump
house or been
associated in any way with a case of tuberculosis within two years, and whether he had ever consulted a medical practitioner for fits or other ailments within the last five years. There was evidence to show that an aunt of the assured who lived with him in the same house, was

during the last five years. The Chief Medical Officer of the Insurance Company gave evidence that if he had
sured, he
also refer-
a policy.
fainting
fits and upon further investigation had found that these came on suddenly, he would have rejected the proposal.

JURISDICTION.

Held, that the answers given to the company were untrue and fraudulent, in the sense that they were made with knowledge of their falsity, and were designed to induce the company to accept the life of the assured on terms which they would have declined, had they known the truth, and that, therefore, the company was entitled to repudiate their liability under the policy. (*Costello and Panckridge, JJ*) MANUFACTURERS LIFE INSURANCE CO., LTD. *v.* SM. HARIDASI DEBI.
42 C.W.N. 823.

INTERPRETATION OF STATUTES—*Case interpreting English Act—Value of.*

An English case interpreting an Act of Parliament is no guide for the interpretation of a section of an Indian Provincial statute, especially where the wordings in the two Acts are different. (*Davis, J. C. and Lobo, J*) TARACHAND PRIBHDAS *v.* EMPEROR.
A I.R. 1938 Sind 116.

——Changing law—Clear language—Necessity. *See* SECURITIES ACT, S. 21. 175 I.C. 327 (P.C.).

which had no
had liberty to
the *prima facie*
construction of the Act is that it is not to be retrospec-
sary implication from the lan-
Legislature intended a parti-
a retrospective operation, the
n operation because it is obvi-

A.I.R. 1938 Pat. 332.

JURISDICTION—Civil and Revenue Courts—Right of mortgagee lessor to sue for rent in Revenue Court—If affected by decision of suit under S. 33 of the U. P. Agriculturists' Relief Act. *See* U. P. AGRICUTURISTS RELIEF ACT, S. 33. 1938 O.A. 434.

——Determination—Plea by defendant that plaintiff has purposely over-valued claim—Duty of Court to raise specific issue on point. *See* PRACTICE—ISSUES.
A.I.R. 1938 Sind 124.

——*Place of suing—Dishonour of hundis.*

One *A* drew at Nagpur two hundis on a firm of Bombay in favour of *B* of Nagpur. *B* negotiated them in
ccessive negotia-
favour of *C* of
d and the drawee
instituted a suit
at Raipur against *B* and other indorsers.

Held, that the only cause of action in which the defendants in the case were jointly liable was the cause of action on the principle contract, that is to say the contract in which the drawer *A* was liable as the principal debtor. The rest were all liable as sureties and their liability being co-extensive with that of the principal debtor the cause of action against them when sued along with the principal

LANDLORD AND TENANT.

against the principal and no other. That was the only cause of action on which they were all jointly liable and therefore the only cause of action upon which they could all be proceeded against in one suit. The cause of action on the principal contract under which the drawer was liable as principal debtor arose exclusively at Nagpur and no part of it arose at Raipur because firstly the hundis were drawn at Nagpur, secondly notice of dishonour under S. 35, Negotiable Instruments Act, had also to be given at Nagpur where the drawer had his place of business or residence and thirdly the compensation according to S. 81, Negotiable Instruments Act was also payable at Nagpur, the place of residence of the drawer. This being so the Raipur Court had no jurisdiction to try the suit. (*Vivian Bose, J.*) DALSUKH NATHMAL *v.* MOTILAL. **A.I.R. 1938 Nag. 262.**

LANDLORD AND TENANT—*Nature of tenancy—Person holding land from lessee under permanent ijardar.*

Where a person holding a lease under a permanent ijardar is himself a raiyat, the status of persons holding land under him, under a lease granted for residential purposes, is that of under-raiyats. (*Henderson, J.*) UPENDRA NARAYAN MUKHERJEE *v.* BEPIN BEHARI. **A.I.R. 1938 Cal. 429.**

——*Occupancy rights—Acquisition by a tenant in a Joint tenancy—Proof of separate tenancy—Onus.*

Where in a joint tenancy one of the tenants claims to have acquired occupancy rights, the onus is on him to prove that he in fact had a separate tenancy for the requisite period. (*Darling, S. M. and Bomford, J.M.*) BENI MADHO PRASAD SINGH *v.* DUKHI. **1938 A.W.R. (B.R.) 207.**

——*Permanent tenancy—Inference of—Origin unknown—Land occupied by same tenant for over 100 years—Erection of thatched buildings with mud walls—If permanent.*

Where it is found that the origin of a tenancy is unknown, that the family of the tenant has occupied the [illegible] for at least 100 years, that the land has been used for residential purposes, that no rent has been paid and that the land has been occupied by a building consisting of twelve rooms and three court-yards, the walls being made of mud and the roofs thatched, the tenancy is a permanent one. The mere fact that the building is made of mud and not of bricks is not a feature which would prevent a Court from holding, as a matter of law, that the tenancy was not a permanent one, as the fact whether the buildings are made of mud or bricks depends very largely upon the financial position of the person occupying the land. The question of the nature of a tenancy being a mixed question of fact and law, the inference to be drawn from the nature of tenancy becomes a question of law which can be gone into in second appeal. (*Wort, J.*) SHAIKH DARGAHAN *v.* HAFIZ MOHAMMAD. **A.I.R. 1938 Pat. 333.**

——*Rent—Suit for—Maintainability—Lessee leaving premises before expiry of term.*

A person contracted to take certain premises on lease for a period of three years and subsequently extended it to a period during which he would remain in the town. After remaining in possession of the premises for a long period he left the premises without any sufficient reason before the expiry of the term in spite of the warning given by the landlord that he would be liable for rent so long as he would remain in the town. The landlord thereupon took possession of the premises and brought a suit for recovery of rent for a part of the unexpired period of lease.

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Held, that a suit for rent could lie for the unexpired period of lease. (*Tek Chand, Offg. C.J.*) H. G. LUSH *v.* RAM CHAND MANCHANDA. **A.I.R. 1938 Lah. 454.**

——Rent—Suit for in respect of part of holding—Competency—Right to money decree. *See* BIHAR TENANCY ACT, S. 148. **A.I.R. 1938 Pat. 305.**

——*Rent—Suspension of—Principle.*

Even in the case of dispossession by the landlord, the question whether a tenant would be entitled to suspension of rent is to be determined with reference to the facts of each particular case, and the sound course would be to determine what is equitable in each case. (*Chatterji, J.*) SHIVA PRASAD SINGH *v.* DEOKI KUER. **175 I.C. 61 = 4 B.R. 516.**

LAND TENURES—Thika doami *tenure in Hazaribagh—Nature and incidents—Transferability by sale or mortgage.*

In order to demonstrate that a particular tenure is not transferable it must be shown that the tenure-holder occupies something in the nature of an office rather than the mere enjoyment of property. If that is not shown and the tenure is created by a patta, the presumption is that it is transferable by way of sale or mortgage. A tenure held under the proprietor of the Gande Estate in the Hazaribagh District was described in the record-of rights as created by a patta of the year 1879, and was shown as a *thika doami* tenure. There was a remark that the rent was not permanently fixed, but there was nothing to suggest that the tenure-holder enjoyed any right other than that conferred upon him by his patta. He did not produce the patta.

Held, that the effect of the entry in the record-of-rights would be to warrant the presumption that the tenure was a permanent one but held at a rent liable to enhancement and that the tenure-holder was entitled to transfer it by sale or mortgage. (*Courtney Terrell, C.J., James, J.*) SOMAR RAM *v.* BUDHU RAM. **19 P.L.T. 421.**

LEASE—*Agricultural lease—Portion of leased land planted with the shrubs—Tenant at liberty to utilise rest for any purpose—Nature of lease.*

A good portion of land which was subject-matter of a lease had already been planted with tea shrubs and on a portion thereof was a factory for manufacturing tea. There was a covenant in the lease that the tenant was not to break up or convert any part of the land which was under tea cultivation for any other purpose but that he could use the rest of the land for any other purpose but not so as to affect prejudicially the said tea estate.

Held, that the lease was one for agricultural purposes. (*Mitter and Biswas, JJ.*) PRAVAT CHANDRA SYAM *v.* BENGAL CENTRAL BANK, LTD. **42 C.W.N. 761.**

——*Assignment—Restraint by condition or convenant—Effect of—Lessee's power to assign subject to condition—Assignment not fulfilling condition—Validity.*

If a term is granted subject to a condition against assignment, an assignment by the lessee will be void but if the restraint is by covenant only, the lessee, by assigning, commits a breach of covenant but the assignment itself is not void, though the landlord can put an end to it as soon as the assignment comes to his knowledge if the lease contains a power of re-entry. If a grantor can by a stipulation withhold from the grantee the power to assign absolutely, it follows that he can make the power to assign subject to conditions and can stipulate that any purported assignment which does not fulfil those conditions shall not be valid. A clause in a *maurashi mokrari potta* was as follows :—"If at any time you (grantees) transfer by sale any land (comprised in the tenure), then the transferee shall be bound to pay

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us (grantors) a *chauth* or one-fourth of the consideration money as *kharij* (mutation) fee; in default of such payment his transfer shall not be valid."

Held, that the clause was not a covenant but was a

that clause. (*Costello and Panckridge, JJ.*) SRIDHAR

Nature of lease.

Where a lease expressly states that its object is to enable the tenant to reside in the land on erection of structures, the fact that the land is described as a *bagat* land or that the landlord used in a litigation between the parties words which would be appropriate to an agricultural tenancy, cannot alter the nature of the lease which is one for residential purposes. (*Mukherjea, J.*) UDOYTARA SAHA *v.* HABIBAR RAHAMAN.

42 C.W N. 771

LEGAL PRACTITIONERS ACT (XVIII OF 1879)

S. 13—*Pleader under taking responsibility for defalcations by his co-trustee—Disciplinary action if called for*

defalcation and undertakes responsibility for the defalcation which had arisen, he cannot be held to be guilty

A.I.R. 1938 Rang. 158.

——S. 13 (b) and (f)—*Pleader entering record-room without permission of Judge in charge in defiance of standing order of District Judge—Propriety—Duty of pleader and of Judge-in-charge.*

When there is a standing order of the District Judge forbidding the pleaders and the public from entering into the record room, it is the obvious duty of pleaders to obey that standing order and to refrain from entering into the record-room. The Judge-in-charge of the record-room should also see that the orders of the District Judge forbidding entry into the record-room by the public or pleaders are strictly obeyed. (*Courtney Terrell, C.J., James and Manohar Lall, JJ.*) KARUNA KANT PRASAD, PLEADER, *In re.* 17 Pat. 261 (S.B.).

——S. 13 (f)—*Conviction for offence of receiving stolen goods—If a disqualifying circumstance.*

A person who is convicted of so serious an offence as of receiving stolen goods, even though the property may not be of very great value, is not fit to be a pleader. (*Roberts, C. J. and Dunkley, J.*) U, A LOWER GRADE PLEADER, *In the matter of.*

A.I

——S. 13 (f)—*Conviction for—*

I. P. Code—Offence committed in

qualifying circumstance—Non disclosure of offence when applying for admission—Propriety.

An offence of the character of one under S. 377, I. P. Code, committed by a pleader or advocate cannot be ordinarily condoned. Where, however, the offence was

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committed very early in life, it ought not to debar the person, committing it, who is making an honest attempt to reform, from ever seeking respectable society or from being a member of an honourable profession. So also

ng the offence does not bring

e High Court at the time of

when required to give all

necessary information at the time of his enrolment he

stances of their past career with the knowledge that the High Court would take into consideration every matter which ought properly to be dealt with by it. (*Roberts, C. J. and Dunkley, J.*) T. K., A HIGHER GRADE PLEADER, *In the matter of*

175 I.C. 124 = A.I.R. 1938 Rang 159.

——S 14—*Procedure—Subordinate Court drawing up charge and holding inquiry—Finding that no case made out and no report to be made—Order dropping proceedings—District Judge disagreeing with finding—Proper course—Reference of proceedings without fresh proceedings and without recording of evidence—Competency—Powers of High Court.*

to the High Court recommending suspection He has no jurisdiction to forward the proceedings which were

er initiated by him or to act on the evidence which

never recorded by him. A reference to the High

rt by the District Judge in such a case is *ultra vires.*

e District Judge disagrees with the findings of the Subordinate Court, he is at liberty to draw up fresh proceedings and after giving notice to the pleader record himself all evidence in support of the charge or to repute the charge, and then after adjudicating thereon he can report to the High Court if in his view the conduct of the pleader deserves a punishment to be meted out by the High Court. It is also open to the High Court to draw up fresh proceedings and then to dispose of the matter after giving notice to the pleader and after hearing his defence if any. (*Courtney-Terrell, C. J., James and Manohar Lall, JJ.*) KARUNA KANT PRASAD, PLEADER, *In re.* 17 Pat 261 (S.B.).

LIMITATION—*Cause of action—Hindu widow—Arrangement with mother-in law—Latter taking possession of estate under—Suit for possession by reversioner after widow's death alleging that arrangement with mother-in-law not binding on him—Cause of action—Starting point of limitation.*

In the case of a succession by a reversionary heir after the death of a widow, who takes by inheritance from her husband and is dispossessed, the period of limitation as against the reversionary heir, in the absence of fraud is not to be reckoned from the time when he succeeds to the estate but from the time at which it would have been reckoned against the widow if she had

possession of the property not immediately but only in pursuance of an arrangement between her and her daughters in law, there is no reason to hold that any cause of action accrues to the widow against her mother-in law as on a dispossession. The possession taken by

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the mother-in-law in pursuance of an arrangement cannot be said to amount to a dispossession of the widow as representing estate. If no cause of action therefore accrues to the widow, there is no question of the reversioner having to rely on a second cause of action. His only cause of action arises on the death of widow; on the contention that the arrangement entered into by the widow is not binding on the reversioner. (*Varadachariar and King, JJ.*) RAMAYYA *v.* LAKSHMAYYA.

A.I.R. 1938 Mad. 513.

——*Extension of time—Right of auction-purchaser—Order of executing Court referring him to regular suit—Fresh start.*

Anything done behind the back of a debtor does not tend to extend the period of limitation originally provided for the recovery of a debt under the Limitation Act. One *R*, along with three other persons, obtained a contract from the Municipal Committee and the firm in whose name the contract stood deposited certain sum with the Municipality by way of security. Subsequently one *S* instituted a suit for recovery of some money against *R* in his individual capacity and obtained a decree in execution of which he attached and sold the amount lying in deposit with the Municipality. The amount was purchased by *B*. In the meanwhile the other partners of the firm in whose name the contract had been obtained instituted a suit against the Municipality for recovery of the deposit money and obtained a decree. Throughout the pendency of this suit *B* made no attempt to be brought on record as plaint. *B* however instituted a suit for recovery of certain amount against the Municipality on the basis of his purchase of *R's* rights in the deposit money. The suit was beyond the period of limitation.

Held, that *B* could not claim extension of limitation period. Had *R* put forward a claim against the Municipal Committee for recovery of the deposit amount he could sue only within period prescribed for the suit. His rights were in execution of his decree purchased by *B* who as assignee from *R* stood in his shoes and could not by the mere fact of his purchase override the provisions of the Limitation Act. It could not be argued that once attachment of the amount was made, the Limitation Act ceased to operate and that *B*, the auction purchaser, was at liberty to recover the amount at any time he liked in complete disregard of the provisions of the Limitation Act. Moreover, *B* could not claim fresh period of limitation merely on the basis of an order of the execution Court which referred him to a regular suit if so advised.

Held, further, that there was other defect in *B's* suit. The very sale relied upon by *B* was illegal inasmuch as it obviously disregarded the clear provisions of law as laid down in O. 21, R. 49, C. P. Code. (*Addison and Din Mohammad, JJ.*) ISHAR DAS *v.* RALLIA RAM.

A.I.R. 1938 Lah. 437.

LIMITATION ACT (IX OF 1908), S. 5—*Reasonable cause—Inconvenience of party to attend Court as per Court's direction.*

An appeal was filed by a counsel on behalf of one *S*. During the hearing of the appeal the signature on the power-of-attorney was doubted. The counsel filed certain affidavits the purport of which was that power of attorney had been signed by *S* in blank at the time he started the litigation, that he had handed the paper bearing his signature to his agent *W* and that it was *W* who had engaged the counsel. The Court doubting this and the signature of *S*, directed *S* to attend personally in the Court, but he did not attend as he thought it inconvenient to attend personally. After the final hearing

LIMITATION ACT (1908), S. 28.

W asked the Court that he might be permitted to sign the counsel's power-of-attorney. The Court could not allow *W* to sign it at that stage because to do so would defeat the provisions of the Limitation Act. As *S* did not appear the Court dismissed the appeal under O. 41, R. 17, C. P. Code.

Held, that the Court had discretion to direct the personal appearance of *S* in order to satisfy itself as to the genuineness of his signature.

Held further, that the non-appearance of *S* because it did not suit his convenience was not a reasonable cause for employing S. 5, Limitation Act. (*Mackney, J.*) KONG HIP LON & CO. *v.* C. A.M.A.L. FIRM.

A.I.R. 1938 Rang. 214.

——**S. 5**—*Sufficient cause—Mistake of legal adviser.*

There is no authority for the view that a mistake of a legal adviser, however gross and inexcusable, if *bona fide* acted upon by the litigant, will entitle him to the protection of S. 5 of the Limitation Act. The facts of each case and the nature of the omission or mistake on the part of the legal adviser in each particular case, will have to be examined and scrutinized in order to find out whether there has been negligence or gross want of legal skill in the legal adviser, or whether there was merely a *bona fide* mistake not through misconduct or negligence or want of reasonable skill, but such as even a skilled person might make. It is only in the latter case that the litigant would be allowed the benefit of the section. (*M. N. Mukerji and S. K. Ghose, JJ.*) PHANI BHUSAN PAL *v.* SM. NALINIBALA DASI. **67 C.L.J. 107.**

——**S. 7**—*Family business—*A *and* B *Proprietors—*B, *a minor represented by certificated guardian—Power of* A *to give valid discharge.*

A and *B* were proprietors of a family business in two equal shares. *B*, who was a minor, was represented by a guardian appointed under the Guardians and Wards Act. A suit was filed by *A* and *B* for money due on account of price of goods supplied by their firm, within three years of the date on which *B* attained majority. The claim in suit was admittedly made about 14 years after the transaction in question.

Held, that *A* was not in the position of a managing member of an ancestral joint family business, who was competent to represent *B*, who had a certificated guardian, and he was not, therefore, competent to give any valid discharge as contemplated by S. 7 of the Limitation Act so far as *B's* half share in the family business was concerned, and that the claim of *B* in the suit could not be dismissed as barred by limitation. (*Guha and Bartley, JJ.*) GOURHARI GHOSE *v.* SRIMATI ANARDAI BIBI. **67 C.L.J. 88.**

——**S. 19**—*Basis of suit—Acknowledgment with promise to pay—Pro-note inadmissible.*

A subsequent acknowledgment containing clearly a promise to pay the balance due on a promissory note can be the basis of a suit, even though the original promissory note is not admissible in evidence. A.I.R. 1938 Lah. 503, Rel. on. (*Tek Chand, J.*) PUNJAB ZAMINDARS BANK *v.* MOHAMMAD SHAFFI.

A.I.R. 1938 Lah. 505.

——**S. 28**—*Tenancy for horticultural purposes—Structures erected by tenant—Suit for mandatory injunction by landlord dismissed as time-barred—Structures subsequently destroyed by fire—Transferee from tenant erecting fresh structure on same site—Landlord, if can bring fresh suit.*

Where a tenant erected structures on land let out to him for horticultural purposes and the landlord's suit for a mandatory injunction against him was dismissed as barred by limitation, the landlord cannot bring a fresh

LIMITATION ACT (1908), Art. 7.

suit against the transferee from the tenant if he, on the destruction of the structures by fire, erected a fresh structure on the same site so long as there was no change in the user of the land and the land was not again used for agricultural or horticultural purposes. (*Mukherjea, J.*) BHUPENDRA NATH *v.* TRINAYANI DEBI. 42 C W.N. 758.

——Arts. 7 and 56—*Applicability—Suit for remuneration by goldsmith for work done.*

Article 7 applies to a case where a household servant,

ments falls under Art. 56 and not under Art. 7. (*Niyogi, J.*) LAXMINARAYAN NATHMAL *v.* SHRI RAM DANMAL MARWADI. A.I.R. 1938 Nag. 286.

——Art. 29—*Attachment and receipt of amount deposited in Court by receiver—Suit to recover it back—Limitation.*

Where certain amount deposited in Court by the receiver appointed under *O. 40, R. 1, C. P. Code,* is attached and paid to a person a suit to recover back such amount is not governed by Art. 29, as the attachment is neither seizure within the meaning of Art. 29, nor wrongful. (*Addison and Din Mohammad, JJ.*) BALDEV RAJ *v.* MOOLCHAND AMOLAK RAM. A I.R. 1938 Lah. 493.

——Art. 44—Applicability—Release by guardian of sub soil rights of minor mortgagee—Suit to set aside—Limitation. *See* GUARDIAN AND WARDS ACT, SS. 29 AND 30. A I.R. 1938 Pat 337.

——Art. 56—Applicability—Suit for remuneration by goldsmith for work done. *See* LIMITATION ACT, ARTS. 7 AND 56. A I R. 1938 Nag. 286.

——Art. 85—*Mutual account—Essentials*

A mutual account does not mean merely of the two parties has received money and account of the other, but where each of two received and paid on the other's account. account there must be reciprocity of dealings between the parties. Each must enter into relation with the other in the same manner as the other enters into relation with him. Without this there can be no mutuality, *no reciprocity. Where there is only a* solitary instance of deposit made by the defendant to his credit in the account opened in his name by the plaintiff, and the deposit is the only occasion on which he is of being able to make a demand on the existence of this solitary credit is not suffici that there were mutual and reciprocal deali the parties. The account cannot in such case be said to be mutual account. (*Mackney, J.*) BHOLAT *v.* MOTALA. A I R. 1938 Rang. 224.

——Arts. 113 and 144—*Suit for possession under a lease—Plaintiff never in possession—Article applicable.*

LIMITATION ACT (1908), Art. 181.

——Art. 115—Applicability — Implied contract—Lease of market tolls by municipality—Absence of contract or document under seal—Effect—Suit to recover money due under—Limitation. *See* BIHAR AND ORISSA MUNICIPAL ACT, S. 64. 17 Pat. 277.

——Art. 125—*Applicability—Suit by members of proprietary body of village to declare alienation by widow void.*

The word 'reversioner' should not be imported into Art. 125. Art. 125 is not restricted to suit by r ver- A suit by certain members of the proprietary f the village to declare that an alienation by a shall not affect their reversionary rights is- d by Art. 125. (*Bhide, J.*) NAGINA *v.* MT. BISHNI. A.I.R. 1938 Lah. 457.

——Art. 132 and S. 20—*Suit on mortgage—Stipulation in bond that whole amount would become payable on default to pay interest for 3 years—Default committed—Subsequent payment of interest — Limitation—* Terminus a quo.

It was stipulated in a mortgage bond executed on the 14th April, 1910, that the mortgagee would be entitled to realise interest every year and in case three years' interest was not so paid, the mortgagee would be entitled to recover the whole amount by sale of the mortgaged property. No interest was paid as agreed upon and the payment of interest was for the first time made on the 28th December, 1921, when a bond for interest due was executed by the mortgagors in favour of the mortgagee. No interest was paid subsequently and on 15th April, 1936, the mortgagee instituted a suit for recovery of the mortgage amount by sale of the property mortgaged. The lower Courts held that although Art. 132 of the Limitation Act applied, the clause relating to default revived on 28th December, 1921, when a bond for the

the point that a fresh period of limitation was to be computed from the time when the payment was made and that being so, no question of further extension of time by a period of three years as provided in the case of original default, arose in the case. Default did take place during the first three years and the cause of action arose on the 14th April, 1913. Subsequent payment of fresh start but the from what it was ortgagee, therefore, of the bond dated 28th December, 1921, within which to sue and the suit was, therefore, time barred. (*Din Mohammad, J.*) BHAGAT RAM *v.* RALLA RAM. 40 P.L R. 571.

——Art. 144—Applicability— Suit for possession under a lease. *See* LIMITATION ACT, ARTS. 113 AND 144. 1938 A L.J. 561.

——Art. 144—*Suit by auction purchaser for possession within 12 years—Previous possession by defendant—Burden of proof.*

LIMITATION ACT (1908), Art. 182.

Article 181 applies to an application for restitution under S. 144, C. P. Code. An application under S. 144 is not an application for execution and Art. 182 does not apply to such an application. (*Jai Lal, J.*) TELU *v.* RAJA RAM. **A.I.R. 1938 Lah. 456.**

——Art. 182 (2)—Scope—If governs S. 48, C. P. Code—Appeal—Dismissal for default—Starting point for execution. *See* C. P. CODE, S. 48.

1938 P.W.N. 449.

——Art. 182 (5)—"Application in accordance with law"—Assignment of decree benami—Application for execution by real assignee—If saves limitation—Declaration in suit that latter is real assignee under deed—Effect of. *See* C. P. CODE, O. 21, R. 16.

17 Pat. 223.

——Art. 182 (5)—*Application in accordance with law—Application containing mistake in description of suit.*

Where the only defect in an application for execution is a mistake in the description of the suit given in it, the application is one in accordance with law within the meaning of Art. 182 (5) of the Limitation Act. (*Nasim Ali, J.*) BRIDABAN BEHARI BOSE *v.* MONMOTH NATH DWARI. **42 C.W.N. 842.**

——Art. 182 (5)—*Step-in-aid—Application to wrong Court.*

Application for execution of a decree made to a wrong Court cannot be considered as a step-in-aid of execution. (*Bhide, J.*) ABDUR RAHIM *v.* FATEH MOHAMMAD. **A.I.R. 1938 Lah. 451.**

MADRAS GAMING ACT (III OF 1930), S. 5—*Warrant under—Form and validity—Conditions.*

There is no prescribed form for warrants under S. 5. S. 5 does not require the Magistrate to record any where his reasons for believing any information the police may have given him, nor even the fact that he had reason to believe that any place is used as a common gaming house. All that it requires is that "the Magistrate shall have reason to believe." If he has, he can issue his warrant, not in any particular form, but his warrant giving authority to a police-officer to do certain things. (*Burn, J.*) NARANAPPAYYA, *In re.*

1938 M.W.N. 319 = 47 L.W. 750 = A.I.R. 1938 Mad 550 = (1938) 1 M.L.J. 509.

MAHOMEDAN LAW—*Apostasy—Renunciation of religious faith—Proof required.*

Renunciation of a religious faith requires no other proof than a person's declaration, the only condition being that the declaration is not casual, of which the declarer may repent afterwards, but it should be attended with volition and should be such to which the declarer adheres and in which he persists. The motive of the declarer is immaterial. A genuine conversion is one which has actually taken place and if once it is proved as an accomplished fact, further enquiry is barred. Where the plaintiff declared not only in the plaint but even in her statement in Court as her own witness that she did not believe in God, the Qoran and the Prophet of Islam.

Held, that she at once went out of the pale of Islam and the marriage with her husband was dissolved.

Held, further, that the lower Court was not justified in testing the *bona fides* and sincerity of the plaintiff especially by the objectionable and unwarranted procedure of allowing pork to be brought to Court and calling upon the plaintiff to take it in open Court. (*Addison and Din Mohammad, JJ.*) MT. RESHAM BIBI *v.* KHUDA BAKHSH. **A.I.R. 1938 Lah. 482.**

——Co-heirs—Decree for dower against all heirs of deceased talukdar in Oudh—Decree realised only out of non-talukdari property—Suit for contribution against succeeding talukdar—If lies. *See* C. P. CODE, S. 52.

A.I.R. 1938 P.C. 169.

——Co-heirs—Realisation of dower decree from non-taluqdari property—Taluqdari property if liable to contribute. *See* CONTRIBUTION—LIABILITY FOR.

1938 A.W.R. (P.C.) 138 = A.I.R. 1938 P.C. 169 (P.C.).

——*Waqf—Dedication—Shia Law—Reservation of life-interest in usufruct—Validity—Postponement of waqf after life-interest—If lawful.*

If a will can be read as intending that on the death of a testator that certain properties should become waqf, it would be in no way unlawful that a life interest in the usufruct should be reserved for the beneficiaries. On the other hand a direction that the property should become waqf after the death of a person surviving the testator is contrary to the principles applied by the Shia Law to dedications *inter vivos.* (*Sir George Rankin.*) ALI BEGAM *v.* BADR-UL-ISLAM ALI KHAN.

1938 A.W.R. (P.C.) 131 = 174 I.C. 870 = A.I.R. 1938 P.C. 184 (P.C.).

——*Wakf — Mutwalli—Right of appointment—Nature of.*

There is in law no absolute right to be appointed mutwalli and it is not a matter of property. (*Ameer Ali, J.*) WAZIR ALI *v.* LADLEY BEGUM.

A.I.R. 1938 Cal. 437.

——*Wakf—Sale under Court's order—Protection of purchaser.*

An order of a Court to sell wakf property protects the purchaser, and the fact that some other person or persons might have been appointed mutwalli in the place of those who were actually appointed and to whom permission to sell was granted, makes not the slightest difference. (*Ameer Ali, J.*) WAZIR ALI *v.* LADLEY BEGUM. **A.I.R. 1938 Cal. 437.**

——*Waqf—Will, if creates—Construction—Reservation of right of residence to heirs—If offends rule of Shia law.*

Where a testator not only used the word *waqf* but expressed his intention to benefit the general public and directed that the property should be 'excluded from the rights of relations,' it was held that on a proper construction of the will in question there was a valid and effective dedication for the purposes specified. It was further held that the provision for the residence of the testator's heirs was not obnoxious to the rule of Shia law which requires a *wakif* to divest himself of all interest in the property and in its usufruct. (*Sir George Rankin.*) ALI BEGAM *v.* BADR-UL-ISLAM ALI KHAN.

1938 A.W.R. (P.C.) 131 = 174 I C. 870 = A.I.R. 1938 P.C. 184 (P.C.).

MAJORITY ACT (IX OF 1875), S. 3—*Scope of—If affected by S 19 of the Guardians and Wards Act—Appointment of guardian for minor having father alive—Legality—Period of limitation—If extended.*

In order to extend the minority of a person to 21 years under S. 3 of the Indian Majority Act, there must in the first instance be a lawful appointment of a guardian. An appointment which is not lawful but null and void cannot extend the period of minority. S. 19 of the Guardians and Wards Act specifically prohibits the Court from making an appointment of a guardian for a person whose father is alive and who is not unfit to be guardian. An appointment of guardian for such a minor is not a lawful appointment, as it is one which cannot be made under the Guardians and Wards Act. The Court has always got the power to vacate or rescind such an order which should never have been made. Nor

MINOR

would such an order extend the period of minority to 21 years under S 3 of the Majority Act (*Davis, J. C. and Lobo, J.*) DHOLANDAS GIDUMAL v. SADHUMAL DOLUMAL. 32 S L R. 215.

MINOR—*Compromise of disputes in family—Settlement—Representation by person not authorised, and having adverse interest—Binding nature—If could be upheld on the ground of family settlement.*

Where on the death of a lady leaving two daughters, there were disputes between them and the collaterals as to the right to succeed to the property left by the deceased lady and which were compromised and the terms of which were embodied in a deed, by which the properties were divided between all the claimants and as one at least of the daughters was a minor, she was represented by one of the contesting collaterals himself, on a question whether the deed was binding on the daughters.

Held, that as one at least of the daughters was admittedly a minor on the date of the settlement, and the person who acted as her guardian was neither appointed by any Court nor could claim that status under the law applicable to her, and further was himself a claimant and so had an interest adverse to that of the minor, and as a minor cannot contract of her own accord, the deed of settlement was a void transaction as against her. The elder sister would not be bound, if the transaction was

allowed to disturb it on the ground of inequality of the benefit, unless there was fraud or some other ground which in law vitiates it. (*Sir Shadi Lal.*) PARTAP SINGH v. SANT KAUR.

1938 A W.B. [illegible]

1938 A.L.J. 549[illegible]

—*Order setting aside whole decree and directing re-hearing of suit—Legality.*

Where certain Hindu minor sons sue for a declaration that a mortgage decree made on the basis of a mortgage executed by their fathers are not binding on them on the ground that the mortgage was not for a valid family necessity and that they were not properly represented in the mortgage suit, if the Court comes to the conclusion that the minors were not properly represented in the prior suit by reason of the failure of the guardians *ad litem* to raise valid defences open to the minors, and that the

TION (III OF 1911), S. 115—*Applicability—Order*

MYS. CR. P. CODE REGN. (1904), S. 225.

under S. 476-B on appeal from order by Civil Court—Revision—If to be dealt within civil revision or criminal revision—Mysore Criminal Procedure Code Regulation, S. 439 (1)—"Any proceeding."

S. 115, C. P. Code and not S. 439 (1), Cr. P. Code, applies to a case where a Civil Court passes an order under S. 476 B, Cr. P. Code, making or refusing to make a complaint, on appeal from an order under S. 476 (1), Cr. P. Code. The mere fact that a superior civil or revenue Court in exercising its jurisdiction under S. 476-B, Cr. P. Code, has to follow the procedure laid down in that section cannot make that Court an inferior Criminal Court within the meaning of S. 435 (1) or 439 (1), Cr. P. Code. The words "any proceedings" in S. 439 (1), Cr. P. Code, must be taken to mean any proceeding of an inferior Criminal Court. Ss. 435 and 439, Cr. P. Code must be read together. (*Shankaranarayana Rao and Sreenivasa Rao, JJ.*) RAMASWAMY v. RAMASWAMY IYER. 43 Mys H C R. 230.

MYSORE COMPANIES REGULATION (VIII OF 1917, as amended by Regulation XVI of 1923) S. 202—*Construction and scope—Right of appeal—If confined to order of winding up—Order in the course of winding up—Appeal.*

S. 202 of the Companies Regulation is very wide and allows an appeal against any order made in the course

S. 220—*Resolution for voluntary winding up—Subsequent order for compulsory winding up by Court—Date of winding up—Date of resolution or date of*

nies Regulation does not em-
aking an order for compulsory
e commencement of the winding

can be proceeded under.

An official liquidator also comes within the scope of S 235 of the Companies Regulation and can be proceeded against. The term "liquidator" in the section in a general expression including all classes of liquidators (*Nagesvara Iyer and Singaravelu Mudaliar, JJ*) ETHIRAJAN v. BANK OF MYSORE, LTD 43 Mys H C R. 237.

——S 235—Limitation—Application against liquidator for negligence—Limitation for. *See* MYSORE LIMITATION REGULATION, ART. 36.

43 Mys H C R. 237.

[illegible] PROCEDURE CODE REGN. (1904). S 225—*Scope—Non-[illegible] fatal.*

should contain the necessary S. 222. Cr. P. Code, but any [illegible]ity in the charge is no ground [illegible] as occasioned a failure [illegible] fully understands the [illegible] he is charged. be [illegible] omission of certain words from the charge. ([illegible] RAMA-

PENAL CODE (1860), S. 304.

——Ss. 304 and 325—*Accused knocking down old man causing fractures thereby—Fractures resulting in death—Offence committed.*

Where the accused struck an old man on the head with a *takwa* thereby causing injuries of simple nature, and the fractures which caused the death of the old man were caused when he was knocked over by the accused, it is impossible to hold that the act of knocking him over though it did result in his death was one that he could reasonably be held to have known to be likely to have caused his death, and therefore the second part of S. 304, I.P. Code, has no application. Nor can it be held that merely by knocking the old man down, the accused intended or knew himself likely to be causing grievous hurt and therefore even a conviction under S. 325, I. P. Code, cannot be sustained. The accused, in the circumstances, is liable to conviction or simple hurt under S. 323 read with S. 324, I. P. Code. (*Blacker, J.*) RAJU *v.* EMPEROR. 40 P.L.R. 562.

——Ss. 337 and 307—*Shooting blindly with shot gun in dark—Man injured—Offence committed.*

If a man fires blindly in the dark with a shot gun, in the direction from which he has heard sounds coming from a distance away and injures a man, it cannot be held that his act must in all probability cause death or such bodily injury as was likely to cause death. Such person cannot possibly be convicted under S. 307 but should be convicted under S. 337. (*Mackney, J.*) MOHAMMAD CASSIM *v.* EMPEROR.

A.I.R. 1938 Rang. 220.

——Ss. 366 and 376—*Charges under—Conviction under S. 366 only—Legality.*

Where the accused are charged under Ss. 366 and 376, it is open to the jury to convict the accused under S. 366 and acquit them under the main charge under S. 376 and there is no inconsistency in such a finding. Where a man has illicit intercourse with an adult woman with her consent after abducting her, it is not rape under the law. In such a case, the accused will be held guilty under S. 366 but not under S. 376. (*M. C. Ghose and Bartley, JJ.*) EBADI KHAN *v.* EMPEROR.

A.I.R. 1938 Cal. 460.

——S. 366—*Evidence of girl abducted—Value of.*

In cases of offences under S. 366, the evidence of the girl alleged to have been abducted must be taken with a great amount of caution. (*Blacker, J.*) MOHAMMAD SADIQ *v.* EMPEROR. A.I.R. 1938 Lah. 474.

——S. 366—*Young man abducting girl of marriageable age—Presumption as to his intention.*

Even a forcible abduction does not amount to an offence under S. 366, unless there are other ingredients, namely the intention either that the girl should be seduced or forced to illicit intercourse or that she should be compelled to marry against her will. In cases of forcible abduction, there can seldom be direct evidence as to the actual intention of the abductor and that intention must be inferred from the circumstances of each case under S. 114, Evidence Act. Human nature being what it is, whenever one finds a young man abducting a girl of marriageable age, the first natural presumption must be that he has abducted her with the intention of having sexual intercourse with her either forcibly, or with her consent after seduction, or after marrying her. If he has any intention other than that which is suggested by the natural circumstances of the case, the burden lies upon him under S. 106, Evidence Act, to prove that intention. (*Blacker, J.*) MOHAMMAD SADIQ *v.* EMPEROR. A.I.R. 1938 Lah. 474.

——S. 403—*Accused taking ornaments from complainant promising to marry his daughter to him—*

Accused subsequently marrying his daughter to another and denying receipt of ornaments—If guilty of offence.

Where on the accused promising to marry his daughter to the complainant, the latter handed over to the accused certain ornaments as presents to the bride in consideration of the marriage, but the accused subsequently gave his daughter in marriage to some other person and denied all knowledge of the ornaments,

Held that the accused was technically guilty of dishonest misappropriation under S. 403, I. P. Code, but that the more appropriate proceedings would have been an action in the Civil Courts. (*Derbyshire, C.J. and Mukerjea, J.*) MOHORI LAL CHOWDHURY *v.* EMPEROR. 42 C.W.N. 783.

——S. 421—*Offence under—Shopkeeper stocking goods on credit—Sale by him without paying creditors.*

The property of a debtor cannot be distributed according to law save after the provisions of the relevant enactments have been complied with. It cannot be held, without further proof, that a shopkeeper who has stocked his shop with goods obtained on credit and who sells these goods without making any payment to his creditors has committed an offence punishable under S. 421, Penal Code. In selling these goods, which are his own in spite of the fact that he has not yet paid for them, he is not causing wrongful gain to himself; neither is he causing wrongful loss to anybody, because unless the creditors have obtained some legal right over the property he is not by his action depriving them of any right of theirs. (*Mackney, J.*) ISMAIL PEER MOHAMED *v.* THE KING. A.I.R. 1938 Rang. 242.

——S. 424—*Dishonest removal—What is.*

If the accused, a judgment-debtor, knew that the crop was attached or even was going to be attached in execution of a decree and his object was to prevent the decree-holder from obtaining his money, his action is dishonest, because it was intended to cause wrongful loss to the decree-holder. S. 424, Penal Code, says nothing at all as to the attachment of property. (*Allsop, J.*) TARA SINGH *v.* EMPEROR.

1938 A. Cr. C. 45=1938 A.L.J. 528.

——S. 494—*Construction—"Marries"—Meaning of.*

The word 'marries' used in S. 494 means marries by some form of marriage known to or recognized by the law. Merely showing that some form of marriage ceremony was gone through is not sufficient. The section does not refer to a valid marriage. A bigamous marriage cannot be a valid marriage, and apart from the bar of the first marriage, it may be that there may be some other legal impediment to the validity of the marriage of the man or woman, some legal impediment personal to the man or woman, such as consanguinity; yet if the second marriage be a form recognized by or known to the law, that would be sufficient to satisfy this particular provision of the section. (*Davis, J.C. and Lobo, J.*) MT. KALAN *v.* EMPEROR. A.I.R. 1938 Sind 127.

——Ss. 494, 497 and 498—*Prosecution under—Expediency—Duty of Court to prevent abuse.*

Judges should be particularly careful to see that Ss. 494, 497 and 498 are not abused for the purpose of private spite or persecution. (*Davis, J.C. and Lobo, J.*) MT. KALAN *v.* EMPEROR. A.I.R. 1938 Sind 127.

——S. 500—*Complaint under—Maintainability—Same facts constituting offence under S. 182 or S. 211.*

There is no exception to S. 499 saying that when the defamation is made in a statement to a public servant or in Court proceedings, by virtue of which the offence was punishable under S. 182 or S. 211, Penal Code, or some other section, then no prosecution under S. 500 would lie. Hence a complaint under S. 500 cannot be

PENAL CODE (1860), S. 500.

dismissed even in the same facts constitute also an offence under S. 182, and sanction required by S. 195, Cr. P. Code is not obtained.
156 I.C. 598, Overruled; 73 C. Cal. 1, Approved. (*Baguley*, ... U AUNG PE v. THE KING.
A.I.R. 1938 Rang. 232 (F.B.).

——**S. 500**—*Duty of Court—Accused not raising specific plea of privilege—Court—If bound to see whether case under any recognised exception.*

In a prosecution for defamation under S. 500, I. P. Code, even though the accused does not raise a specific plea of privilege, it would be the duty of the Court to consider whether the circumstances made apparent by the evidence adduced are or are not enough to bring the case under any of the exceptions to S. 499, even where the accused has not relied upon the same (*Abdul Ghani, J.*) RAMACHANDRAPPA v. DODDA MAVARSA.
16 Mys L J. 205.

POWER-OF-ATTORNEY—*Construction—Power to surrender shares—If includes power to refuse newly issued shares.*

A power-of-attorney must be construed strictly, and general words must be interpreted in the light of the special powers, although they include incidental powers

[illegible]

was entitled.

Held, that the agent acted beyond the scope of his ... "surrender shares" were not

[illegible]

sequent [illegible] *to act.*

Where the principal just before leaving India e[illegible] ed a power-of attorney authorizing the agent to act in his absence from India and subsequently he came to India and again left it but did not execute a new power before so leaving:

Held, that the power of the agent did not terminate and the agent had power to act for the principal during his absence. (*Panckridge, J.*) EZEKIEL v. CAREW & Co. LTD. **A.I.R. 1938 Cal. 423.**

PRACTICE—*Adjournment—Adjournment to produce witness—Discretion of Court.*

Where the Court refused to grant a[illegible] ment to the defendant to produce a [illegible] ground that the process fee for such wit[illegible] sited late but it appeared from the reco[illegible] mons to him was returned with the rep[illegible] not be found and when he was undoubtedly an important witness,

Held, that the refusal by the Court to grant an adjournment to the defendant to produce the witness under the circumstances was not justified. (*Bhide, J.*) THAKUR DAS v. JAIKISHEN DAS.
A.I.R. 1938 Lah. 448.

——Appeal—Interference—Discretion of trial Court—Dismissal of suit for failure to deposit Commissioner's fee—Interference in appeal—If justified. *See* CR. P CODE, O 17, R. 3. **A.I.R. 1938 Sind 142.**

——*Appellate Court—Interference—Credibility of witnesses—Opinion of Judge sitting on original side of High Court.*

Where a Judge, especially a Judge on the Original Side of the High Court, has seen a witness and heard

PRACTICE.

his evidence and comes to a conclusion about his credibility, it requires circumstances of an exceptional char-

[illegible]

attitude and the trustworthiness of the witness and the effect of his whole demeanour in the witness-box. It is not necessary that a Judge should always comment upon the demeanour of the witnesses in the box but he may record the demeanour of the witness. (*Mya Bu and Sharpe, JJ.*) RORKE v. RORKE.
A.I.R. 1938 Rang. 248.

——*Appellate Court—Powers—Rehearing on facts.*

As an appellate Court is a Court of appeal on facts as well as law, the appeal is rehearing and as such the Court may have to consider whether there are not such surrounding facts as make it impossible to accept the finding of the Judge. (*Lord Wright.*) HUKUMCHAND SARUPCHAND v. HANSRAJ HARJI.
174 I.C. 875 (P.C.).

——*Issues—Duty of Court to raise—Plea that plaintiff has inflated claim to file suit in higher Court—Specific issue on point—Necessity for.*

Where the defendant alleges that the plaintiff has inflated his claim in the plaint in order to bring his suit ... [illegible] rame a specific ... was any *mala* ... merely frame a ... *Mehta and Lobo, JJ.*) KHIOMAL v. GOPALDAS.
A.I.R. 1938 Sind 124.

[illegible] *Patent Appeal.* ... w is raised for the first time ... upon the construction of a ... s either admitted or proved

[illegible]

ultimate review is placed in a much less advantageous position than the Courts below. But that course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. In a suit for declaration that the charge created by the guardian *ad litem* of the minors to secure postponement of the decretal amount in favour of the decree-holder

[illegible]

sion and fraud. In the Letters Patent Appeal the plaintiff wanted to question the guardian's power to execute that bond,

Held, that as the validity or otherwise of the security bond depended upon certain state of facts which the materials on the record were insufficient to enable the Court to determine definitely one way or the other, the plaintiff could not be allowed to raise it. (*Mya Bu and Sharpe, JJ.*) A. R. M. N. A. CHETTYAR v. R. M V. S. CHETTYAR. **A.I.R. 1938 Rang. 236.**

——*Pleadings — Amendment—Powers of Court—Amendment setting up new and inconsistent case, and introducing cause of action already barred by time—Permissibility.*

A party is not competent [illegible] e case

which is not consistent with the case set up originally by him and that too at a very late stage of the case. An amendment setting up such a new case, or changing the specific legal relationship of the parties alleged in the plaint or written statement or seeking to introduce a cause of action which is barred by limitation should not be permitted. (*Abdur Rahman, J.*) DORAISWAMI IYENGAR *v.* RADAKRISHNA CHETTY.

(1938) M.W.N. 542.

——*Relief—Suit for possession—Plaintiff basing his claim as heir of original owner—Defendant denying it and setting up mortgage—Cases of neither plaintiff nor defendant proved—Plaintiff found entitled to possession of suit land on different contention—Decree for possession—If can be granted.*

In a suit for possession the plaintiff based his claim as the heir of the original owner and that he had leased the suit land to the defendant. The defendant denied the title of the plaintiff and set up a mortgage. Neither the plaintiff nor the defendant could prove their case, though the plaintiff was proved entitled to possession of the suit land on a different contention:

Held, that the plaintiff should be given a decree for possession, and there was no need to refer the parties to another suit. (*Mosely, J.*) MA PWA ZON *v.* MAUNG CHIT SAYA. A.I.R. 1938 Rang 213.

PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), S. 38—*Jurisdiction of Full Bench—Nature of—Power to interfere or order retrial—Power to order amendment of plaint.*

The Full Bench of the Presidency Small Cause Court exercising its powers under S. 38 of the Presidency Small Cause Courts Act is not a Court of appeal and cannot therefore arrogate to itself the powers of an appellate Court. Its jurisdiction is merely revisional in nature, and it can only interfere when it finds some question of law or usage having the force of law to have been wrongly decided, or when it holds that the verdict of the trial judge was not based upon any legal evidence or possibly when it finds that no reasonable person could have arrived at the conclusion to which the trial judge has arrived. In no other circumstances can the Full Bench interfere with a finding of fact. Nor can a retrial be ordered unless the trial has been vitiated by some legal effect in omitting to observe some rule of procedure or on account of some mistake in appreciating or applying the correct rule of substantive law, or the discovery of some important matter of evidence which may necessitate a further re hearing or reconsideration. It has no powers to order an amendment of the plaint, but it can order a retrial if an amendment setting up a new and inconsistent case is allowed by the trial Court. (*Abdur Rahman, J.*) DURAISWAMI IYENGAR *v.* RADHAKRISHNA CHETTY. (1938) M.W.N. 542.

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 52 (2) (a)—*Provident fund coming into possession of insolvent—If divisible among creditors.*

The absence of intervention by the Official Assignee before Provident Fund money reaches the insolvent's hands might affect the vesting of the money, but when it comes into the possession of the insolvent it is nevertheless his property, the property of an insolvent divisible among his creditors within the meaning of S. 52 (2) (*a*), Presidency Towns Insolvency Act. (*Shaw, J.*) SOLOMON DAVID *v.* THE KING. A.I R. 1938 Rang. 245.

PRINCIPAL AND AGENT—*Liability of principal—Agent making offer beyond his authority—Principal if liable for contract which agent has authority to make.*

Acceptance of an offer made by an agent the terms of which are beyond the agent's authority, cannot give the

acceptor a right to call upon the principal to perform a contract based on hypothetical offer which the agent would have had authority to make. (*Panckridge, J.*) EZEKIEL *v.* CAREW & CO., LTD.

A.I.R. 1938 Cal. 423.

PRIVY COUNCIL—*Concurrent findings—Interference—Rule as to.*

Where it is a case of concurrent findings of fact, the whole question is one of fact, and under such circumstances, it is not the practice of the Board to go behind those findings. It may be that, in exceptional cases, where it is clear that some serious injustice has or may be involved, the rule may be departed from, but that is so only in the most unusual circumstances. The rule is one which obviously it is of the utmost importance to maintain, because the Board does not sit for the purpose of reopening findings of fact in which the Courts below have concurred. (*Lord Wright.*) NATHU LAL *v.* THE COLLECTOR OF BUDAUN. 174 I.C. 867= 1938 A.W.R. (P.C.) 129=1938 A.L.J. 547= A.I R. 193 P C. 183 (P.C.).

PROVIDENT FUNDS ACT (XIX OF 1925), S. 3 (1)—*Money to credit of undischarged insolvent in Provident Fund of District Council—Official Assignee, if can claim it.*

Money to the credit of an undischarged insolvent in the Provident Fund of a District Council is not a compulsory deposit within meaning of S. 3 (1), Provident Funds Act, unless and until the protection of S. 3 (1) has been extended to such fund by the Local Government. Before the extension of the protection to such fund, the Official Assignee has claim to such deposit. (*Shaw, J.*) SOLOMON DAVID *v* THE KING.

A.I.R. 1938 Rang. 245.

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 75—*Order of District Judge making complaint under S. 70—Appeal to High Court—If competent.*

No appeal, without leave, is competent to the High Court from an order of the District Judge under S. 70 of the Provincial Insolvency Act making a complaint of an offence punishable under S. 69 of that Act. (*Derbyshire, C.J. and Mukherjea, J.*) MADAN MOHAN SARKAR *v.* EMPEROR. 42 C.W.N. 787.

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), Art. 4 (as amended by Bombay Act VI of 1930)—*Question of title—Test of—Reference to defence.*

In cases under Art. 4 for purposes of deciding as to whether the Court has got jurisdiction to entertain the suit both the plaint and the allegations in the written statement can be considered. Plaintiff sued for recovery of the rent and ejectment of defendants. The rent deed was executed by only one of the defendants and the others were impleaded on the ground that they were in possession as members of a joint family along with the executant of the rent note. These defendants denied the title of the plantiff.

Held the substantial issue as between these defendants and plaintiff being one of title, the Small Cause Court had no jurisdiction to try that issue. (*Mehta and Lobo JJ.*) KEWALMAL *v.* SOBHOMAL.

A I.R. 1938 Sind 122.

PUNJAB COLONIZATION OF GOVERNMENT LANDS ACT (V OF 1912)—*Acquisition of proprietary rights—Right of female tenants—Lower Chenab Canal Colony—Policy of Government.*

It is not the policy of Government that colony land should as a matter of course remain in the family of the original male grantee. Female tenants would be permitted to acquire proprietary rights in the Government

tenancy in the Lower Chenab Canal Colony when there are no reversioners to succeed. (*Dobson, F.C*) GULAM BIBI *v.* PIR BAKHSH. 17 Lah L.T. 19.

PUNJAB MUNICIPAL ACT (III OF 1911) Ss 80 and 81 *Terminal tax—Servant introducing goods without paying full tax—Liability of master to pay deficiency.*

terminal tax, if the servant has introduced the goods without paying full terminal tax by misrepresenting their weights, and the Magistrate can issue execution against the master under S 81 of the Punjab Municipal Act. (*Coldstream, J*) MAIN MOHAMMAD-ALLAH BUX *v.* MUNICIPAL COMMITTEE, LYALLPUR

I L R. 1938 Lah. 251.

——S. 81—*Function of Magistrate.*

Under S 81 of the Punjab Municipal Act, the Magistrate's function is ministerial only, his power of enquiry being limited to finding whether the amount is claimable or not. (*Coldstream, J.*) MIAN MOHAMMAD-ALLAH BUX *v.* MUNICIPAL COMMITTEE, LYALLPUR.

I.L R. 1938 Lah. 251

PUNJAB PRE EMPTION ACT (I OF 1913), S. 15 (b)—*Right of pre-emption—Distant heir of vendor.*

Under S. 15 (*b*) of the Pre empsion Act, the right of pre emption in respect of agricultural land is conferred upon the whole line of heirs of the vendor and not merely on the nearest heir at the time of the sale although the priority of right between claimants is to be determined according to the order of succession. Consequently a distant heir of the vendor is entitled to pre-emption when there is no competiti[illegible] and the nearer heirs [illegible] (*Addison and* [illegible] *JJ.*) ALLAH DIN *v.* PRABH DAYAL.

40 P L R. 508

——S. 15 (b)—*Sale by testator—Legatee's right to pre-empt*

A will can be revoked at any moment by the testator during his life time. It is therefore doubtful whether a legatee can be said to be a heir within the meaning of the Pre-emption Act so as to be entitled to pre empt a sale by the testator. (*Addison and Din Mohammad JJ.*) ALLAH DIN *v* PRABH DAYAL. 40 P L R 508

——S 22 (1) and (5)—*Security bond becoming void—Power of Court to ask for cash.*

Having exercised the option between cash and security bond by asking for security bond, the Court cannot ask for cash in case the security bond submitted becomes void. Court should ask for another security bond instead (*Bhide, J*) ZAMAN MEHDI KHAN *v* HAYAT KHAN.

A I R 1938 Lah 452.

PUNJAB RELIEF OF INDEBTEDNESS ACT (VII OF 1934) S. 17—*Agreement recorded by Board amounting to lease of applicant's property—Registration, if necessary—Registration Act, S. 17.*

Where by virtue of an agreement recorded by the Debt Conciliation Board under S. 17 of the Punjab Relief of Indebtedness Act certain property of the applicant is leased for a period of 12 years, the agreement is tantamount to a lease and, therefore, requires registration under S 17 (1) (*d*) of the Registration Act. (*Bhide, J*) JINDA RAM-FATEH CHAND *v.* MAHNI.

40 P L R. 567

——S. 21—*Plea of lack of jurisdiction in Board—Cognizance by Civil Court—If barred.*

Obiter.—S. 21 of the Punjab Relief of Indebtedness

Act only debars a Civil Court from taking cognizance of certain classes of suits, and there is no reason why a Civil Court should not be able to take cognizance of a plea of lack of inherent jurisdiction in the Board to pass a certain order. (*Bhide, J.*) JINDA RAM FATEH CHAND *v.* MAHNI 40 P L R 567.

——S. 35—*Applicability—House mortgaged before*

[illegible] of Indebtedness Act [illegible] mortgaged with posses- [illegible] attached after the Act came into force. (*Dobson, F.C.*) IMAM DIN *v* SHIB DAYAL.

17 Lah L T. 23.

——S. 35—*Liability of house to attachment—Onus.*

Under S. 35 of the Punjab Relief of Indebtedness Act, the onus of proving the liability of a house to attachment rests on the decree holder. (*Dobson, F. C.*) IMAM DIN *v.* SHIB DAYAL. 17 Lah L.T. 23.

RAILWAYS ACT (IX OF 1890), S. 47—*Rules under—Rule 18—Goods when unclaimed—Powers given to Railways—Strict construction.*

In the restricted sense that delivery had not been taken, the goods may be said to have been unclaimed, but where ownership in the goods had been asserted and directions given as to their retention, it cannot be said that the goods have been unclaimed in the general sense of the word. The powers given to the Railways by the rules must be strictly construed. (*Weston, J*) B. B & C. I. RAILWAY *v.* KASHI RAM. 1938 A M L.J. 6.

RECORD OF RIGHTS—*Entries in—Value of.*

The importance and weight of entries in the record of rights varies with the circumstances of each case. (*Davis, J.C. and Mehta, J*) TAHILRAM TACKCHAND *v* MT MIRAL. A I.R. 1938 Sind 132.

——*Presumption of correctness —Challenging—*

[illegible] that it is for the party challenging [illegible] to displace the presumption of correctness that applies to it by statute. (*Dhavle and Varma, JJ*) KAMESHWAR SINGH BAHADUR *v.* KRISHNA CHANDRA JEW. 175 I.C. 316.

REGISTRATION ACT (XVI OF 1908), S 17 (1)(c) *Receipt recording receipt of consideration on mortgage—Registration, if necessary.*

A receipt which records the receipt of the consideration for a mortgage on the date of the execution of the document, requires registration under the provisions of S 17 (1) (*c*), to be admissible in evidence as a receipt. A.I.R. 1934 Lah 970 Foll. (*Tek Chand, J.*) WADHAWA SINGH *v.* KUNJ LAL. A.I R. 1938 Lah. 497.

——S. 17 (1) and (2) (xi)—*Applicability—Receipt for mortgage-money—Admissibility without registration to prove payment.*

Receipts purporting to put an end to the mortgage rights do not come within the exception embodied in S. 17 (2) (*xi*). It follows therefore that these receipts are compulsorily registrable under S. 17 (1). These receipts can be relevant only as evidence of payments of mortgage debts either in full or in part. Otherwise they would be irrelevant. And if they are relevant only for proving payments of the mortgage debts, they certainly would affect the mortgage debts by reducing them considerably. Hence the mortgagor cannot rely on these receipts as evidence of payment of the mortgage debts in question. (*Pandrang Row and King, JJ.*) LINGAPPA *v.* NILAKANTAPPAYYA WADYAR

1938 M. W N 296 = A I R. 1938 Mad. 533 = (1938) 1 M L.J 586.

——S. 17 (2) (vi)—*Scope of.*

S. 17 (2) (*vi*) of the Registration Act which exempts

REGISTRATION ACT (1908), S. 17 (2) (xi).

certain classes of decrees from registration applies only to documents falling under Cls. (*b*) and (*c*) of S. 17 and not to those falling under Cl. (*d*) of that section. (*Bhide, J.*) JINDA RAM FATEH CHAND *v.* MAHNI.

40 P.L.R. 567.

———S. 17 (2) (xi)—*Purchaser out of money left with him by vendor redeeming mortgage—Receipt reciting extinction of mortgage—Admissibility.*

Where a property is mortgaged by the owner who subsequently sells it and the purchaser redeems the mortgage out of the money left with him, the receipt reciting the fact of extinction of the mortgage is admissible in evidence on the ground that the transaction is not between original parties to the mortgage. The purchaser can enforce the contract by means of a suit and also can raise the question by way of defence in a suit brought by the mortgagee. 7 All. 820 and 27 All. 305, Foll. (*Jai al, J.*) UDHAM SINGH *v.* BISHAMBAR DAS. A.I.R. 1938 Lah. 485.

———S 47—*Sale—Execution — When complete—Registration—Effect—Absence of registration, if can affect completion of execution.*

A sale deed is completed when it is executed by the vendor. The registration is no part of execution, though it is necessary to make the deed valid. Failure to register does not affect the completion of the execution, for in spite of the executant's refusal to register, the vendee can get it complusorily registered. Neither death nor express revocation by the executant is a ground for refusing registration. (*Ganga Nath, J.*) MAHADEO SINGH *v.* MIAN DIN. 1938 A.L.J. 557.

———S. 49—*Collateral purpose— Mortgage for amount exceeding Rs. 100—Unregistered receipt evidencing payment of consideration—Admissibility as receipt for refund of consideration money.*

Where the sole purpose for which an unregistered receipt is executed is to furnish evidence in writing of the payment of the "consideration on account of the creation of an interest in immovable property" exceeding Rs. 100 in value, the claim for the refund of the amount cannot be treated as a "collateral" purpose within the meaning of S. 49, and such receipt is therefore inadmissible in evidence. If however the document embodies the terms of a mortgage transaction it would be admissible to support a claim for the refund of the amount advanced, if the mortgage transaction implies a personal liability of the mortgagor to repay the amount. In the case of a usufructuary mortgage however the mortgagor is under no personal liability to repay the amount and hence the receipt is inadmissible in evidence for a collateral purpose in a suit for the refund of the consideration. (*Tek Chand, J.*) WADHAWA SINGH *v* KUNJ LAL.

A.I.R 1938 Lah. 497.

———S. 49—Mortgage-money—Receipt for—Admissibility without registration. *See* REGISTRATION ACT, S. 17 (1) AND (2) (*xi*) A.I.R. 1938 Mad. 533.

RELIGIOUS ENDOWMENT—*Alienation of property belonging to—Recovery—Procedure.*

Where the property of a public endowment has either been alienated by the Shebait or lost in consequence of his action, it can be recovered only in a suit filed by the shebait. The remedy, so far as the public is concerned, is to secure the removal of the shebait by proceedings under S. 92, C P. Code, and then to get another shebait appointed who would then have authority to represent the idol in any suit for recovery of the property. (*Agarwala, J.*) KUNJ BEHARI CHANDRA *v.* SHYAM CHAND JIU THAKUR. 175 I.C. 218.

SECURITIES ACT (X OF 1920), S. 16—*Scope of—Renewal of Government promissory notes—Effect of.*

SPECIFIC RELIEF ACT (1877), S. 42.

The holder of a renewed Government promissory note obtains a new promise from Government free from any equities or disputes which might have attached to the prior note. S. 16 of the Securities Act provides in terms that a renewed Government promissory note is to be deemed to constitute a new contract between the Government and the person to whom it is issued and all persons deriving title through him. (*Lort Wright.*) SECRETARY OF STATE *v.* BANK OF INDIA, LTD.

175 I.C. 327 (P.C.).

———S. 21—*Construction—Implied right of indemnity under old Act, if abrogated—Statute—Construction—New Act—Extent of protection offered.*

As a matter of construction the view cannot be accepted, that S. 21 of the Securities Act, has not merely the positive effect of giving the special right which it provides for, but has also the negative effect of cutting out the implied right of indemnity which undoubtedly existed in the repealed Act of 1886. A statute is *prima facie* to be construed as changing the law to no greater extent than its words or necessary intendment require. S. 21 was not in the earlier Act of 1886. If it had been intended by the insertion of that section in the Act of 1920 to abrogate the common law indemnity existing under the repealed Act the Legislature would it seems have used words clearly expressing that intention. There is no reason to justify reading in or implying such words. On the contrary S. 21 has to be construed as giving an added statutory right, which is different from and in no way inconsistent with the common law right. (*Lord Wright.*) SECRETARY OF STATE *v.* BANK OF INDIA, LTD. 175 I.C. 327 (P.C.).

———S. 21—*Renewal of Government promissory note—Security not taken—Government forced to pay damages for conversion of original note—If entitled to indemnity from party who requested for renewal.*

A broker forged the indorsement of the holder of a Government promissory note and subsequently indorsed it for value to the Bank of India. The Bank obtained a renewal of it under S. 21 of the Securities Act. No security was taken from the Bank. Subsequently the holder of the original note sued the Secretary of State in conversion and obtained damages. In a suit by the Secretary of Sate against the Bank of India for indemnity against the loss it was held that he was entitled to be indemnified against the loss incurred as the Public Debt office had issued the renewed note only on the request of the Bank of India. The fact that no security was taken at the time of the renewal could not affect this right of indemnity. (*Lord Wright.*) SECRETARY OF STATE *v.* BANK OF INDIA, LTD. 175 I.C. 327 (P.C.).

SPECIFIC RELIEF ACT, (I OF 1877), S. 42—*Declaratory relief—Grant of—Duty of Court—Injunction maintaining* status quo ante *not granted.*

In cases, where no temporary injunction maintaining the *status quo ante* is or can be granted, and the consequential relief in the shape of a mandatory injunction is denied, the Court should be very careful in framing the declaration it makes in favour of the plaintiff. Nothing should be declared which does not strictly speaking come within the scope of the suit, and the effect of which might be to embarrass other parties and complicate other transactions which are not before the Court. (*Mukherjee, J.*) THE ALL-INDIA TEA AND TRADING CO, LTD. *v.* UPENDRA NARAYAN SINHA. 42 C.W.N. 774.

———S. 42—*Declaratory suit—Maintainability—Suit to declare that plaintiff is gaddnashin of Khankah—Allegation by defendant that he is in joint possession of properties with plaintiff—Prayer for possession—If necessary.*

SPECIFIC RELIEF ACT (1877) S. 45.

Where in a suit for a declaration that the plaintiff is a gaddnashin of a certain Khankah, the allegation by the plaintiff that he is already in possession of the properties attached to the khankah is not disputed by the defendant who merely claims to be in joint possession with him, it is not necessary for the plaintiff to include a prayer for possession but he must however include a prayer for ejectment of the defendant. It is open to him to sue also for an injunction restraining the defendant from interfering with his rights as a manager of the khankah. (*Bhide, J.*) MOHAMMAD MUSA *v.* NABI BAKHSH. **40 P.L.R. 516**

——**S. 45, proviso (d)**—*Possibility of right of action—If bars application.*

The mere possibility of a right of action is no bar to an application under S 45 of the Specific Relief Act. (*Panckridge, J.*) GARRISON ENGINEER *v.* CORPORATION OF CALCUTTA. **42 C.W N. 789**

——**S. 56**—*Grant of injunction — Discretion of Court.*

Injunction is a discretionary form of specific relief, and under S. 56 of the Specific Relief Act the Court may refuse to grant an injunction if the plaintiff by his conduct has disentitled himself to such relief. (*Din Mohammad, J.*) CHANDI RAM *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. **40 P.L R. 577**

STAMP ACT (II OF 1899), S. 2 (17)—*'Mortgage deed'—What amounts to.*

In order to bring an instrument within the definition of mortgage deed it is necessary that the transfer should be effected by the instrument in question. Where an entry is merely a memorandum of payment of certain sum to another on account of the mortgage of certain land and does not purport itself to create the mortgage, the document is not liable to be stamped as a mortgage deed. (*Tek Chand, J.*) DASAUNDHA SINGH *v.* MALHI SINGH. **A I R. 1938 Lah. 460.**

[illegible]

obviously is to make the stamp unfit for further use in the ordinary course of business, and wh[illegible] been done in any particular case is a[illegible] determined on an examination of the[illegible] question. The section does not lay down that the cancellation must be such that it would be impossible for a criminally inclined person to use the stamp again. Thus, where the executant of a promissory note clearly initials his signature on the adhesive stamps on it, the mere fact that the date on which the executant initialled does not appear on any of them, does not make it "not effectually cancelled". (*Tek Chand, J.*) PUNJAB ZAMINDARS BANK *v.* MOHAMMAD SHAFFI. **A.I.R. 1938 Lah. 505.**

SUCCESSION ACT (XXXIX OF 1925), S. 214—*Applicability—Impartible estate—Decree of costs obtained by holder—Execution by succeeding holder—Succession certificate—Necessity.*

Succession to an impartible estate is dependant and is [illegible]

the decree for costs forming part of the impartible estate. (*Wort, C J. and Manohar Lall, J.*) RAM RAN BIJAYA PRASAD SINGH *v.* KESHO PRASAD SINGH. **19 Pat.L.T. 424=1938 P.W N. 449.**

SUGAR EXCISE DUTY ORDER (1934), Art. 15.

SUFEDPOSH—*Appointment of—Government servant in service—Eligibility.*

The appointment as *sufedposh* of a Government servant with 20 years of service still to run and who cannot consequently take office for that period, is not justified although a competent substitute could be found to do the work. (*Dobson.*) GHULAM QADIR *v* CHAUDHRI LAKHI SINGH. **17 Lah L T. 21.**

SUGAR EXCISE DUTY ACT (XIV OF 1934), S. 8—*Applicability—Failure to submit return in form B under Art. 5 of the Sugar Excise Duty Order—If evasion of payment—Offence—Duty of prosecution.*

The omission to file a return in Form B every month as required by Art. 5 of the Sugar Excise Duty Order is not an evasion to pay the duty punishable under S. 8 of the Act. The prosecution must establish other facts from which an inference can be drawn that the accused failed to file the return with the object of evading payment of the duty. But the failure to submit a return under Art. 5, would be an offence of failure to supply information as required by Art. 5, and would be punishable as such under S. 8. (*Manohar Lall, J.*) BEHARI RAM *v.* EMPEROR. **19 Pat. L.T. 415= 1938 P.W.N. 426.**

——**S. 8**—Failure to keep accounts—if failure to supply information—Offence. *See* SUGAR EXCISE DUTY ORDER, ART. 8. **19 Pat. L T. 415= 1938 P.W.N. 426.**

——**S. 8**—*Offence—Late payment of duty—Effect.*

A late payment of the duty assessed is not an evasion of payment punishable under S. 8 of the Sugar Excise Duty Act (*Manohar Lall, J.*) BEHARI RAM *v.* EMPEROR. **19 Pat L.T 415=1938 P W N. 426.**

——**S. 8**—*Sugar Excise Duty Order* (1934), *Art. 6—Assessment in February 1937, for duty in respect of December, 1936 and January, 1937—Effect of—Order for payment earlier than end of February—Propriety—Payment by end of February— If sufficient—Offence.*

[illegible] s that an [illegible] e on each [illegible] ntemplate [illegible]. Where the Collector therefore makes a summary assessment for December, 1936, and January, 1937, in February 1937, [illegible]

1937, though the Collector may fix an earlier date for payment. If the payment is made by the end of February, that is sufficient; the failure to pay on the date fixed by the Collector before the end of the month is not an offence under S. 8 of the Act. (*Manohar Lall, J.*) BEHARI RAM *v.* EMPEROR. **19 Pat L.T. 415=1938 P.W N. 426.**

SUGAR EXCISE DUTY ORDER (1934), Art. 8—*Failure to keep accounts—Offence*

Failure to keep correct daily accounts as required by Art. 4 of the Sugar Excise Duty Order is not a failure to supply any information as is contemplated by S. 8 of the Sugar Excise Duty Act, but failure to keep any account at all, is an offence punishable under Art. 8 of Sugar Excise Duty Order. (*Manohar Lall, J.*) BEHARI RAM [illegible] **19 Pat. L.T. 415=1938 P.W N. 426.**

[illegible]—*Power of Collector under to accept punishment.*

[illegible] of Art. 15 makes it quite clear that the Collector has the power to accept a sum of money only in lieu of punishment for breach of any of the Sugar Excise Duty Order, but not [illegible] Duty Act. But the imposition [illegible] Art.

cannot be justified unless the duty payable after assess- ment has not been paid within the time fixed, having regard to S. 4 (1) of the Sugar Excise Duty Act. (*Manohar Lall, J.*) BEHARI RAM *v.* EMPEROR
19 Pat.L.T. 415=1938 P.W.N. 426

SURETY—*Co-sureties—Rights* inter se — *Co-surety paying in excess of his share—Rights of.*

Where a surety or sureties under a mortgage deed have paid in excess of his share, he is entitled to bring a suit for the amount paid against the principal debtor and the co-surety together under O. 1, R. 3, C. P. Code. The fact that the property, which has been conveyed to the plaintiff surety by the mortgagee on his paying the mortgage amount under the mortgage deed is unrealized, is no ground for the co-surety to insist that his liability should be postponed, until the security is realized and its extent ascertained. All he is entitled to claim is that he should share proportionately in the proceeds of the security when it is realized. (*Panckridge, J.*) KAMAL CH. CHUNDER *v.* SUSHI- LABALA DASSEE. A.I.R. 1938 Cal. 405.

SURETY BOND—*Correction—Mistake of Court— Equities—Power to impose terms—Surety's liability—If extends to cost of appeal.*

A judgment-debtor appealed from a decree. Pending appeal, execution was stayed on the appellant furnishing security for the due performance of any decree or order that might be passed against him by the Appellate Court. There was in fact a second appeal. Both the appeals were dismissed. The surety for the judgment- debtor had, through mistake of some official of the Court, used the Form 3, App. G, instead of Form 2, App. G, Sch. I, C. P. Code.

Held, that owing to the use of a wrong Form the document did not correctly represent the contract. Though S. 92, Evidence Act, applied to the document, the case being one of palpable error, equity sanctioned the admission of evidence to expose the error. More- over as the error and negligence was on the part of some official of the Court in using the wrong Form, the Court could correct its officer's error without driving the per- sons affected to proceed under S. 31 of the Specific Relief Act.

Held further that, on the bond as it stood, the surety was under no liability at all. As the bond had to be ·rrected before the surety could become liable, the Court was entitled, while correcting the bond, to direct the decree-holder to pursue his remedy first against the judgment-debtor before executing the decree against the surety.

Held also that the costs of the second appeal could not be added to the decree amount to secure which the bond was given. (*Stone, C. J. and Puranik, J.*) MADHORAO NARAYANRAO *v.* HARINATH BHIKAJI.
A.I.R. 1938 Nag. 259.

TORT—*Conversion—Measure of damages.*

In the case of a wrongful conversion of goods entrust- ed to a Railway Company, for transmission, the amount of damages to be awarded is the value of the goods in the open market at the place of delivery on the date when the wrongful conversion took place. (*West.m.*) B. B. & C. I. RAILWAY *v.* KASHI RAM. 1938 A.M.L.J. 6.

——*Vicarious liability—Liability of master—Inde pendent competent contractor—Negligence of—Liability for.*

In general, a person is liable for the tortious acts of his servants but not for those whom he engages as in- dependent contractors. Cutting down a tree which is three feet in diameter is not a hazardous task requiring skill nor is the work necessarily dangerous if properly performed. It is a work which even unskilled persons

are able to accomplish with the exercise of a little in- genuity and care. Where therefore the defendants engage competent persons for doing the work and leave the matter in their hands but the work is performed negligently and as a result part of the tree falls on the plaintiff's house causing damage to it, the defendants cannot be held responsible for the negligence of the persons whom they have employed. (*Vivian Bose, J.*) MT. SULTAN BI *v.* NAND LAL.
A.I.R. 1938 Nag. 296.

TRADE MARK—*Infringement of—Cotton spools— Interlocutory injunction—Grant of.*

Where in a suit based on an alleged infringement of a trade mark on cotton spools, the plaintiffs pray for an interlocutory injunction restraining the defendants from selling cotton spools which are similar in appearance to those sold by the plaintiffs, but there is no evidence of any actual cases in which the defendants' cotton has been sold to persons desiring to purchase the plaintiffs' cotton or of cases where illiterate customers have been misled by the defendants' design into thinking that they were buying plaintiffs' cotton, no interlocutory injunction should be granted simply because the two spools have various features in common. (*Panckridge, J.*) KERR & CO. *v.* AHMEDABAD COTTON MANUFACTURING CO. A.I.R. 1938 Cal. 458.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 6 (d) and (dd)—*Property given to Hindu widow in lieu of maintenance—Its transfer during her life— Validity.*

The statutory non-transferability enacted by S. 6 (*d*) and S. 6 (*dd*) is based on the impossibility of transfer inherent in the nature of the right sought to be transfer- red, and not on notions of public policy. Where property has been given to a Hindu widow in lieu of maintenance, the transfer of the property during her life is not a tran- sfer of her rights to maintenance and is valid. Ss. 6 (*d*) and (*dd*) have no application to such a case. A.I.R. 1932 All. 662 Foll. (*Panckridge. J.*) KAMAL CH. CHUNDER *v.* SUSHILABALA DASSEE.
A.I.R. 1938 Cal. 405.

——**S. 52**—*Suit by* A *for declaration of title to property against* C—*Mortgage taken from* C *pending suit—If affected by* lis pendens.

A brought a suit against *B* to recover lease money of certain property. *B* pleaded that *A* had represented to him that *C* had half share in such property and that on such representation he paid half the lease money to *C* and took a mortgage of his half share from *C*. *B* there- fore contended that *A* was estopped from denying his title as mortgagee and that he was bound by his mort- gage. It was found that *B* took his mortgage from *C* after repudiation by *A* of *C's* title to the property and after the institution of the suit by *A* against *C* for decl- aration of his title to the property. To this suit *B* was also made a party.

Held, that even though *B* was aware of the fact that the title of his mortgagor *C* was in dispute he took the mortgage from *C*. The mortgage was therefore affected by the doctrine of *lis pendens* and *A* could not be held bound by such mortgage. (*Bhide J.*) THAKUR DAS *v.* JAI KISHEN DAS A.I.R. 1938 Lah. 448.

——**S. 53 A**—*Applicability—Mortgage—Mortgagor reserving to himself right to settle sub soil rights—Sub- sequent unregistered lease by mortgagor—Lessee in pos- session—Action on mortgage by assignee of mortgagee— Claim by lessee to specific performance—Sustainability.*

In a mortgage deed the mortgagor reserved to himself the right to manage sub-soil rights of the mortgaged property. Subsequently, the mortgagor by an unregis-

T. P. ACT (1882), S. 53-A.

tered document contracted to lease the sub-soil rights to another person. The lessee was in possession of the soil under the unregistered document. In an action on the mortgage by the assignee of the mortgagee the lessee contended that the action could not affect his leas .

and Manohar Lall, JJ.) JAGDAMBA PRASAD v. ANADI NATH. A.I.R. 1938 Pat 337.

——(as amended in 1929), S. 53-A—*Scope—If retrospective.*

Act, is not retrospective, (*Wort and Manohar Lall, JJ.*) JAGDAMBA PRASAD v. ANADI NATH. A.I.R. 1938 Pat. 337.

——S. 55 (1)(g) and Sub-S (2)—*Applicability of principle underlying—Covenant for freedom from incumbrances—Who could avail and pursue remedy—Measure of damages.*

A mortgaged to *R* and subsequently to *P* by way of second mortgage. *P* assigned to *G*. Later on, *R* sued *A* without impleading *P* or *G* and obtained a foreclosure decree and then sold to *X* as a property free from incumbrances. *X* mortgaged it to *Y* also as unincumbered estate. Subsequently *G* sued on his mortgage and obtained a decree. The question was whether *Y* the mortgagee of *X* was entitled to pursue the remedy which *X* had against his vendor *R* on the covenant for freedom from incumbrances.

Held, that the question was to
to the principle of S. 55 of the
the Court was concerned with was
mortgagee, but of a person, against not
a vendor. Linking up sub S. (2) clause
benefit of the contract mentioned in this
S. (1) (g) *R* must be deemed to have contracted with *X* that he had power to transfer and that the property was free from incumbrances. The benefit of this contract passed to *Y*, the mortgagee from *X*, and hence *Y* could recover damages for the breach of the covenant from the representative of *R* who was primarily liable to the extent of loss caused by the fact that *P's* mortgage was outstanding in the hands of *G*.

Held further that the measure of damages was not the amount of the debt for the securing of which the property was mortgaged but the value of the security. But *Y* had only a part interest. If the value of the subject-matter exceeded the debt, *Y's* claim against *R's* representative would be limited to his debt, though had *X* sued *R's* representative, the liability would be greater If the value of the subject matter was less than the debt, the damage would be the value of the subject-matter. (*Stone, C. J. and Puranik, J.*) RINZA ANSA MOHANLAL MADANGOPAL. A.I.R. 1938 Nag 257.

——S. 58 (f)—*Mortgage by deposit o*
Nature of documents to be deposited.

In order to create a valid mortgage by
deeds under S. 58 (*f*) it is not necessary
or even the most material, of the docum
the property, should be deposited, nor
ments deposited should show a complete
the depositor. It is sufficient if the deeds
fide relate to the property or are material evidence of title or are shown to have been deposited with the intention of creating a security thereon. (*Roberts, C.J., Mya*

U. P. AGRIC. REL ACT (1934), S. 33.

Ba and Dunkley, JJ.) CHIDAMBARAM CHETTIAR v. AZIZ MEAH. 175 I.C. 206 = A.I.R. 1938 Rang. 149 (F.B.).

——S. 107—*Lease reserving yearly rent not regis-*

g a yearly
eye of law
to month.

(*Mukherjea, J.*) UDOYTARA SAHA v. HABIBAR RAHAMAN. 42 C.W.N. 771.

——Ss. 114 A and 111(g)—*Termination of lease on forfeiture—Two notices, if necessary—Form of notice.*

the T. P. Act, only
not two. In cases
remedy, all that the
should be given by
the landlord before suit, conveying his election of forfeiting the tenancy.. But if the breach is one capable of remedy, it is further necessary that he should require the lessee to remedy the breach and must give to the lessee reasonable time to do so from the date of service of notice. Otherwise the notice is bad. (*Mitter and Biswas, JJ*) PRAVAT CHANDRA SYAM v. BENGAL CENTRAL BANK LTD. 42 C.W N. 761.

U P AGRICULTURIST RELIEF ACT (XXVII OF 1934), Ss. 2 (8) and 30 (4)—*Interest—What is included in—Theka money to be paid by mortgagor lessee—If can be dealt with under S.* 30 (4 .

S. 2 (8) of the U. P. Agriculturists Relief Act lays down that 'interest' includes return to be made over and above what was actually lent whether the same is charged or sought to be recovered specifically by way of interest or in the form of service or otherwise. Where it is
leases in favour
to 'rent' only by
the 'rent' is no

sions of S. 30 (4) of the Act. The word 'otherwise' in S. 2 (8) makes the provision comprehensive enough to cover what is called 'rent' in the above case. (*Thomas, C.J and Zia-Ul Hasan, J.*) RAM NARAIN v. CHANDRIKA PRASAD. 175 I.C. 50 = 1938 O L.R. 259 = 1938 O A 434 = 1938 O W.N. 535.

——S. 30 (4)—Applicability—Theka money to be paid by mortgagor lessee. *See* U. P. AGRICULTURISTS RELIEF ACT, Ss. 2 (8) AND 30 (4). 1938 O.A. 434

——S. 33—*Jurisdiction of Court acting under—Nature of—Power of Court to pass a decree for sale or foreclosure.*

The U. P. Agriculturists Relief Act does not provide for the creation of any special Court and as S 2 (5) of

which a suit under S. 33 of the Act has been filed by a

suit by debtor under S. 33—If affects creditor's right to sue for lease money in Revenue Court.

Where there has been a mortgage and lease back to

the mortgagors, the decision in a suit for accounts under S. 33 of the U. P. Agriculturists' Relief Act brought by the debtor, would not in any way affect the right of the mortgagee-creditor to recover the lease money by suit in the Revenue Court in the usual course, nor would mere decrees obtained by him therein be deemed to constitute money 'realised' for purposes of the Act. (*Thomas, C. J. and Zia Ul-Hasan, J.*) RAM NARAIN *v.* CHANDRIKA PRASAD. **175 I.C. 50=1938 O.L.R. 259=1938 O.W.N. 535=1938 O.A. 434.**

——**S.** 33—*Suit under—Nature of—Mortgagee-defendant, if entitled to costs.*

A suit by a mortgagor-debtor under S. 33 of the U.P. Agriculturist Relief Act for accounts, cannot be regarded as a suit coming under O. 34, C. P. Code, and as such the mortgagee-defendant is not entitled to costs and particularly where all the points raised in defence were found against him. But if the mortgagee had exercised his right under S. 33 (2) of the Act and prayed for a decree in his favour, then perhaps, it might be regarded as coming under O. 34, C. P. Code, and other considerations might arise. (*Thomas, C.J. and Zia-Ul-Hasan, J.*) RAM NARAIN v. CHANDRIKA PRASAD. **175 I C. 50=1938 O.L R. 259=1938 O.W.N. 535=1938 O A. 434.**

——**S** 33 (1) and (2)—*Construction—Applicability to mortgages.*

Sub-S. (1) of S. 33 of the U. P. Agriculturist's Relief Act cannot be deemed to have been modified by Sub-S. (2), as it is Sub-S. (1) which lays down the substantive law, Sub-S. (2) merely prescribing the procedure, to be followed. Therefore, if anything, it is Sub-Sec. (2) that should be read subject to Sub-S. (1) and not *vice versa.* There is nothing moreover, in Sub-S. (2) which may be said to be in conflict with the provisions of Sub S. (1) or to show that S. 33 of the Act was not intended to apply to mortgnges. (*Thomas, C.J. and Zia-Ul-Hasan, J.*) RAM NARAIN *v.* CHANDRIKA PRASAD. **175 I.C. 50=1938 O.L.R. 259=1938 O W.N. 535=1938 O A. 434.**

U P. ENCUMBERED ESTATES ACT (XXV OF 1934). S. 4 *Application under—Objections as to—If could be raised after decree is passed.*

Where the special Judge has passed a regular decree under Cl. (7) of S. 14 of the U. P. Encumbered Estates Act and it has been transmitted for execution it is too late a stage to allow objections as to the original applications to be entertained. (*Darling, S.M.*) TEJ SINGH *v.* KANHYA LAL. **1938 A.W.R. (B R.) 204.**

——**Ss. 4 and 6**—*Order transferring application to special officer—Subsequent order under Regulation of Sales Act—Effect.*

No order under the U. P Regulation of Sales Act could be passed after the date on which an application under S. 4 of the U. P. Encumbered Estates Act has been ordered to be transfered to the special officer under S. 6 of the same Act. (*Darling, S.M. and Bomford J.M.*) SAMRAJ SINGH *v*, HARI KISHUN DAS **1938 A.W.R. (B.R.) 212.**

——**S. 7**—*'Debt'—Meaning of—Costs payable under decree—Mesne profits—If included.*

There is nothing in S. 7 or anywhere else in U. P. Encumbered Estates Act to warrant the contention that the word 'debt' in S. 7 connotes a contract. On the other hand S. 2 (*a*) lays down that 'debt' includes any pecuniary liability except a liability for unliquidated damages. The words 'any pecuniary liability' are wide enough to include not only costs payable under a decree. but also mesne profits awarded. Those profits cannot

be 'unliquidated damages' as their amount is fixed after inquiry by Court. (*Thomas, C.J. and Zia Ul-Hasan, J.*) BADRI DAS *v.* RAJA BIRENDRA BIKRAM SINGH. **175 I.C. 169=1938 O.A. 461.**

U. P. PUBLIC GAMBLING ACT (XV OF 1936), Ss. 5 and 6—*Issue of warrant—Condition necessary—Presumption under S. 6, if can arise when warrant is illegal.*

Where the legality of a search warrant is attacked, the Court has to see whether the Magistrate was given credible information and not whether the officer seeking the warrant had received credible information. If the warrant was issued simplybecause the police officer asked for it, then it is not a legal warrant under S. 5 of the Public Gambling Act and hence no presumption under S. 6 of the Act can arise from it. (*Weston, J.*) KAPOOR CHAND *v.* EMPEROR. **1938 A.M.L.J. 13.**

——**S.** 6—Presumption under—If case arise when warrant is illegal. *See* U. P. PUBLIC GAMBLING ACT, SS. 5 AND 6. **1938 A.M L.J. 13.**

U P. REGULATION OF SALES ACT (XXVI OF 1934), Ss. 3 and 4—Proceedings under—Orders thereon subsequent to passing of orders under S.6 of the Encumbered Estates Act—Effect. *See* U. P. ENCUMBERED ESTATES ACT, SS. 4 AND 6. **1938 A.W.R (B R.) 212.**

——**Ss. 3 and 4**—*Transfer—Who can set aside.*

An order of transfer can only be set aside by the order of the Board. (*Darling, S.M. and Bomford, J.M.*) SAMRAJ SINGH *v.* HARI KISHUN DAS. **1938 A.W.R. (B.R.) 212.**

UPPER BURMA RUBY REGULATION (XII OF 1887), Rr. 17 and 18—*Powers of Inspector of Mines—Extent of—Order prohibiting person digging mine from allowing debris to fall out—Disobedience—If punishable—Penal Code, S.* 188.

Under R. 17 all disputes arising between native miners as to sites or other matters shall be decided by the Inspector of Mines, but there is nothing in the rules, or in the conditions of the license issued under the rules, which gives the Inspector of Mines authority to prohibit a person from digging his mine and allowing the debris to fall out. The "other matters" referred to in R. 17 do not appear to include matters of this kind, or else surely some provision would have been made for the enforcement of the Inspector's orders. According to R. 18 the orders are of the kind that a Revenue Officer can pass under the Upper Burma Land and Revenue Regulation, 1889, and the word "order" as here used does not appear to mean a command but a "decision." S. 188, I. P. Code, could not possibly apply to orders of the Inspector of Mines passed under R. 17. *P* and *G* were each digging for precious stones by working mines of the kind called lu and *G* complained that debris from *P's* lu dropped into his lu. The Inspector of Mines and Sub-Divisional Officer inspected the locality and came to the conclusion that *P* should be prohibited from passing sand or debris or kane into the perennial stream. The order so passed was disobeyed by *P* for which he was convicted under S. 188, I. P. Code. On revision,

Held, that the Inspector of Mines had no authority to issue such an order. There does not appear to be any provision under the Upper Burma Ruby Regulation or rules thereunder for punishing *P* for his alleged misconduct in this matter. Persons aggrieved by his acts must apply to a Civil Court. (*Mackney, J.*) KO PO *v.* THE KING. **A.I.R. 1938 Rang. 223.**

USURIOUS LOANS ACT (X OF 1918), (as amended by U. P. Amendment Act of 1934), S. 3—*Scope and effect—Relief to debtor—Limits.*

WZZZ.

As the local legislature has by the U. P. Usurious Loans (Amendment) Act of 1934, laid down the specific principles on which excessiveness or otherwise of the interest is to be judged, cases coming up before Courts after the passing of the local amending Act must of necessity be decided on the principles laid down by that Act. The effect of the amendment of S. 3 of the original Act is that the Court can now relieve the debtor of liability in respect of excessive interest not only when the interest is excessive and the transaction was substantially unfair but also where either the interest is excessive or the transaction was substantially unfair.

[illegible]

A Court of probate is not a Court of probity, and the Court has not to ask whether the testatrix bequeathed her property as they think she ought to have done If the propounders prove the *bona* [illegible] and there are no circumstance[illegible] probate can be granted. (*Bag*[illegible] SAW YAW BA *v.* SAW BA MAUNG.

A I.R. 1938 Rang. 251.

WORKMEN'S COMPENSATION ACT (VIII OF 1923), S 2(1)(e)—*'Employer'—Person getting labour supplied by another.*

WORKMEN'S COMPENSATION ACT (1923), Sch. II, Cl. (viii).

If a person who is responsible for the putting up of a building gets workmen supplied by a Sirdar and pays them through the Sirdar, he and not the Sirdar is the employer of the workmen for the purposes of the Workmen's Compensation Act. (*Derbyshire, C.J. and Mukherjea, J.*) KALOO & SONS *v.* OFATANNESSA BIBI.

42 C.W.N. 803.

——S. 12 (1)—*'Contractor'—Person supplying labour.*

A person who does not contract to do the whole or [illegible] but merely supplies labour at so [illegible] contractor within the meaning [illegible]kmen's Compensation Act, and [illegible]refore, no right to indemnity against him. (*Derbyshire, C.J. and Mukherjea, J.*) KALOO & SONS *v.* OFATANNESSA BIBI.

42 C.W.N. 803.

[illegible] g of [illegible] Act, although it is erected for a temporary purpose and is some sort of a flimsy pavilion. (*Derbyshire, C.J. and Mukherjea, J.*) KALOO & SONS *v.* OFATANNESSA BIBI.

42 C.W.N. 803.

II—SELECT ENGLISH CASES.

APPORTIONMENT —*Dividends —Life tenant—Death of—Sale by trustees of securities 'cum dividend' Effect of on dividend accrued during the lifetime of life tenant—If proceeds to go to remainderman or apportionable between life tenant and remainderman.*

A testator created certain trusts for two ladies in equal moieties as tenants for life and subject to those life interests for various remaindermen. The testator died on 29th January, 1911. One of the tenants for life died on 22nd August, 1932, and the other died on 22nd September, 1936. The moiety of the estate whence the latter's income was derived was about 1,300,000*l.* the estate duty coming to 500,000*l.* The estate included ordinary stocks on which the final dividend for the year ending 31st October, 1936, was to be declared and payable in March, 1937. The trustees sold certain of the stocks to pay death duties 'cum dividend' so that no current dividend was received by them. But there was a dividend of 2,160*l.* odd accrued due at the death of life tenant. The question was if it had to be paid to the executors of the life tenant or treated as capital.

Held, that the trustees, when they sell the securities, ought so to arrange matters as to preserve, if they reasonably can be preserved, the rights of the tenant for life. The trustees ought not to treat the whole of the purchase price as capital, but ought to apportion it as between, on the one hand, the remainderman, and on the other the executors of the tenant for life, by paying over to the executors of the tenant for life, out of the purchase price the sum of 2,160*l.* odd representing the proportion of dividend accruing on the securities so sold, calculated to the death of the tenant for life. *In re* WINTERSTOKE'S WILL TRUSTS: GUNN *v.* RICHARDSON. (1938) 1 Ch. 158.

CINEMATOGRAPH ACT, 1909, Ss. 2 and 5—*County council—Power to issue licenses for theatre—Delegation of, to justices—Application to justices for approval of plans for premises—Nature of—Extra-judicial proceeding—Writ of* mandamus *or* certiorari—*If can issue.*

S. 2 of the Cinematograph Act, 1909, confers on the county council the power to grant licenses to such persons as they think fit to use the premises specified in the licence for the purposes of a cinematograph theatre subject to such terms and conditions as the council may determine. S. 5 permitted the county council to delegate this power to justices sitting in petty sessions. A county council so delegated its powers to justices. In the statute of 1909 there is no provision made for the grant of provisional licenses in respect of premises not yet erected. The practice therefore was that when a plan of premises was approved, it was to be understood that an application for a license will be automatically granted when the building is completed. When an application for licence was refused by the justices, this application was taken out for a writ of *mandamus*.

Held, that the justices sitting for the preliminary purpose of considering plans of a building not yet constructed, are not engaged in a judicial proceeding such as may be brought to the notice of the Court for the purpose of the prerogative writ of *mandamus* or *certiorari.* THE KING *v.* BARNSTAPLE JUSTICES. CARDER, *Ex parte.* (1938) 1 K.B. 385 = 107 L.J. (K.B.) 127.

CONTRACT,

COMPANY—*Winding up—Payments to a customer creditor by way of fraudulent preference—Payments by customer to company during the period—If can be set-off.*

A company *F* carrying on business as contractors for tar-paving and similar work was for a long time a customer of the respondent companies (*W* and *I*) and had considerable dealings with them. The respondent companies supplied goods to the *F* Company and made loans to it and in that way the *F* Company became indebted to them and the *W* Company became indebted to the *F* Company for work done by the *F* Company. The *F* Company was wound up. During the three months prior to the commencement of the winding up (13—1—1937) payment was made to the *W* and *I* Companies of the sums owing to them for goods supplied. They were found to be fraudulent preferences. The *W* and *I* Companies claimed to dedust from the sums that they are liable to return on the ground of fraudulent preference certain sums which they had paid to *F* Company during the same period by way of advances or on account of the tar-paving contracts.

Held, that looking at the accounts of *F* Company there was no attempt to treat what was done as a set-off. There was no mutual set-off or position in which there should have been a set-off and hence the deductions could not be allowed. *In re* B. B. FOWLER, LIMITED. (1938) 1 Ch. 113.

CONTRACT—*Agreement by a married woman with a third party "to forego the consortium of her said husband" for a time—If valid—Public policy.*

A married woman filed a suit for breach of contract. The contract was entered into in January 1936 "whereby in consideration of the plaintiff persuading her husband to go to New Zealand and for consenting to forego the consortium of her said husband, the defendant promised to pay to the plaintiff an allowance at the rate of 4*l.* per week" until a certain time mentioned therein. She alleged that she had sent her husband to New Zealand and had foregone the consortium as agreed. The defence was that the contract was invalid as founded upon an illegal consideration and opposed to public policy.

Held, by Lewis, J., that the agreement is not invalid. The agreement as pleaded does not necessarily contemplate a complete separation of husband and wife. There is no general principle of public policy that no contract is enforceable which is inconsistent with maintenance of the marriage tie, in the absence of any immorality or illegality, in the contract.

Held, by the Court of Appeal, that the consideration for the contract as pleaded is not the consent of the wife to forego the consortium of her husband. The agreement so far from being an agreement of separation, is an agreement of physical separation for a period and contemplates that the parties will remain as husband

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and wife and actually provides for the financial means for their once more physically living together. The consortium is not broken. It is a persuasion by the wife of her husband to go to New Zealand in consideration of which the defendant promised to pad the plaintiff a weekly allowance. DAVIES v ELMSLIE.

(1938) 1 K B. 337=107 L.J. (K B.) 113.

COPYRIGHT—*Copyright Act* (1911), *S.* 6—*Copyright in idea.*

"A person may have a brilliant idea for a picture, or for a play, and one whi him to be original; but if he communicate an author or an artist or a playwright, the production which is the result of the communication of the idea to the author or the artist or the playwright is the copy right of the person who has clothed the idea in form, whether by means of a picture, play, or a book, and the owner of the ide the other hand, to take down a word for word, i then transcribes author is the owner of the copyright and not the shorthand writer. A mere amanuensis does not, by taking down word for word the language of the author, become in any sense the owner of the copyright." DONOGHUE v. ALLIED NEWSPAPERS, LIMITED.

(1938) 1 Ch. 106=157 L. T. 186= 107 L.J. (Ch.) 13.

INSURANCE—*Motor insurance—Policy — Non-disclosure of a material fact, namely, of prior convictions of insured—Suit by company to avoid policy—Defence that company had not treated it as a material element*

was done to one *O*, who was i claim against the defendant *D*. Road Traffic Act, 1934, provides payable by an insurer under the this section, if, in an action commenced before, or with-

this provision alleging that the defendant *D* did not disclose two previous convictions for driving a motor car without a license and for driving a motor cycle in a dangerous manner. The defence was that it was not a material fact because the company had accepted policies in certain other cases with knowledge of such convictions there.

Held, that the allegations regarding this defence should be struck out as the allegations amounted to no more than pleading evidence of want of materiality. The

Held, that discovery cannot be ordered because the mere fact that the plaintiff company, in cases where convictions of the same character as those now in question had been disclosed to them by the applicants, did not decline the risk or raise the premium, is not relevant

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to the case. If discovery had been asked for, or could have been asked, of documents relating to cases where the plaintiffs after discovering the existence of similar convictions which an applicant had failed to disclose, nevertheless decided to issue the policy on ordinary terms, the position might be different. MERCHANTS' AND MANUFACTURERS' INSURANCE COMPANY, LTD. v. DAVIES:

(1938) 1 K.B. 196=156 L T. 524= 106 L J. (K B.) 433.

ECTION ACT, 'isiting committee by the committee —*Dismissal of, with three months' notice—Power of visiting committee to dismiss without notice—Action for wrongful dismissal—Limitation.*

The plaintiff was appointed as assistant medical officer of a mental hospital in June, 1923. At the time of the

three months. The plaintiff then was prosecuting his claim for a superannuation allowance This question was finally decided by the Minister of Health in November, 1930, against the plaintiff. In 1933 the plaintiff filed this suit against the visiting committee for wrongful dismissal and for return of his superannuation allowance.

Held, that the suit was barred by S. 1 of the Public Authorities Protection Act as inadequacy of notice complained of, and the neglect to pay the superannuation contributions were neglect of "an act done in pursuance, Act of Parlia- n 6 months of of the Lunacy mittee of every officer . . . ." e may remove MCMANUS 7 L T 385= 107 L J. (K B) 51.

ACT, 1934—*Passenger vehicle— V. 8 Utility car, if a passenger*

A Ford V. 8 Utility car was constructed as follows:— se used in the motor cars, anufacture of oon body the ted of wood celluloid fitted at the sides and rear of the car ....In the forward portion of the body was a seat large enough to accommodate the driver and two other persons, behind this were two other single seats, and behind these a rear seat large enough to accommodate three persons. The construction of this rear seat was such that the whole of the seat could easily be lifted out of the vehicle so as to leave a large vacant area on the floor. This vacant area could be used for the carriage of luggage or other goods or burden............ The vehicle was included by the n their catalogues and price lists under the passenger cars'." The vehicle was being driven exceeding 30 miles an hour and a charge was st the respondent for having driven at more than 30 miles speed, which is permitted only to passenger vehicles.

Held, the vehicle was not a passenger vehicle but a goods vehicle and therefore was subject to the speed limit of 30 miles per hour.

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defined as "vehicles constructed *solely* for the carriage of passengers and their effects". This vehicle cannot be said to be constructed *solely* for the carriage of passengers and was therefore a goods vehicle. HUBBARD *v.* MESSENGER. **(1938) 1 K.B. 300 = 157 L.T. 512 = 107 L.J. (K.B) 44.**

———**S. 18**—*Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935—Regulations made by Minister under S. 18—Accident to pedestrian while crossing—Plea of contributory negligence—If available.*

Rules 3 and 4 of the Pedestrian Crossing Places (Traffic) Provisional Regulations, 1935, made by the Minister of Transport under S. 18 of the Road Traffic Act, 1934, ran as follows :—R. 3. "The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing." R. 4. "The driver of every vehicle at or approaching a crossing where traffic is not for the time being controlled by a police constable or by light signals shall allow free and uninterrupted passage to any foot passenger who is on the carriage way at such crossing, and every such foot passenger shall have precedence over all vehicular traffic at such crossing." While the plaintiff was crossing a road in a pedestrian crossing which was marked by Belisha beacons, he was struck by the defendant's motor car. He was visible to the oncoming car. The defendant pleaded contributory negligence of the plaintiff in that he did not keep a proper look out to see that the defendant's motor car was approaching.

Held, that the Regulations are so framed as to make it impossible, when they apply, for the defence of contributory negligence to be raised. Regulation 3 says that unless the driver can see that there is no foot passenger thereon he must proceed at such a speed as to be able, if necessary to stop before reaching such crossing and Regulation 4 imposes an obligation upon him to give precedence to a foot passenger on the crossing. Now if his duty is to stop it is physically impossible in such a case that the cause of the accident can be negligence of the plaintiff, because *ex hypothesi* the defendant, if he has done his duty, has already stopped. BAILEY *v.* GEDDES. **(1938) 1 K.B. 156 = 107 L.J. (K.B.) 38.**

SHIPPING—*Action in rem for damages against shipowners—Arrest of ship—Release of, on bail—Subsequent addition of charterers as defendants—Charterers held entitled in other proceedings to indemnity from shipowners—Claim by charterers to have the bail given to plaintiff for their benefit also.*

In February, 1936, the plaintiffs (owners of cargo) instituted an action *in rem* against the owners of the carrying ship in respect of damages to the cargo. The plaintiffs arrested the ship and she was released on bail bond of certain sureties. This was in March. In May, the charterers of the ship were added as defendants. It was held that the parties liable to the plaintiffs were the charterers and not the owners. In third party proceedings between the defendants, the characterers were held entitled to an indemnity from the owners in respect of any claim by the plaintiffs for damages. In July the characterers defendants asked that the bail bonds given to plaintiffs may also be made available to meet the claim of these charterers under the indemnity.

Held, that assuming that a claim for indemnity is a claim falling under S. 22, sub-S. (1) (*a*) (*xii*) (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, as a "claim arising out of an agreement relating to the use or hire of a ship", yet the second defendant (charterer) cannot claim the benefit of a bond given to the plaintiffs. The bail was put in to answer the claim of the plaintiffs against the first defendant and the plaintiffs have failed in that claim and against that bail. The proper course for second defendant would have been to sue out a warrant of arrest on their own claim, when the question of their right to arrest could have been challenged, and to pursue by the regular and normal course their right, if any, to obtain bail. THE ROBERTA. **(1938) P. 1.**

SOLICITOR—*Acting for a party—Change of solicitor—New solicitor at date of judgment—Professional misconduct by the original solicitor in conduct of suit—Court, if can order the solicitor to pay costs personally.*

Before the trial of the action concluded, the solicitors engaged by the defendants first ceased to act for them and new solicitors were on record at the date of the judgment. The plaintiffs claimed costs of the action personally from the original solicitors on the grounds that the said solicitors while acting in the action as such solicitors were guilty of certain acts of professional misconduct. The solicitors contended that as from the date when they ceased to represent the defendants for whom they had acted, the judge ceased to have jurisdiction over them in respect of matters that happened before that date.

Held, that the jurisdiction of a judge of the High Court who hears a case to exercise control over the conduct of solicitors in the case, as officers of the Court, does not come to an end if they cease to be solicitors on the record before an application is made to him to exercise that jurisdiction. *Simes* v. *Gibbs*, (1838) 6 Dowl. P. C. 310, followed. BRENDON *v.* SPIRO. **(1938) 1 K.B. 167 = 157 L.T. 265.**

SUMMARY JURISDICTION (MARRIED WOMEN) ACT, 1895—*Desertion by husband—Claim by wife for maintenance—Defence justification—Adultery of wife—Statement by wife about the doubtful paternity of a child—If admissible in evidence.*

The parties were married in 1920 and there were three children of the marriage. The wife claimed maintenance from the husband on the ground that he had deserted her in 1937. The defence was that he had reasonable cause for leaving the wife in that she was guilty of adultery. As evidence he wanted to let in evidence of a statement by her that she told him that he would have to keep the last child whether his or not. The wife was also found to have written an indecent letter and there were also indecent letters in her possession.

Held, the evidence of the admission of adultery was admissible in evidence. It was not tendered to bastardize the child. When a husband comes to Court and seeks to prove adultery merely by saying that a child has been born and tendering evidence that he could not have been the father, it is hit by *Russell* v. *Russell*, (1924) A. C. 687. It is admissible to prove that the husband had reasonable cause to leave the wife. ROAST *v.* ROAST. **(1938) P. 8 = 157 L.T. 596.**

TORT—*Master and servant—Independent contractor—Employer sending one of his apprentices to work with the contractor—No request by contractor for loan of his services—Negligence of such apprentice—If contractor liable or the employer.*

The defendants *L* Company were the owners of paper mills and in 1935 were erecting a new power house for the electrical equipment required for the mills. The electrical installations were entrusted to an indepedent contractor (another Company *E*). That company was short of men and therefore by an arrangement with *L* Company some men (including the plaintiff *C*) were borrowed from the *K* Company and as a result he (*C*)

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was now in the work of the *E* Company. It was the custom of the defendants *L* Company, when electrical contractors were at work on the premises, to instruct their electrical apprentices to work with the other electricians and under that system *M* was working under the orders of *J*, the foreman of *E* Company. On the instructions of *J*, this *M* put up a scaffolding for the plaintiff *C*. The plank of it proved defective. plank was not supplied by the defendants The p broke and plaintiff sustained injuries, whereupo plaintiff filed this suit for damages.

Held, (*i*) that the defendant company was not liable

the work ; (*ii*) but the defendant was liable for the tortious act of its servant *M*. He is to be regarded as its servant because he was an apprentice of sent him to work under *J*. The *E* Company ask *L* to send *M*. The *L* Company was in fac

they are liable. *Dono* Q.B. 629 and *Bain* v. 2 A.C. 412, distingui LLOYD, LIMITED. (1938) 1 K B. 272= 157 L T. 236=106 L J. (K.B.) 626.

——*Negligence—Paddling pool in a public park for children—Sand heaped at the side of the pool—Piece of glass in sand—Injury to a child*

The piers c or po of sea from s child a piece of glass in the sand and so brought a suit for damages. The authorities had put up a notice board near the pond stating that "owing to the risk of cut feet, persons must not take into the paddling pool any bottles,

where the plaintiff was injured.

Greaves-Lord, J.—held that the plaintiff was an invitee, that the presence of the glass was a hidden danger of which the defendants ought to have known, that the rake was useless to ascertain whether there was anything imbedded in the sand and that the Council did not exercise that reasonable care which they should have exercised towards a child whom they invited to the pond and were therefore liable.

Held on appeal, that without deciding whether the relationship between the local authority and the plaintiff was that of invitor and invitee, and treating the case as

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subjected when they paddled in the pool or by seeing that the children did not paddle in the pool at all, and that the rake that they provided was not sufficient to remove anything embedded in the sand. ELLIS *v.* FULHAM BOROUGH COUNCIL. (1938) 1 K B. 212= 157 L.T. 380=107 L J. (K.B.) 84.

TRADE MARK—*Registration of an invented word*—

act of liver and iron, a trade mark "Livron" was registered. Livron was also the name of a town in France cinal pre- ny applied

under the is not an invented word within the meaning of S. 9, cl. (3) of the Trade Marks Act, 1905, as amended by S. 7 of the the name and the no Englishman rished to refer to

. The mark is *ex hypothesi* the name of a he name of a place where medicines character are manufactured and the business in medicines being of an international character, it cannot be held that the mark is distinctive. (*iv*) Even if the matter comes within one of the 3 paragraphs, yet the Registrar on the original application would have had a discretion and on the cise his be exer- Appeal Trade Trade le trade mark must contain or consist of at least one of the following essential particulars :—" (3) An invented word or invented words ; (4) A word or words having no direct reference to the character or quality of the

MARK NO. 530, 535 OF BOOTS . LTD. (1938) 1 Ch. 54= 157 L.T. 225=106 L J. (Ch.) 352.

WILL—*Charity—Gift to corporation of armour and antiques to be kept in public hall for public inspection—Valid as educative—Gift of public hall for such public purposes as the corporation may consider desirable—Valid as a gift for the benefit of the inhabitants of the particular locality.*

By his will a testator after certain legacies, etc., gave his " collection of arms and antiques and articles de vertu to the corporation of *S* subject to the condition that the said corporation shall deposit the same in one of the rooms of the public hall he shall be kept open to such reasonable be imposed by the en disposed of his his executor upon to e same

WILL.

and with and out of the monies thereby produced spend for certain purposes set out in the will and the rest to be held upon trust to apply the same in the pur chase of a suitable site of land at *S* and in or towards the erection on such site of a public hall which site and hall when completed shall be presented by the executor to the corporation of *S* to be used by the said corporation for such public purposes as it may from time to time consider desirable. Question arose whether the trust for erection of a public hall and the gift of arms, etc., was valid.

Held, first with regard to the gift of the public hall that the gift was a good valid charitable gift as the site and public hall were to become the property of the corporation of *S* and accordingly to be held, like its other corporate property for the benefit of the borough. The fact that the will says it is to be a public hall and used for "such public purposes as the corporation may from time to time consider desirable" does not render the gift invalid. The words 'public purposes' here are limited to public purposes for the benefit of the inhabitants of *S* and is used in order to exclude any possibility of the hall being used for private purposes and in contradistinction to any such private uses. Secondly the gift of the collection of arms and antiques is also a good charitable gift. The object of the gift is to allow the collection to be inspected by the public. This is an educational object and is therefore charitable. *In re* SPENCE. BARCLAYS BANK, LIMITED *v.* MAYOR, ETC., OF STOCKTON-ON-TEES. (1938) 1 Ch. 96 = 107 L.J. (Ch.) 1.

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"THE YEARLY DIGEST"

OF

INDIAN AND SELECT ENGLISH CASES.

I—INDIAN DECISIONS.

AGRA TENANCY ACT (III OF 1926), S. 3 (15)—*Grove land—Plots occupied by guavas and plum trees.*

Plum trees though not specifically mentioned in the explanation to the definition, are similar to guavas and peaches. Hence plots occupied by guavas and plum trees are not grove land within the definition of the Act. (*Darling, S. M.*) MASIT ULLAH *v.* SARDAR SINGH. 1938 A.W.R. (B.R.) 237 (1).

AJMER LAND AND REVENUE REGULATION (II OF 1877), Ss. 67 and 69—*Entry in settlement record—Value of—Suit for declaration of title—Cause of action.*

There is nothing in any of the laws applicable to Ajmer-Merwara, to warrant the statement that an entry in the settlement record either creates or takes away any right or title. An entry is only a piece of evidence to which a presumption of correctness attaches, and this

ABDUL HAKIM KHAN *v.* MATHURA. 1938 A.M.L.J. 33.

——**Ss. 67 and 69**—*Revenue records—Entry in—Presumption of correctness—Earlier and later entry.*

Although the presumption of correctness would attach to the later entry rather than to the earlier one, yet when the earlier entries are supported by substantial evidence while the later entry is supported by none, that presumption of correctness is thereby sufficiently rebutted. (*Weston,* I
v. MATHURA.

. UMRAO MAL *v.* GOPI NATH. 1938 A.M.L.J. 63.

——**S. 119 (b)**—*Bar of civil suit—Scope and limit of the rule as to.*

The restriction on the Jurisdiction of civil Courts created by S. 119 of the Land and Revenue Regulation should be construed strictly. It was intended merely to

prevent interference through the medium of civil Co[urts] with final decisions taken by revenue officers. A sui[t to] obtain a declaration which may be used as evide[nce] before a revenue officer and a suit to obtain an o[rder] directly within the province of the revenue officer [are] quite different. Clearly a civil suit to eject a tenant [at] will or a suit to restrain ejectment by injunctio[n is] barred by S. 119. But a decree of declaration is not [an] executable decree and it may not be binding on revenue officials. S. 119 cannot be held to be a bar [to] such a decree being given. (*Weston, I.C.S.*) ABD[UL] HAKIM KHAN *v.* MATHURA. 1938 A.M.L.J.

ASSAM LAND AND REVENUE REGULATI[ON] (I OF 1886), S. 71—*'Encumbrance'—Interest acqu[ired] by adverse possession.*

Obiter.—The interest acquired by a person by adve[rse possessi]on of an estate ... [reven]ue sale adversely ... [encu]mbrance within t[he] ... [L]and and Reven[ue] ... (... and Biswas, JJ.) JITEND[RA] KUMAR PAL *v.* DEBENDRA CHANDRA SAHA. 42 C.W.N. 91

——**S. 71**—*Recorded or unrecorded proprietor purchasing estate from stranger revenue-sale purchas[er]—Right to annul encumbrances.*

If a purchaser at a revenue sale, who was not recorded or unrecorded proprietor and who was not re[s]ponsible for the encumbrance on the estate, later c[on]sells his rights to one who was a recorded or un... de... tte... b... t... annul encumbrances, which the former ha[d] by his purchase. (*Mitter and Biswas, JJ.*) ... KUMAR PAL *v.* DEBENDRA CHANDR[A] ... 42 C.W.N. 913

... *a warrant of—If* ...

e doubt whether th[e] ... ent by a process serve[r] ... judicial act which may be considere[d] as taking place at the earliest period of the day o[n] which it takes place. (*Grille, J.*) POONAMCHAN[D] SHEORATAN *v.* MT. FULABAI. A.I.R. 1938 Nag. 309

BENAMI—*Presumption—Purchase by wife.*

There is no presumption that when a wife possesse[d] of considerable wealth and considerable income pur[chases] a property in her own name the property must b[e]

BENAMI.

regarded as one purchased *benami* for her husband. (*D. N. Mitter and Patterson, JJ.*) SYED MAHOMED MALEEH *v.* SHASI MOULI NAG. **67 C.L.J. 188.**

——*Suit by benamidar—Real owner's right to be joined as party.*

As the benamidar represents the real owner, it is open to the latter to apply to be joined in the action, but whether he is joined or not he is bound by the result of the proceeding unless it is revoked. (*S. K. Ghose and Patterson, JJ.*) BANWARI MUKUND DAS NANDI DALAL *v.* AJIT KUMAR NANDI. **67 C.L.J. 320.**

BENGAL AGRICULTURAL DEBTORS' ACT (VII OF 1936), S. 34—*Receipt of notices for stay under S. 34—Civil court, if competent to decide whether debtor is a debtor under the Act.*

Where a notice under S. 34 of the Bengal Agricultural Debtors Act is received by the Court and no sale has taken place and the debt still exists, so that there is, in fact, a proceeding with regard to the debt which has been included in the application under S. 8 or in the statement under sub S. (1) of S. 13 as the case may be, the civil Court has got no Jurisdiction to decide the question whether the debtor is a debtor within the meaning of the Act. The Act has set up a special tribunal for the determination of the question whether the person is a debtor or not. It would be inconsistent with the provisions of the Act to hold that the civil Court is to go into and decide the same question. (*S. K. Ghose and Nasim Ali, JJ.*) SAILABALA DAS *v.* NITYANANDA SARKAR. **A.I.R. 1938 Cal. 375.**

——**S. 40**—*Order of Munsif as Special Appellate Officer—High Court's power of revision—C. P. Code, S. 115.*

The High Court has no power to revise under S. 115, C. P. Code, an order of a special Appellate officer appointed under S. 40 of the Bengal Agricultural Debtors Act, although such officer is a Munsif. (*S. K. Ghose and Edgley, JJ.*) RAM KRISHNA SUKUL *v.* ALI NEWAJ. **42 C.W.N. 892.**

[BEN]GAL AND ASSAM CIVIL COURTS ACT [(XII] OF 1887), Ss. 11 (1) and 9—*Transfer of proceed[ing]s in Subordinate Judge's Court—Power of District [J]udge.*

A preliminary decree in a mortgage suit was passed in the Court of the 4th Subordinate Judge of a certain place. That Court was then abolished and the Court of the second Subordinate Judge of that place was placed in charge of the business of the fourth Court and the final decree in the mortgage suit was passed by the second Court. The decree-holder applied for execution of the decree in the second Court but his application was returned to him with a statement that the Court of the third Subordinate Judge of the place had already been placed in charge of the business of the fourth Court. The decree-holder thereupon presented his application for execution to the third Court. There was a sale but that sale was set aside. After that fresh sale processes were served but before the sale date, the execution case was transferred under the District Judge's order to the fourth Court which had been reinstated in the meantime. The sale was held and confirmed by the fourth Court.

Held, that the whole of the proceedings was in order as a result of orders properly made by the District Judge in pursuance of his powers under Ss. 9 and 11 (1) of the Civil Courts Act. (*Derbyshire, C. J. and Mukherjea, J.*) SISIRCHANDRA DUTT GUPTA *v.* GOPAL DAS. **42 C.W.N. 977.**

BENGAL CHILDREN ACT, S. 40—*Custody—Meaning of.*

BENGAL TENANCY ACT (1885), S. 104.

The question whether a person has the custody of another within the meaning of S. 40 of the Bengal Children Act is purely a question of fact, and no question of lawful custody or legal custody arises. (*Bartley and Khundkar, JJ.*) BHAGAWATI DASI *v.* EMPEROR. **42 C.W.N. 983.**

BENGAL LAND REVENUE SALES ACT (XI OF 1859), S. 37, Excep. 2—*'Settlement'—Meaning of—Settlement of estate for term and resettlement after expiry of term—Tenure created by settlement-holder before resettlement—If protected from annulment.*

The word "settlement" in the second exception to S. 37 of Act XI of 1859 means the settlement of the estate. Where an estate was settled by the Government for a term of 40 years with the option of resettlement for a period of 30 years after the expiry of that term, and the settlement-holder created a tenure and after the expiry of 40 years a re-settlement was made of the estate which was subsequently sold for arrears of revenue.

Held, that the re-settlement was not completely a new settlement although the term in the re-settlement was altered but was only a continuation of the original settlement, and that as the tenure was not in existence at the time of the original settlement, it was not protected from annulment after the revenue sale under the second exception to S. 37 of the Act. (*S. K. Ghose and Edgley, JJ.*) NILIMA PROVA DUTTA *v.* P. S. MANTOSH. **42 C.W.N. 864.**

BENGAL MONEY-LENDERS' ACT (VII OF 1933), S. 4—*Applicability—Pending suits.*

S. 4 of the Bengal Money-Lenders' Act does not apply to suits instituted before the commencement of that Act. (*Nasim Ali and Henderson, JJ.*) HARI MOHAN GOVINDA CHANDRA DAS *v.* AMRITALAL CHOWDHURY. **42 C.W.N. 976.**

BENGAL TENANCY ACT (VIII OF 1885), S. 65—*Landlord purchasing tenure in execution of money decree—Right to recover arrears of rent for anterior period.*

Per *S. K. Ghose, J.*—If a landlord purchases a tenure in execution of a money decree against the tenure-holder the liability of the tenure for arrears of rent in respect of a period anterior to the auction-purchase passes with the sale and attaches to the landlord-purchaser and the latter is not entitled even to a money decree against the judgment-debtor tenant. The fact that the proclamation of sale which resulted in the landlord's purchase did not contain any notice that there were rents in arrears for the anterior period is immaterial.

Per *Patterson, J.*—The arrears of rent due to the landlord are extinguished by his purchase of the tenure. (*S. K. Ghose and Patterson, JJ.*) MIDNAPUR ZEMINDARY CO., LTD. *v.* MRINAL KANTI ROY. **42 C.W.N. 967.**

——**S. 104**—*Permanent tenure at fixed rent created by grantee of permanent lease under Government—Grantee subsequently surrendering permanent lease and taking lease for term—Settlement of rent of tenure after expiry of term—Jurisdiction of settlement officer.*

In 1827, Government granted a permanent lease to certain persons. Thereafter in 1840, the grantees created certain permanent tenures at fixed rent under the above permanent lease. These tenures were held by themselves. Thereafter in 1853 the grantees surrendered the permanent lease and in its place took from Government a lease for 99 years of the same estate. In 1926, when the term of 99 years was over, the settlement officer settled the rent of the tenure under S. 104 of the B. T. Act at rates much more than the rates which had been fixed in 1840.

BENGAL TENANCY ACT (1885), S. 104.

Held, that the assessment was in accordance with law and not *ultra vires*. (*M. C. Ghose and Bartley, JJ.*) SATINDRA NATH CHOUDHURY *v.* HARENDRA NATH CHOUDHURY. 42 C.W.N. 866= A I R. 1938 Cal. 529.

——**Ss. 104 and 104 J**—*Record-of-rights—Entries in—Conclusive nature.*

Where proceedings under Part II of Chapter X of the B. T. Act have been taken, *only* the entry regarding rent and not other entries in the record-of-rights is conclusive. (*R. C. Mitter and Biswas, JJ.*) SRISH CHANDRA NANDI *v.* MIDNAPORE ZEMINDARY CO. LTD. 67 C.L.J. 202.

——**S. 153**—*District Judge deciding appeal when no appeal lies—Appeal—Revision.*

Where the trial Court had to consider and decide a question relating to the title to the land in suit, but that question did not fall for decision between parties having conflicting claims to the land in suit, no appeal lies to the District Judge from the decision of the trial Court. But if the District Judge decides an appeal, his decree will be without jurisdiction and yet under S. 153 no appeal will lie against such decree. But the Court can under such circumstances vary the decree in revision. (*Patterson, J.*) HRISHIKESH CHAKRAVARTY *v.* NILMADHAB CHATTOPADHYA. A.I.R. 1938 Cal. 543.

——**S. 191**—*Scope—Zamindar granting mokarrari lease of* asli *and* diara *lands at consolidated rental—Revenue officers settling rent payable by tenant of* diara *portion—Government settling* diara *lands as temporarily settled estate with Zamindar—Contract of lease—If affected.*

When a Zamindar grants a mokarrari lease in respect of lands comprising his *asli* lands and *diara* lands accreted to his estate at a consolidated rental, his con- ... the ... tion ... ttles ... the ... the Act. When the contract is for *one* tenancy bearing a consolidated rent covering *both* lands of the permanently settled estate and *diara* lands, the contract cannot be split up, whether at the instance of the Revenue officer or of the landlord alone or of the tenant alone, and made into two. That would be creating a new contract between the parties, *i e.*, substituting two tenancies in the place of one. This can only be done by the mutual consent of the landlord and tenant. S. 191 contemplates that a lease or contract (provided it is made after the passing of the B. T. Act) may be superseded as therein stated, only where the area comprised in the

... *putnidar—On objection by latter, transferee ... as party defendant—Decree obtained against ... alone—If rent decree.*

So long as a Transferee of a putni tenu ... recognised by the landlord and his name is not registered in the landlord's *sherista* in conformity with the provisions of Ss 5 and 6 of the Putni Regulation, the latter may sue the original putnidar for rent and put the tenure up to sale in execution of the decree without any notice to the assignee. The mere fact that in the rent suit, on objection by the putnidar, the landlord impleads the transferee as a party defendant cannot be construed as an act of recognition on the part of the landlord. If, therefore, in such a suit the landlord obtains a decree against the original putnidar alone, the decree can be executed as a rent decree by sale of the tenure under the provisions of Chap. XIV of the B. T. Act. (*Mukherjea, J.*) RADHARANI DEBI *v.* BIJOY CHAND MAHATAP. 42 C.W.N. 890.

BENGAL VILLAGE CHOWKIDARI ACT (VI OF 1870)—Chowkidari jagir—Liability to resumption. *See* GRANT—CHOWKIDARI JAGIR. 17 Pat. 315

BIHAR TENANCY ACT (VIII OF 1885), S. 26-N—*Scope and operation of—Retrospective effect—Transfer of part of holding—Suit by landlord more than 10 years after against recorded tenant alone—Decree and execution sale—Transferee's title—If affected.*

Section 26-N, of the Bihar Tenancy Act is retrospective and the object of the section is to quiet titles which are more than ten years old, and to ensure that if during those ten years the transferee has not been ejected, he shall have the right to remain on the land. In 1913 there was a transfer of a part of a holding to plaintiff, which transfer, according to the plaintiff, was recognized by the landlord. In 1931, the landlord brought a rent suit against the recorded tenants, without impleading the plaintiff as a party, and purchased the holding in execution of the decree in that suit. Plaintiff sued for a declaration of his right to possession.

Held, that the plaintiff had title by reason of the operation of S. 26-N of the Bihar Tenancy Act, and that he was in no way affected or extinguished by the decree in the suit against other parties, as he was not a party to that action (*Wort and Varma, JJ.*) THAKUR RAI *v* ISSARDYAL PARSHAD. 17 Pat. 333.

BOMBAY CITY POLICE ACT (IV OF 1902), S. 27—*Construction and scope—Order under—Conditions for making—Commissioner's power to deport dangerous or undesirable character.*

Section 27 of the City of Bombay Police Act is of very limited application, and it is one of a group of sections which confer upon the Commissioner of Police power to deal with various emergencies so as to secure the public safety, and the orders to be made by the Commissioner under those sections are mainly of a strictly temporary character. It is clear from the language of S. 27 that the foundation for any order under the section is the movements or encampment of any gang or body of persons. Before any action can be taken under the section it must appear to the commissioner that the movements or encampment of a gang or body of persons are or is causing or calculated to cause ... on that unlaw- ... ang or by any ... can the Com- ... ers of the gang ... ction to deport ... or undesirable ... mber of a gang ...

——**S. 27**—*Order under—Validity—If can be impeached in Court of law—Prosecution for disobedience of order—Duty of Court—Burden of proof.*

An order made under S. 27 of the City of Bombay Police Act is, it is true, an order made by an executive officer and is not subject to appeal ... in ... Court. But that is very different ...

BOMBAY CITY POLICE ACT (1902), S. 128.

an attempt is made to impose a penalty for breach of an order under S. 27, the validity of the order cannot be impeached. In all charges before a Magistrate under S. 128 of the Act for disobedience of an order under S. 27, it is incumbent upon the Magistrate to be satisfied, first, that the accused was informed by the Commissioner of the charge against him with sufficient particularity to enable him to answer the charge, and that he was given an opportunity of answering; and, secondly, that there was material before the Commissioner of Police on which he could properly hold that the conditions of S. 27 had come into operation. In a prosecution under S. 128, the burden is not on the accused to show that the order is invalid; the burden is on the prosecution to satisfy the Court that the order alleged to have been disobeyed was a valid one. There is no reason why the Commissioner should not give evidence before the Court as to the general character of the material which he had before him. (*Beaumont, C.J. Rangnekar, Wadia and Wassoodew, JJ.*) EMPEROR *v.* YARMAHOMED AHMEDKHAN.

40 Bom.L.R. 483 (F.B.).

——**S. 128** — Charge under—Burden of proof—Validity of order disobeyed—If can be gone into. *See* BOMBAY CITY POLICE ACT, S. 27

40 Bom,L.R. 483 (F.B.).

BOMBAY HEREDITARY OFFICES (WATAN) ACT (III OF 1874), S. 5—Scope—If overridden by Bombay Land Revenue Act, S. 217. *See* BOMBAY LAND REVENUE ACT, S. 217. **40 Bom.L.R. 461.**

BOMBAY KHOTI SETTLEMENT ACT (I OF 1880), S. 5—Applicability—Tenant proved to be in occupation from 1848—Absence of proof of prior occupation — Permanent tenancy—Presumption of—*Presumitur retro*—Application of doctrine. *See* BOMBAY LAND REVENUE CODE, S. 83.

40 Bom.L.R. 534.

BOMBAY LAND REVENUE CODE (V OF 1879), 83—*Applicability—Khoti lands*—Presumitur retro—'*ication of doctrine—Tenant shown to be in occupa- from* 1848—*Absence of proof of prior occupation— nt notes passed to landlord from* 1855 *to* 1901 *admit- ing annual tenancy — Presumption of permanent tenancy.*

The doctrine of *presumitur retro* right apply to a case falling under S. 83 of the Bombay Land Revenue Code where the only thing to be proved is that the origin of the tenancy was lost in antiquity, that is, it cannot be proved to have commenced from a particular year or period. In such a case if the tenant proves that he was on the land, say in 1848, and if it is not shown that his occupation commenced in that year, a presumption could be made that his ancestors were on the land even before that date, though there is no presumption as to the actual date from which the occupation commenced. But the doctrine has no scope for application to a case falling under S. 5 of the Bombay Khoti Settlement Act; that section requires proof of occupation from or before a particular year, and the burden lies on the tenant to prove that particular fact. The fact the tenant was proved to be on the land in 1848, three years after the particular year fixed by S. 5, would not entitle him to the benefit of the presumption that his tenancy began from or before 1845—1846. Where the evidence establishes the tenant's possession since 1848, but there is no definite evidence that he was on the land before that year, and it is found that there were various kabuliyats passed by the tenant's ancestors and himself from 1855 to 1901 admitting an annual tenancy, the tenant cannot be held to have established a permanent tenancy

under S. 83 of the Bombay Land Revenue Act. Nor can the tenant claim the benefit of S. 5 of the Khoti Settlement Act, when his possession is not shown to have commenced on or before 1845—1846. (*Divatia, J.*) SONU KASHIRAMSHET *v.* SHANKAR SAKHARAM.

40 Bom.L.R. 534.

——**S. 83**—*Applicability to khoti tenures—General and special enactments.*

Quaere.—Whether S. 83 of the Bombay Land Revenue Code would apply to a case falling under S. 5 of the Khoti Settlement Act, having regard to the fact that the latter is a special enactment while the former remains a general enactment. (*Divatia, J.*) SONU KASHIRAMSHET *v.* SHANKAR SAKHARAM.

40 Bom.L.R. 534.

——**S. 217**—*Applicability—Watan lands—Alienation contrary to S. 5, Watan Act—Permanent tenant under —If becomes occupant by introduction of survey settlement.*

S. 217 of the Land Revenue Code would not apply in the case of watan lands governed by S. 5 of the Bombay Watan Act. S. 217 cannot override the clear provisions of S. 5 of the Watan Act. An alienation by way of a permanent lease made by watandar in contravention of S. 5 of the Bombay Watan Act is not binding on the successor of the alienating watandar. A tenant under such a lease granted by the watandar does not therefore become an "occupant" of the lands by reason of the introduction of survey settlement into the village under S. 217 of the Land Revenue Code. It would be contrary to the principle of S. 5 of the Watan Act (Bombay Hereditary Offices Act of 1874) to hold that the lessee acquires occupancy rights under S. 217 of the Land Revenue Code. (*Rangnekar and Wadia, JJ.*) SHRIPAD RAMACHANDRA *v.* TULJARAMRAO.

40 Bom.L.R. 461.

——**(as amended in 1913), S. 217**—*Scope—Retrospective operation.*

S. 217 of the Bombay Land Revenue Code, as amended in 1913, has retrospective effect. (*Rangnekar and Wadia, JJ.*) SHRIPAD RAMCHANDRA *v.* TULJARAMRAO. **40 Bom.L.R. 461.**

BOMBAY LOCAL BOARDS ACT (VI OF 1923), S. 8 (b)—*Scope—If controlled by S.* 14 (3)—*Right of person whose name appears in voters' list as finally published to stand as candidate—If can be challenged.*

S. 8 (*b*) of the Bombay Local Boards Act cannot be construed as meaning that if the name of any person appears in the voters' list, he was entitled to stand as a candidate or that the names appearing in the list are to be treated as conclusive. S. 8 (*b*) is to be read along with S. 14 (3). The effect of this provision is that nobody whose name does not appear on the list of voters is qualified to stand as a candidate but that does not mean that if a person's name appears on the voters' list and he is therefore entitled to stand as a candidate at the election, his candidature cannot be challenged on the ground that although his name appears on the voters list, he is not duly qualified as a voter. The list as finally published is not conclusive and does not bar the right of any person to challenge the names appearing therein. (*Divatia, J.*) VINAYAK VASUDEO *v.* GOPAL CHIMNAJI. **40 Bom.L.R. 525.**

——**Ss. 13 and 14 (2)**—*Construction and scope—Voters' list—Finality as regards the right to vote or to be elected.*

There is nothing in Ss. 13 and 14 of the Bombay Local Boards Act which provides that the voters' list is conclusive in the sense that no one has a right to challenge the names appearing in that list after it has been duly published before the election. S. 14 (2) is

BOMBAY LOCAL BOARDS ACT (1923), S. 14.

clearly negative and it says nothing about the name of a person who is on the list but who is not qualified to a voter. The marginal note to the section to the effect that the lists are conclusive evidence of the right to be

C. P. LOCAL FUND AUDIT ACT, S. 10.

brought by their parent to the second marriage, as against their step mother on their father's death. (*Mosely and Dunkley, JJ.*) MA E NYUN *v.* DAW MA GET. **A.I.R. 1938 Rang. 293.**

entered in revenue records in member's name—If sufficient.

The words "in his own right" in S. 15 (2) (a) (ii) of the Bombay Local Boards Act mean that he must own the land by himself, in other words, he must be the exclusive owner of the land. Sub-S. 2 (a) (ii) must be read with sub-S. 4 (*c*) of S. 15, and both of them read together mean that in the case of a joint Hindu family no other person than the manager has the right to vote except in a case where one of the coparceners is holding some separate or self acquired property in his own right, and in such a case he is entitled to be a voter if he fulfils the other requisites of the section. The fact that some family property is entered in the name of a coparcener in the revenue records would not entitle him to have his name on the voters' list. (*Divatia J.*) VINAYAK VASUDEO *v.* GOPAL CHIMNAJI. **40 Bom.L.R. 525.**

BOMBAY MUNICIPAL BOROUGHS ACT (XVIII OF 1925), S. 68 (1) (d)—*Scope—Duty of Municipality—Cutting off of water supply at night—Destruction of house by fire owing to delay in getting water to extinguish fire—Liability to damages—Tort—Non-feasance—If actionable.*

Appellant had a shop within the Municipality of Ahmedabad. The Municipality had, under the advice of a Government expert and owing to shortage of water, passed an order, in order to prevent waste of water, to

KAR. **42 C.W.N. 894.**

CATTLE TRESPASS ACT (I OF 1871), Ss. 20 and 22—*Complaint under S. 22—Forum—Presentation to wrong Court—If cured by S. 537, Cr. P. Code.*

Where a complaint mainly under S. 22 of the Cattle Trespass Act, though Ss. 323 and 504 of the Penal Code were also mentioned, is presented to a panchayat Court within time, but which by reason of S. 17 of the U P. Village Panchayat Act was not competent to entertain it, and it was subsequently transferred to the proper Court, the presentation is not proper and cannot be cured by S. 537, Cr. P. Code. (*Thomas, C.J. and Yorke, J.*) MEHDI HUSAIN *v.* EMPEROR. **175 I.C. 662.**

CENTRAL PROVINCES DEBT CONCILIATION ACT (II OF 1933), S. 4—*Fraud on Court—Purchase of land for purposes of Jurisdiction—Parties admittedly agriculturists.*

Where the parties were admittedly agriculturists, the fact that they bought a bit of property with a view to give jurisdiction to a particular Board, or to acquire the requisite qualification to apply, would not make the act of purchase a fraud upon the Court. (*Niyogi, J.*) BALWANT *v.* TUKARAM. **1938 N L J. 235.**

——**S. 8**—*Delivery of movables to avoid attachment—Discharge of Judgment debt under S 8 of the Act—*

for about half an hour after the arrival of the fire engines. The appellant sued the Municipality for damages on the ground that the latter were guilty of a breach of the duty imposed by S. 68 (1) (*d*) of the Municipal Boroughs Act to make reasonable and adequate provision for extinguishing fires and protecting life and property, and that the same amounted to misfeasance.

Held, that though the Municipality had negligently failed in its duty to make an adequate and reasonable provision for extinguishing fire, its action in cutting off the water supply could not be regarded as a misfeasance of a kind which gave the appellant a right of action for damages that it was only a case of non-feasance and therefore no action lay. (*Broomfield and Sen, JJ.*) MOHANLAL BAPA LAL *v.* BOROUGH MUNICIPALITY OF AHMEDABAD. **40 Bom.L.R. 552.**

BUDDHIST LAW (Burmese)—*Inheritance—Share of children of first marriage in* payin *property.*

Where a Burman Buddhist leaves surviving him his children by a former marriage and also his second wife and his children by her, the children of the first marriage are entitled to three-fourths of the *payin* property,

was found to be cognizant of, the Judgment-debtor is entitled to the restoration of the movables. (*Niyogi, J.*) AZIMMIYA *v.* NAYNYA. **1938 N.L J. 233.**

——**S. 21**—*Applicability—Proceedings subsequent to execution sale.*

S. 21 of the C. P. Debt Conciliation Act cannot come into operation to suspend proceedings subsequent to execution sale. The reason seems to be that when the sale is held the sale proceeds are set off against the Judgment-debt. The debt being not in existence, the debtor cannot say he is debtor in respect of this Judgment debt. (*Niyogi, J.*) HARI SADASHEO *v.* WAMAN VITHAL. **1938 N.L.J. 229.**

CENTRAL PROVINCES LOCAL FUND AUDIT ACT, Ss. 10 (1) and 8 (b) (c)—*Surcharge—Notice—Conditions necessary.*

Before a notice can be served under S. 10 (1) of the C. P. Local Fund Audit Act, the Examiner, in cases which fall under cls. (*b*) and (*c*) of S. 8 of the Act must be satisfied that the loss has been occasioned or caused by gross negligence or misconduct. (*Stone, C. J. and Bose, J.*) ATMARAM *v.* ACCOUNTANT GENERAL, C. P. **1938 N.L.J. 220.**

C. P. LOCAL FUND AUDIT ACT, S. 14.

——S. 14—*Application to Dt. Judge—When lies—Procedure to be followed.*

When a person is surcharged under S. 10 he has under S. 14 the right to apply to the Dt. Judge. The Judge must consider whether in point of fact there was gross negligence or misconduct. In order to arrive at a conclusion of that nature, he must consider the evidence, case by case and not take a lot of cases all together decide one, and say that all are the same. (*Stone, C. J. and Bose, J.*) ATMARAM *v.* ACCOUNTANT-GENERAL, C. P. **1938 N.L.J. 220.**

CENTRAL PROVINCES MUNICIPALITIES ACT (II OF 1922), S. 58—*Scope—If confers a power of review.*

S. 58 of the C. P. Municipalities Act provides for the control of the Dy. Commissioner and Commissioner by the ProvincialGovernment, and of the Dy. Commissioner by the Commissioner and nothing more. It does not provide for a review of one's own orders of the above mentioned persons. There being no other section, it is evident that theAct has no provision for review.(*Mishra*) MUNICIPAL COMMITTEE, NAGPUR *v.* WAGALWAR. **1938 N.L.J. 205.**

——S. 83—*Reference to Hight—When could be availed of.*

The advantage of the provisions of S. 83 of C. P. Municipalities Act could be taken only by government when hearing revision petition against order of the commissioner and not after it had been decided. (*Mishra*) MUNICIPAL COMMITTEE, NAGPUR *v.* WAZALWAR. **1938 N.L.J. 205.**

CHARGE—Equitable charge—Creation of—Agreement between debtor and creditor that fund should be applied in particular way—Charge on future property—Validity. *See* C. P. CODE, O. 21, R. 46. **42 C.W.N. 971.**

CHARITABLE AND RELIGIOUS TRUSTS ACT (XIV OF 1920), S. 3—*Public trust—What constitutes.*

To constitute a trust "created or existing for a public purpose of a charitable or religious nature" the author ... authors of the trust must be ascertained, and the ...n to create a trust must be indicated by words or ... reasonable certainty. Moreover the purpose of ..., the trust property, and the beneficiaries must ...cated so as to enable the Court to administer the ... if required. A.I.R. 1935 P.C. 97, rel on. (*Sir Shadi Lal*) PARMA NAND *v.* NIHAL CHAND. **175 I.C. 459 = 1938 A W.R. (P.C.) 145 = A.I.R. 1938 P.C. 195 (P. C.).**

CHILD MARRIAGE RESTRAINT ACT (XIX OF (1929), S. 5—*Preliminaries—If punishable.*

S. 5 of the Child Marriage Restraint Act takes account only of performing, conducting or directing a child marriage, that is to say, the actual marriage ceremony itself, and not of any negotiation, preparation or any other preliminary acts. Hence these are not covered by S. 5 of the Act. (*Grille, J.*) SHEIKH HAIDER *v.* SYED ISSA. **175 I.C. 615 = A.I.R. 1938 Nag. 235.**

——S. 6—*Scope of—Promotion of child marriage outside British India—If punishable.*

S. 6 of the Child Marriage Restraint Act has reference only to a marriage that is prohibited. As child marriage outside British India is not prohibited, its promotion is not an offence punishable under the Act. (*Grille, J.*) SHEIKH HAIDER *v.* SYED ISSA. **175 I.C. 615 = A.I.R. 1938 Nag. 235.**

——S. 9—*Complaint—Case under Section 5 sent by Magistrate to Police Officer for investigation—Letter by Police Officer to Magistrate if a complaint.*

C. P. CODE (1908), S. 11.

When a Police Officer investigates a non-cognizable case under orders of a Magistrate, the report which he makes at the end of his investigation is of the same nature as a report made under S. 157, Cr. P. Code, and such a report being a police report is not a 'complaint' though if a police officer,acting without instructions from a Magistrate, reports a non-cognizable offence to aMagistrate with a view to the Magistrate taking action, this is a complaint. An offence under S. 5, Child Marriage Restraint Act being punishable only with simple imprisonment up to one month or a fine of Rs. 1,000 or both, under Sch. 3, Cr. P. Code is not cognizable. Hence, when, such case is forwarded to an Assistant Superintendent of Police for investigation a letter written on behalf of the Assistant Superintendent of Police to the District Magistrate is a 'Police Report' and not a 'complaint'. (*Baguley, J.*) JAGDEO PANDAY *v.* N. C. HILL. **A.I.R. 1938 Rang. 257.**

CIVIL PROCEDURE CODE, (V OF 1908), S. 11—*Competent Court—Test—Competency to try subsequent issue—If enough—Large valuation in subsequent suit—Effect of.*

A decree in a previous suit cannot be treated as *res judicata* in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide not only the particular matter in issue but also the subsequent suit itself in which the issue is subsequently raised In spite of a large valuation in the subsequent suit, there would be *res judicata* at least with regard to so much of the property as was dealt with in the previous suit. (*S. K. Ghose, and Patterson, JJ.*) GONESH CHANDRA DEUTY *v.* RAJKUMAR DEUTY. **67 C.L.J. 223.**

——S. 11—*Co-plaintiffs*—Res judicata *between—Contest between them—If necessary.*

An issue may be *Res judicata* between co-plaintiffs as well as co-defendants, and for an issue to be *res judicata* between co-plaintiffs it is not necessary that there must be a real contest between them. When the interests of various plaintiffs are common, and no question of adopting two conflicting positions as between themselves arises, the decision arrived at by the united efforts of all will bind them for ever, especially when the only person concerned in holding the opposite position has had a full right. (*Addison, A. C. J. and Din Mahomed, J.*) RAM BHAJ *v.* AHMAD SAID AKHTAR KHAN. **40 P.L.R. 591.**

——S. 11—*Findings not necessary but only incidental—Effect.*

In a suit for letters of administration, an order while affirming the claimant's status as the legal son of the deceased and granting him letters of administration, also incidentally contained a finding that the rival claimant was the legal wife and heir of the deceased. But as the claimant was entitled to 14 annas share and rival claimant to only 2 annas share, the former was entitled to the letters:

Held that the finding regarding claim of rival claimant was merely incidental and unnecessary to arrive at and was therefore not *res judicata*. All that the Court should have done was to express an opinion that the evidence proved the rival claimant to be the legal married wife of the deceased. (*Mosely and Dunkley, JJ.*) FATIMA BIBI *v.* MA TOKE. **A.I.R. 1938 Rang. 275.**

——S. 11—Litigating under the same title—Decree for rent against assignee from lessee—Decree not satisfied—Subsequent suit for rent against original lessee—If barred. *See* LEASE—ASSIGNMENT BY LESSEE. **40 Bom.L.R. 497.**

——Ss. 11 and 47—*Order of stay under S. 21 of the Debt Conciliation Act—Appeal held incompetent—*

...ceedings under ... n appeal there... open to the decree... The prior order is ... nd it did not in the least affect the rights of parties and such an order cannot possibly be regarded as having the effect of *res judicata*. (*Niyogi, J.*) HARI SADASHEO *v.* WAMAN VITHAL. **1938 N.L.J. 229.**

——S. 11—*Scope—Principle of* res judicata.

S. 11, C. P. Code, is not exhaustive and the bar of *res judicata* operates as much on general principles as on the wording of the section. The *raison d'etre* of the rule is to confer finality on decisions arrived at by competent Courts between interested parties after genuine contest and to allow persons who had deliberately chosen a position to reprobate it and to blow hot now when they were blowing cold before would be completely to ignore the whole foundation of the rule. (*Addison, A C.J. and Din Mahomed, J.*) RAM BHAJ *v.* AHMAD SAID AKHTAR KHAN. **40 P.L.R. 591.**

——S. 11, Expl. (vi)—*Representative suit—Suit by reversioner—Findi...*

A suit brought ... all the reversioner ... finding given in favour of a reversioner ... members of the reversionary body, a finding against him injures every body concerned. ... *A C.J. and Din Mahomed, J.*) RAM BHAJ *v* ... SAID AKHTAR KHAN. **40 P.L.R. 591.**

——S. 24 (a)—"Competent to try and dispose of such su... C... tr... 5...

... for ... during which recovery was delayed by defendant contesting the suit. (*Weston, I.C.S.*) RAJ MAL *v.* ... MAL. **1938 A. I...**

——S. 35—*Award of costs—If include... fees.*

Pleader's fees are costs of the suit and unless pleader's fees are specifically excluded an award of costs of the suit must be taken to ... There is no distinction between ... suit and decreeing a suit with cc... BHAG CHAND *v.* BENI PARSHAD. **1938 A. M.L.J. 47.**

——S. 47—*Application under O. 21, R. 22—If falls under S. 47.*

Application under O. 21, R. 22 falls under S. 47 and can be enquired ... *and Dunkley, J.* ...

——S. 47—... *tion under O. 21, R. 89—Suit to set aside sale—Maintainability.*

A suit to set aside an exe... fraud in respect of an appli... C. P. Code, is barred by S. ... is really within the provisio... decided under that section and not by a separate suit. (*Bhide, J.*) RAM CHAND *v.* SHAMAS DIN. **40 P.L.R. 615.**

——S. 47—*Bar of suit—Transfer by defendant pendente lite—Decree against defendant—Enforcement against transferee — Remedy—Execution — Separate suit—If barred—"Representative."*

A transferee of the defendant *pendente lite* is a representative of the defendant, and a decree in the suit passed against the defendant-transferor must be enforced against the transferee in execution and not by a separate suit. A separate suit is barred by S. 47. (*Beaumont, C.J. and Wassoodew, J.*) GOPAL SATTU *v* DNYANU MARUTI. **40 Bom.L.R. 512.**

——S. 47—*Executing Court—Powers of—Decree against minor—Question whether minor was properly served or represented—If can be gone into.*

It is not open to an executing Court to sit in judgment over the Court which passed the decree which has to be executed. It cannot, except in certain limited cases, conduct inquiries as to whether the decree was properly passed. If on the face of the record it is clear that some illegality has been committed the executing Court can refuse to execute the decree. But where is nothing to show that there has been such illegality, the executing Court has to presume that the decree was properly made, and take the decree as it stands and execute it. Where a decree made on an award in arbitration against a minor contains nothing on the face of it to show that the minor was not served or properly represented in the ... Court has no ... he minor was ... execute the ... or properly ... r cannot be ... e his remedy ... AM URBAN CO-OPERATIVE BANK *v.* BALASUBRAMANIA MUDALI. **(1938) M.W.N. 567.**

...—*Compensation money in hands of Collector under Land Acquisition Act—Liability to* ...

... ation money awarded under the Land Acquisition ... instance of ... ds have been ... them under ... the Collector on the one side and the owners of the lands on the other. S. 60, C. P. Code, does not therefore ...

SUNDAR DAS *v.* SECRETARY OF STATE. **A.I.R. 1938 Lah. 533.**

——S. 66—*Scope—Relief in suit dependant on declaration of title as against certified purchaser—Suit, if* ...

... given on declara... ...ing title under a ... persons being parties and contesting the claims, is barred under S. 66, C. ... *d Patterson, JJ.*) BANWARI ... DALAL *v.* AJIT KUMAR **67 C.L.J. 320.**

——...—Application for execution ..., but attachment kept pending—If pending—Right of decree-holder to rateable distribution of assets received subsequently. *See* C. P. CODE, O. 21, R. 59. **I.L.R. (1938) Nag. 346.**

——S. 80—*Compliance—Notice under—Essentials of validity—Statement of*

C. P. CODE (1908) S. 92.

To state a cause of action it may be sufficient to give a legal description by which a particular cause of action is known, such as, damages for breach of contract, and damages for negligence. Where a notice, after stating that the plaintiff has been served with a notice by the Deputy Magistrate purporting to act for the District Magistrate, under S. 15 (4) of the Police Act, making a demand of a certain amount of money as an apportioned amount payable by him for the upkeep of additional police force, proceeded that my client asserts that the assessment of costs against him is illegal and *ultra vires* and secondly the sum assessed is too high."

Held, that the notice did sufficiently comply with the requirements of S. 80, C. P. Code, and that there was a sufficient indication of the cause of action for the suit contemplated. (*Wort and Varma, JJ.*) SRINIVAS MULL *v.* SECRETARY OF STATE.

17 Pat. 345.

———S. 92—*'Interest'—Meaning of.*

'Interest' in S. 92, C. P. Code denotes an interest which must be a present and substantial and not a remote and fictitious or purely illusory interest. (*Mya Bu and Sharp, JJ.*) M. E. MITCHLA *v.* A. M. MITCHLA.

1938 Rang. L.R. 276.

———S. 92—*Suit under—Maintainability—Allegation as to breach of trust—Necessity.*

The argument that in the absence of an allegation of breach of trust in the plaint the suit is not maintainable, is untenable. A suit under that section lies not only in the case of any alleged breach of trust, but also where the direction of the Court is deemed necessary for the administration of a trust, if it be a trust for public purposes of a charitable or religious nature. (*Mya Bu and Sharpe, JJ.*) M. E. MITCHLA *v.* A. M. MITCHLA.

1938 Rang. L. R. 276.

———S. 100—*Discretion—Wrong exercise of—Interference—Amendment of plaint.*

Where a judge allowing an amendment of the plaint has proceeded on a wrong view of the law so that he could not have applied his mind to the question whether he should or should not, in his discretion allow the amendment, the High Court would interfere in second appeal though the matter was one in the discretion of the lower Court. (*Stone, C.J. and Bose, J.*) LACHHMANSING *v.* MAHENDRA LAL. 1938 N.L.J. 198.

———S. 100—*Finding of fact—Interference—Mistaken view of burden of proof.*

Where the evidence has been viewed in the lower appellate Court on a mistaken application of the rule as to burden of proof, its judgment is vitiated on a point of law and is open to attack in second appeal. (*Beckett, J.*) HARCHAND *v.* HIRA LAL. 40 P.L.R. 682.

———S. 100—*Mixed question of law and fact—Question of good faith—Limitation Act, S. 14.*

The question whether a party acted in good faith within the meaning of S. 14, Limitation Act, is a mixed question of law and fact and can be questioned in second appeal, provided that the lower Court's findings of fact are not interfered with. 36 I.C. 702, followed. (*Skemp, J.*) MAYA SINGH *v.* UDHAM SINGH.

40 P.L.R. 631.

———S. 115—*Interlocutory order—Question of jurisdiction involved—Interference.*

Though an order is interlocutory, the Court will not decline to hear or interfere, if a question of jurisdiction is involved. (*Weston, I.C.S.*) HARI SINGH *v.* KUNDAN MAL. 1938 A.M.L.J. 74.

———O. 1, Rr. 3 and 5—*Mis-joinder of defendants and causes of action—Every defendant if to be interested in all reliefs—Suit by son against father and alienees to declare debts not binding.*

C. P. CODE (1908), O. 6, R. 17.

Where the sons of a Hindu father sued him and his creditors and alienees for a declaration that the father's debts are immoral debts and hence not binding on them, the suit is not bad for misjoinder of defendants and causes of action, for the several alienations made by the father constitute 'series of acts or transactions' and they are the same series of acts or transactions because, as alleged by the plaintiffs, they were all vitiated by one circumstance namely that they were incurred for immoral purposes. This feature put all debts in one category, and the successive borrowings formed one series of acts or transactions. O. 1, R. 3 contemplates not only joinder of defendants but also causes of action. O. 1, R. 5 is to be read with R. 3 and hence it is not necessary for every defendant to be interested in all the reliefs in suit. (*Niyogi, J.*) PURUSHOTTAM *v.* BHAGWAN SAO.

1938 N.L.J. 210.

———O. 2, R. 2—*Omission of claim—Absence of leave—Effect.*

Where a person failed to include in his suit the whole of the claim which he was entitled to make in respect of a cause of action and also omitted to claim the relief of a declaration and restoration of possession in respect of the land sold in execution, and failed to obtain the leave of the Court to sue for such relief, a subsequent suit for those reliefs is barred by the provisions of O. 2, R. 2, C. P. Code. (*Mosely, J.*) A. S. CHETTYAR FIRM *v.* P. R. S. MEERA PILLAI.

A.I.R. 1938 Rang. 290.

———O. 2, R. 2—*Specific performance of contract of sale—Suit for—Separate suit for possession — If barred.*

In a suit for specific preformance of a contract of sale the cause of action that first arises is one for performance of that contract by execution of a registered deed of sale. It may be that possession will be handed over after a decree for specific performance has been granted, and the question of possession is a contingency that need not necessarily arise until a decree for specific performance has been passed and is then a new and distinct cause of action arising from the deed itself. (*Mosely, J.*) A. S. CHETTYAR FIRM *v.* P. R. S. MEERA PILLAI.

A.I.R. 1938 Rang. 290.

———O. 5, R. 20—*Substituted service—When could be ordered—Conditional order to serving officer—Legality.*

Where in an order for fresh summons a Court remarked that if the defendant evaded service or could not be found after due care and diligence substituted service would be effected, it was held that such a conditional order was illegal, as it was for the Court and not for the serving officer to determine whether there was evasion of service. O. 5, R. 20 allows substituted service only when the Court is satisfied that defendant is evading service. (*Weston, I.C.S.*) GOVIND RAM *v.* NIRANJAN LAL. 1938 A.M.L.J. 43.

———O. 6, R. 17—*Amendment of plaint—When to be disallowed—New case—Late stage.*

It is wrong for a Court considering amendment to regard the new cause of action as in time if it was in time when the original suit was brought. Where a suit was originally brought on an acknowledgment and after the case was all over except for the arguments the plaintiff seeks to amend his plaint so as to found his claim on an earlier agreement, the prayer for amendment should be refused as being not only out of time, but made at a very late stage. It is an amendment that introduces a new case, a new cause of action, a new contract, a contract made at a different time having a different period of limitation and having different legal consequences and so ought not to be allowed. (*Stone,

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Plaintiff brought a suit under O. 21, R. 103, C. P. Code, claiming a declaration and possession. The trial Court having demanded additional Court-fee, the plaintiff amended the plaint by deleting the claim for possession. The suit was decreed and the decree was confirm-

RAMCHANDRA GANGA BUX *v.* SUNDER LAL SINGH. 1938 P.W.N. 455.

——O. 7, R. 11 (c)—*Insufficiency of stamp—Duty of Court—Making up of deficiency—Effect—Application for making good deficiency—Necessity.*

Uhder O. 7, R. 11, C. P. Code, when a plaint is presented insufficiently stamped the Court is bound to give plaintiff time to make good the deficiency; and under S. 149, C. P. Code, the deficient stamp when paid within the period allowed, must be taken to have been paid at the time of the original presentation of the plaint. No application is required to be made under O. 7, R. 11. (*Weston, I.C.S.*) MAHADEO *v.* RAM PRATAB. 1938 A.M.L.J. 60.

——O. 9, R. 3—*Proceedings for final decree pending—Dismissal of suit for default—Propriety.*

Where a preliminary decree for partition has been passed and the Court takes proceedings for passing the final decree, the suit should not be dismissed for default. The suit should be adjourned *sine die* and made revivable on payment of costs. (*Mir Ahmad, J*) VIDYAWATI *v.* GOVINDI BAI. A.I.R. 1938 Pesh. 27.

——O. 9, R. 9 (1)—*Dismissal of suit for default—Plaintiff, if precluded from setting up his claim as defence to suit.*

In a suit on a first mortgage, the third who was impleaded as one of the defendant *priority over the second mortgagor under S. 78 of the T.* P.
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O. 9, R. 9 (1), C. P. Code, its provisions only preclude fresh suit on the same cau *J.*) SUKUMARI BISHNU

——O. 9, R. 13—*Costs*
ex parte *order.*

Where there is no service and an improper *ex parte* order is passed, an applicant seeking to set it aside should not be required to pay costs. (*Weston, I.C.S.*) GOVIND RAM *v.* NIRANJAN LAL. 1938 A.M.L.J. 43.

——O. 9, R. 13—*Sufficient cause—Duty of Court.*

Once the Court is satisfied that the there and that he would have got ther the intervention of an inevitable accid was in no way responsible, it is the duty of the Court to

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equivalent to misconduct or gross negligence on his part or something which cannot be put right so far as the other side is concerned, by making the man to blame, pay for it. A break down of the lorry on the way was considered sufficient cause for setting aside the *ex parte* decree. (*Mir Ahmad, J.*) SAILGAL BROTHERS *v.* JAI RAM JUGATRI LAL. A.I.R. 1938 Pesh. 39.

——O. 9, R. 13, Proviso—*Applicability—*Ex parte *decree against Hindu manager and brother—If can be*

1938 A.M.L.J. 59.

——O. 20—Scope of—Extension of principle underlying—Rules to be observed. *See* TORT—DAMAGES. 1938 A.L.J. 571.

——O. 21, Rr. 11 and 17—*Application not complying with provisions laid down—Effect of.*

An application, to take effect under O. 21 should be presented in accordance with the provisions as laid down therein, and unless the Court rejects the application or calls upon the decree holder to amend it under sub-r. (1) of R. 17, there is no proper application before the Court. (*Addison and Din Mahomed, JJ.*) PIR TAJ-UD-DIN *v.* KHAMBATTA. A.I.R. 1938 Lah. 515.

——O. 21, R. 16—*Applicability—Decree against several persons—Death of one judgment debtor—Right of deceased surviving to decree-holder and some judgment-debtors—Executability of decree.*

In a suit on a promissory note by the assignee thereof, a decree was passed against the executants and against the assignor of the note, was a Hindu female. The assignor died later on leaving the plaintiff and defendants 8 to 10 as her reversionary heirs. Plaintiff having applied for execution of the decree, that the decree had become of O. 21, R. 16, C. P.

Held, (i) though O. 21, R. 16, did not in terms apply applied, : and the , one and treated as itled only

——O. 21, R. 16—*Non-service of notice—Validity of sale.*

The service of notice under O. 21, R. 16, C. P. Code, is an essential pre-requisite to the assumption of jurisdiction by the Court in a proceeding to execute the

The non-service of such notice makes the sale held in

C. P. CODE (1908), O. 31, R. 34.

execution of that decree void *ab initio*, although the purchaser is not the decree-holder himself but an absolute stranger. (*Mukherjea, J.*) SURIFA KHATOON *v.* ASSIMANNESSA BIBI. **42 C.W.N. 949.**

———**O. 21, R. 34**—*Decree for execution of document —If may be passed in any suit.*

There is no foundation for the view that an order under O. 21, R. 34, C. P. Code, can be made only when a decree for execution of a document is made in a suit for specific performance of contracts. The rule simply contemplates that there should be a decree for execution of a document. It may be passed in any suit. (*Bartley and Nasim Ali, JJ.*) BIRENDRA NATH ROY BAHADUR *v.* PURAN CHAND NOHATA. **67 C.L.J. 235.**

———**O. 21, R. 46**—*Attachment of debt due to judgment-debtor—Equitable charge already created by judgment-debtor over such debt—Position of attaching creditor—Equitable charge—What amounts to—Charge on future property—Validity.*

In a garnishee proceeding, the attaching creditor stands in the shoes of the judgment-debtor. No attachment could be made, when there is no existing debt due by the garnishee to the judgment-debtor, and if the judgment-debtor has already parted with his interest in the debt by assignment or created an equitable charge in respect of the same in favour of another person, the attaching creditor acquires no larger rights than his debtor. An agreement between a debtor and a creditor that a fund should be applied in a particular way will not create a valid equitable charge upon the fund. It is further necessary that an obligation should be imposed in favour of the creditor to pay the debt out of the fund. The test really is whether there was an intention to assign or create a charge, which will give the assignee an equitable interest in the fund itself. An assignment by way of charge on future property is a perfectly valid assignment in equity, which will attach to the property, when it comes into existence. Where *X* advanced money to *Y* for the purpose of enabling the latter to carry out his contracts with *Z* and it was stipulated that all bills made out by *Y* against *Z* would be forthwith [illegible] over to *X* who would have the exclusive right to [illegible] the monies due on the bills under an irrevocable power of attorney executed by *Y* in his favour and the amounts thus realised would be appropriated by *X* towards repayment of the advances made by him.

Held, that there was an intention to create a charge in favour of *X* in respect of the money due on the bills and that an attachment of the bills by a creditor of *Y* must be taken to be subject to that charge. (*Mukherjea, J.*) LEGDIR NANJI *v.* SURENDRA MOHAN. **42 C.W.N. 971.**

———**O. 21, R. 57 (as amended in Nagpur)**—*Application "struck off" as infructuous but attachment kept pending—Effect of—If dismissed or merely adjourned —Subsequent receipt of assets by Court—Right to rateable distribution—C. P. Code, S. 73.*

Under R. 57 of O. 21, C. P. Code, as it now stands after its amendment in Nagpur in 1930, a Court has power to dismiss an execution application and to continue the attachment. Where a Court passes an order to the effect that "the case is struck off as wholly infructuous at the instance of the decree-holder; house shall remain under attachment for three months," it must be held that the Court dismisses the application and not merely adjourns it. The execution application in such a case cannot be held to be pending for the purpose of enabling the decree-holder to claim rateable distribution of assets received on a date subsequent to such dismissal. The expression "struck off" is ambiguous and unauthorized and should not be used. (*Pollock, J.*) GULAB-CHAND SHEOLAL *v.* DONGARMAL HARAK CHAND. **I.L.R. 1938 Nag. 346.**

C. P. CODE (1908), O. 21, R. 92.

———**O. 21, R. 63**—*Objection filed by mortgagee to attachment dismissed—Suit by him for possession—Nature of—Onus of proof in such suit.*

O. 21, R. 63, C. P. Code is clearly intended to apply only to claims and objections which can properly be preferred under R. 58. A mortgagee cannot come to Court under R. 58 and argue that the mortgaged property is not liable to attachment. If a mortgagee who is not in possession of the property files a suit for possession after the dismissal of the objection preferred by him under R. 58, the suit cannot properly be described as one under O. 21, R. 63, but it is simply one for possession on the footing of the alleged mortgage. To such a suit, the rule that the onus of proving title lies on the plaintiff who had raised an unsuccessful objection before the executing Court has no application. (*Beckett, J.*) HARCHAND *v.* HIRA LAL. **40 P.L.R. 682.**

———**O. 21, R. 63**—*Suit under—Nature of—Decree in—Effect on prior summary order—Dismissal of claim under O. 21, R. 58 with costs—Suit under O. 21, R. 63 decreed—Both sides to bear their own costs—Costs awarded by summary order—If executable.*

Where a claim is preferred under O. 21, R. 58, C. P. Code and is rejected with costs and the defeated claimant files a suit under O. 21, R. 63, it is substantially one to set aside the summary order and where the suit is decreed, each party being directed to bear its own cost, it amounts to a setting aside of the summary order, and superseding or the prior order as to costs and hence [illegible] of the prior order as to costs is unexecutable. The [illegible] summary order must be deemed to have been set aside wholly and not in part. (*Niyogi, J.*) CHINTAMAN RAMJIPANT *v.* GOVIND VITHAL. **175 I.C. 753.**

———**O. 21, R. 84**—*Failure to deposit—Irregularity.*

The omission to pay 25 per cent. of the sale money amounts only to an irregularity and a sale can be set aside on this ground only if it is proved that substantial injury has been caused by it. (*Almond, J. C. and Mir Ahmad, J.*) BOOTA MAL CHARANDAS *v.* NAND RAM SANTO MAL. **A.I.R. 1938 Pesh. 36.**

———**O. 21, R. 85**—*Applicability—Withdrawal of deposit on sale being set aside.*

O. 21, R. 85, C. P. Code has no application to a case where the purchaser had duly deposited the price but had withdrawn it on the sale being set aside. (*Stone, C. J. and Bose, J.*) TARACHAND *v.* KALU. **1938 N.L.J. 207.**

———**O. 21, R. 89**—*Poundage fee—Duty of judgment-debtor to pay.*

There is nothing in O. 21, R. 89 which makes it necessary for the judgment-debtor to pay in the poundage fee as a condition precedent to the sale being set aside. After the sale is set aside the judgment-debtor can be made to reimburse the auction-purchaser for any costs and the poundage fee he has properly paid in connexion with the sale. (*Derbyshire, C. J. and Mukherjea, J.*) GOPAL CHANDRA *v.* GOBARDHAN CHANDRA. **A.I.R. 1938 Cal. 523.**

———**O. 21, R. 90 Proviso (b)**—*Necessity for deposit in Rangoon.*

Schedule Notification No. 44 of 27th January, 1937 has removed the necessity of a deposit under O. 21, R. 90, C. P. Code. (*Mosely and Dunkley, JJ.*) S. T. R. M. FIRM *v.* ANDATHAL. **A.I.R. 1938 Rang. 292.**

———**O. 21, Rr. 92 and 93**—*Withdrawal of deposit on sale being set aside—Subsequent confirmation of sale—Right to ask for re-sale—Point of time—Forum.*

Where a purchaser had withdrawn the price on the sale being set aside, but the sale was confirmed by the

C. P. CODE (1908), O. 21, R. 100.

appellate Court, and where the judgment-debtor's application for re-sale on the ground of the absence of the deposit under O. 21, R. 85 was negatived, he cannot in appeal from that order agitate the question as to the absence of a deposit, for it is a matter which ought to have been raised and fought out before the Court which confirmed the sale. (*Stone, C. J. and Bose, J.*) TARACHAND *v.* KALU. 1938 N.L.J. 207.

——O. 21, R. 100—*Application under—Maintainability—Person disputing symbolical delivery—Prayer for restoration of possession.*

Where an applicant under O. 21, R. 100, C. P. Code, contended that he was in possession in spite of a symbolical delivery and in the alternative prayed that if it was found that he was not in possession, he should be

would depend upon the nature of the Court's opinion. (*Niyogi, J.*) JAGANNATH *v.* KHWAJA FAYAZUDDIN. 1938 N L J. 223.

——O. 21, R. 100—*Dispossessed co-owner—If can apply under.*

A co-owner who is only entitled to joint possession can invoke the provisions of O. 21, R. 100, C. P. Code, and claim restoration of possession. (*Niyogi, J.*) JAGANNATH *v.* KHWAJA FAYAZUDDIN. 1938 N.L.J. 223.

——O. 21, R. 103—Suit under for mere declaration—Maintainability without claim for possession. *See* SPECIFIC RELIEF ACT, S. 42, PROVISO. 1938 P.W.N. 455.

——O. 23, R. 1 (2) (a) and (b)—*Scope of—Leave to withdraw—When could be granted.*

The two sub Cls. (a) and (b) of sub-R. (2) of

fail. There may be other sufficient grounds is proper to allow the plaintiff to withdra (*Mackney, J.*) DAW DWE *v.* U SAN HLA. 1938 Rang.L R. 270.

——O 26—*Reference to Commissioner of issue as to whether account is mutual, open and current—Legality.*

It is not open to a Court to refer for decision to a Commissioner for accounts, an issue as to whether there was a mutual, open and current account between the parties. Such procedure is unauthorized by O. 26. All

Under O. 30, R. 6, C. P. Code, after appearance steps in the suit must be in the name of the fir Though the appearance in vidual by each partner, ance on behalf of the firm. attorney is given by one p his behalf, the warrant of be on behalf of the firm. (*Lort Williams and Jack, JJ.*) GHISULAL GANESHILAL *v.* GUMBHIRMULL. A.I.R. 1938 Cal. 377.

——O. 34, R. 5—Mortgage suit for sale in High Court—Application for final decree—Limitation. *See*

C. P. CODE (1908), Sch. III, Para. 11.

LIMITATION ACT, ARTS. 181 AND 183. 40 Bom.L R. 507.

——O. 41, R. 10—*Applicability—Original side appeals in High Court—Security for costs of original suit—Power to order—"Suit"—Meaning of.*

O. 41, R. 10, C.P. Code, is applicable to appeals from decrees or orders made on the original side of the High Court, whether the judgment appealed against is one made in a suit or in a petition. The expression "original suit" in O. 41, R. 10 is not used in the technical sense of a proceeding commenced by a plaint, but is used to cover also an original application on which the judgment appealed from was given, whatever its nature. (*Beaumont, C. J. and Wassoodew, J.*) PRATAPGIR NARSINGIRJI *v.* OFFICIAL LIQUIDATOR, PRAHLAD MILLS, 40 Bom.L.R. 470.

—O. 41, R. 27—*Additional evidence—Admissibility—Condition.*

under O. 41, R. 27, C. P. Code, production of additional evidence in the appellate Court is dependent upon whether the appellate Court requires that evidence to enable it to pronounce judgment. (*S. K. Ghose and Patterson, JJ.*) GONESH CHANDRA DEUTY *v.* RAJKUMAR DEUTY. 67 C.L.J. 223.

——O. 43, R. 1 (m)—*Order recording compromise—Appeal—If competent after decree.*

An appeal from an order recording a compromise is not incompetent merely because it was preferred after a decree had been made. It is not necessary to prefer an appeal both from the order and decree passed in pursuance of the order. 141 I.C. 732, Rel. on. (*Din Mahomed, J.*) JARNAIL SINGH *v.* NARAIN KAUR. 40 P.L.R. 664.

——O. 45, R. 7—*Time for furnishing security and making deposit—Power of Court to extend—Privy*

cil the High Council Rules the security

(*Leach, C.J., Madhavan Nair and Varadachariar, JJ*) RAMAYYA *v.* LAKSHMAYYA. 1938 M.W N. 678=48 L W. 35=(1938) 2 M.L J. 128 (F.B.).

——Sch. II, Para. 8—*Filing of award—Power of Court to extend time after award had been made.*

Under Para. 8 of Sch. II, C. P. Code, the Court has f the award even . (*Costello and* CHAND SHAH *v.* 42 C.W.N. 883.

requirements of

P. Code, is that certain permis-

disputed, an unmistakable inference drawn from the written record that permission was given, fulfils the requirements of the paragraph and a formal is then unnecessary. (*Grille,* SHEORATAN *v.* MT. FULABAI.

COMPANY—*Winding up—Call order—Defendant holding share in company registered in Indian State and residing in British India—Call order made against him by State Liquidation Court—Enforcibility.*

In a personal action, a decree pronounced by a Court of a foreign state *in absentem*, the defendant not having submitted to its authority, is by international law a nullity. Where the defendant, who is a shareholder in a company registered in an Indian State and is a resident of British India, does not appear before the State Liquidation Court, before which the liquidation proceedings in respect of the company are started, and does not submit to the jurisdiction of the Liquidation Court, a call order made against him by the Liquidation Court, in absence of an express agreement in the Articles of Association that the disputes with the shareholders should be settled by the State Court, is without jurisdiction and cannot be enforced as such in British India. It is necessary that the liquidator suing the defendant in British India should prove all necessary facts to establish his liability. It is also necessary, in order to allow the plaintiff to succeed, that the call order for the particular amount was necessary and just. The mere fact that the call order was made does not amount to such proof. (*Addison and Din Mahomed, JJ.*) MODERN CHEMICAL WORKS, LTD., BARODA *v.* MAN MOHAN NATH DAR. **A.I.R. 1938 Lah. 559.**

CONTEMPT OF COURT—*Pending suit—Resolution at public meeting making accusations against party—If amounts to contempt.*

Where during the pendency of a suit instituted for a declaration that certain land claimed by the defendant is a public pathway, a resolution is passed at a public meeting protesting against the attempts of the defendant to close the land in question which is being used by the general public from time immemorial, the effect and tendency of the resolution is to embarrass, if indeed not to imperil, the defendant's cause and that being so, the passing of that resolution amounts to contempt. To the resolution itself, there is not so much objection in so far as it is, or purports to be, merely a resolution of the residents of the locality to support the cause of establishing the right of the public over the land in suit. But it is objectionable to put forward in the resolution of a public meeting a positive assertion of a public right of way, as it would predispose people to a belief, right or wrong, that the defendant is an invader of the public right. It undoubtedly conveys the impression of a public denunciation of the defendant's conduct which might well deter inhabitants of the locality from bearing testimony in support of his case. (*Jack and Khundkar, JJ.*) SURESH CHANDRA MUKERJEE *v.* BISWA NATH CHUCKERBUTTY. **42 C.W.N. 952.**

CONTRACT ACT (IX OF 1872), Ss. 17, 18 and 19—*Joint owner on attaining majority executing deed accepting partition made during his minority—Undue influence—Avoiding of deed.*

It is true that there is nothing in law to prevent a joint owner of the property, on reaching majority, accepting and agreeing to a partition of the joint property which was made during his (or her) minority. But when such person is persuaded to execute a deed accepting the partition by misrepresentation and undue influence of a person standing in fiduciary relation by concealing material facts, such deed is voidable at the instance of such person under S. 19 of the Contract Act. (*Roberts, C. J. and Dunkley, J.*) RAHIMA BIBI *v.* S. MUSTAFA. **A.I.R. 1938 Rang. 264.**

——**S. 23**—*Immoral contract—Contract to pay maintenance to past mistress—If void as being immoral or opposed to public policy.*

An agreement by a person to pay to his past mistress a sum of money every month for her maintenance so long as she remained outcasted and unmarried, there being nothing in the agreement with reference to future association cannot be regarded as void as being immoral or opposed to public policy. An agreement to become a mistress, which is doubtless void as being immoral, should not be confused with an agreement to compensate a woman afterwards for an injury done to her and for the loss which she has sustained owing to an association, be it immoral or otherwise, with her protector. Past consideration under the Indian Law is good consideration and the fact that the woman has rendered service in the past whether immoral or otherwise and has suffered an injury of a kind and continues to suffer from that injury forms a perfectly good consideration for the contract to compensate her. (*Courtney-Terrell, C. J. and James, J.*) GODFREY *v.* MT. PARBATI PALUNI. **17 Pat. 308.**

——**S. 25 (3)**—*Promise to pay—Basis of suit.*

When a promise to pay falls under S. 25 (3) of the Contract Act, it constitutes a valid agreement for the purpose of suing, whether there is a fresh consideration for the promise or not, and it is immaterial whether the debts covered thereby are within limitation or not. (*Beckett, J.*) KISHEN LAL *v.* GOHLI. **40 P.L.R. 689.**

——**S. 60**—*Appropriation—Portion of debt not binding on joint family—Realisations—Method of appropriation.*

Where a portion of the joint family debt arising on a single transaction is taken for a future immoral purpose and so not binding on the family, the creditor is not entitled to appropriate a sum realized out of the sale of joint family property towards the whole debt but only towards the portion for lawful purpose. (*Bennet and Verma, JJ.*) BED RAM SINGH *v.* INDERJIT SINGH. **A.I.R. 1938 All. 437.**

——**S. 62**—*If applies to cases of transfer of property.*

It is doubtful how far the provision of S. 62 of the Contract Act will apply to cases of transfer of property. (*Bennet, Mohammad Ismail and Verma, JJ.*) KANHAIYA PRASAD *v.* MT. HAMIDAN. **A.I.R. 1938 All. 418 (F.B.).**

——**S. 62**—*Proposal to discharge debt by executing mortgage—If constitutes novation.*

If there is a proposal to discharge a debt by executing a mortgage but the right of reverting to original position is reserved unless the new transaction is complete, there is no true novation and there is no bar to a suit on the original cause of action. (*Beckett J.*) KISHEN LAL *v.* GOHLI. **40 P.L.R. 689.**

——**S. 178 (before amendment)**—*"Person who is in possession"—If includes owner.*

The words "a person who is in possession" as used in S. 178 of the Contract Act before its amendment includes an owner as well as a mercantile agent and are not limited either to the latter or to persons other than the actual owner of the goods. (*Derbyshire, C. J. Costello and Panckridge, JJ.*) RAMJIBAN SEROWGEE *v.* NIPPON YUSEN KAISHA. **67 C.L.J. 276.**

——**S. 178**—*Validity of pledge—Burden of proof.*

Under S. 178 of the Contract Act, a pledgee may get a better title to the goods or documents pledged than the pledgor had himself provided the circumstances set out in the section are satisfied. The burden of proving the existence of those circumstances is upon the party setting up the validity of the pledge. (*Derbyshire, C. J. Costello and Panckridge, JJ.*) RAMJIBAN SEROWGEE *v.* NIPPON YUSEN KAISHA. **67 C.L.J. 276.**

CO-OPERATIVE SOCIETIES ACT (II OF 1912), S. 2 (c)—*"Member"—Hindu joint family—If can be member.*

A joint Hindu family can be a member of a Co-operative Society. (*Horwill, J.*) VILLUPURAM URBAN CO-OPERATIVE BANK *v.* BALASUBRAMANIA MUDALI. 1938 M.W.N. 567.

CO OWNERS—*Joint property—One of co-owners roofing over part of joint lane and building on it—Right of others to injunction.*

If one of the joint owners of a lane roofs over a part of it adjoining his own property by means of a *chhatra* and builds a room on it a co-owner is entitled to sue for injunction for the removal of that structure, even though the damage only be very slight or hypothetical. But if the latter has made an exactly similar use of the lane opposite to his own property, an injunction will be refused,

(*Beckett,*

CO-SHARER—*Adverse possession—Ouster—Proof of.*

To defeat the title of a co-sharer, there must be an ouster, namely, an assertion of hostile title made with publicity as against the other co-sharer. (*D. N. Mitter and Patterson, JJ.*) SYED MAHOMED MALEEH *v.* SHASI MOULI NAG. 67 C.L.J. 188.

———*Mutual relation—Trustee for payment of rent committing default—Purchase by such trustee—Effect of.*

If either a co-sharer or a person who is in a sense a trustee for the payment of rent defaults in the payment of rent with the express object of getting hold of the interest of the other co-sharer, that purchase must be taken to enure for the benefit of the person so defrauded. (*D. N. Mitter and Patterson, JJ.*) SYED MAHOMED MALEEH *v.* SHASI MOULI NAG. 67 C.L.J. 188.

COURT FEE—*Value for purposes of—Appeal against order making decretal amount recoverable from certain property.*

Where a decretal amount has been ordered to be recovered from a certain property and an appeal is preferred to get that property released from the value for the purposes of court-fee w price of the property or the decretal amoun is less. (*Almond, J. C. and Mir Ahmad, J.*) B. SUNDAR SINGH *v.* R. B. MAKHAN SINGH. A.I.R. 1938 Pesh. 38.

COURT-FEES ACT (VII OF 1870), S. 7, Cl. (5) (e) and Sch. II, Art. 17 (6)—*Suit for possession of temple on an agreement for management by rotation—Court-fee.*

Where a plaintiff sues for possession of a temple on the strength of an agreement for management by rotation the court-fees are payable according to Sch. II, Art. 17 (6) of the Court-Fees Act. The temple so long as it stands as a temple remains the property of the deity and has no market value within the meaning of S. 7 (5) (*e*) of the Act. (*Niyogi, J.*) MOTILAL *v.* SHAMBHOOLAL. 1938 N.L.J. 214.

———**S. 12 and C. P. CODE, O. 43, R. 1 (*a*)**—*Appeal against order returning plaint for presentation to proper Court—Determination of principle for purposes of jurisdiction—If barred by S. 12, Court-Fees Act.*

Where a plaint is returned for presentation to the proper Court, as being beyond the Court's J

not a bar to such a course. It only makes a decision final as to any question which relates to valuation for the purpose of determining the amount of any fee. It does not apply where there is a dispute as to the class in which the suit falls. If there is any doubt as to what section would apply to a suit, then it raises a question of principle, the Jurisdiction to determine which is not impaired by S. 12 of the Court-fees Act. (*Niyogi, J.*) MOTILAL *v.* SHAMBHOOLAL. 1938 N.L.J. 214.

———**Sch. I, Art. 1 and Sch. II, Art. 17 (iii)**—*Declaration and consequential relief—Province of Court as to—Examination of plaint allegations when justified.*

The position with reference to court-fees is that where as it is not permissible to a Court to insist on the plaintiff claiming a consequential relief when he has deliberately omitted to claim it and has confined himself to claiming a declaratory relief only and thus insist on the

has been clothed. Where the plaintiffs ask for a declaration that certain mortgage decrees are null and void and ineffectual, but whose allegations in the plaint in effect amount to asking for the cancellation of the mortgage bond on the basis of which the decree was obtained, *ad valorem* court-fee has to be paid. (*Collister and Bajpai, JJ.*) GOVIND RAO *v.* GOVIND RAO. I.L.R. (1938) All. 470 = 1938 A.L.J. 578.

———**Sch. II, Art. 17 (6)**—Applicability—Suit for possession of temple. *See* COURT-FEES ACT, S. 7 (5) (E) AND SCH. II, ART. 17 (6). 1938 N.L.J. 214.

CRIMINAL

S. 103 (1) and

Search-list by

PENAL CODE,

———**S. 106**—*Applicability—Conviction under S. 3 (12), Town Nuisance Act—Order binding over accused—If justified.*

S 106, Cr. P. Code, should be very sparingly invoked where the offence committed is a petty one; and it is ordinarily objectionable when the accused is convicted ler S. 3 (12) ould also be . 106, Cr. P. Code, as that would involve a far more serious punishment than the main sentence. (*Horwill, J.*) BALIAN, *In re.* 1938 M.W.N. 588.

———**S. 106**—*Applicability—Offence involving breach of the peace—Offence under S. 3 (12), Town Nuisance Act.*

An offence under S. 3 (12) of the Town Nuisance Act is an offence involving a breach of the peace for purposes of S. 106, Cr. P. Code. (*Horwill, J.*) BALIAN, *In re.* 1938 M.W.N. 588.

———**S. 164** — *Requirements — Compliance with—Sufficiency.*

The accused on being produced before a Magistrate for an order of remand stated that he wanted to make a confession and the Magistrate had his handcuffs removed and gave him ten minutes' time to reflect and then recorded the confession. The certificate required by S. 164 was not appended to the confession but the Magistrate was examined as a witness and had deposed that was being accused that d that

Held, that the confession was admissible in evidence. (*Young, C.J. and Tek Chand, J.*) KARTAR SINGH *v.* EMPEROR. A.I.R. 1938 Lah.

——Ss. 196-A (2) and 195—*Object of conspiracy to commit non-cognizable offence—Some of accused parties to proceedings in which offence committed—Sanction, if necessary.*

Where a non-cognizable offence is committed and several persons are charged for conspiracy to commit the offence but some only of the accused are parties to the proceedings in which the offence was committed, sanction is not necessary in the case of such accused but is necessary in the case of the others who are not parties to the proceeding. (*Young, C.J. and Tek Chand, J.*) EMPEROR *v.* NAND LAL. **A.I.R. 1938 Lah. 526.**

——S. 215—*Quashing committal—Grounds—Point of law—Meaning.*

Under S. 215, Cr. P. Code, a committal can be quashed only if the order of committal is against law, in the sense that there was any error of law in the proceedings of the magistrate before committal. (*Pandrang Row, J.*) RAMASWAMY GOUNDAN *v.* EMPEROR. **1938 M.W.N. 577.**

——S. 239—*Charge under S. 401, I. P. Code—Joint trial of all members of gang—Legality.*

In a prosecution under S. 401, I. P. Code, all the members of the gang can be tried together for the offence of being members of that gang. There is nothing objectionable in such a joint trial if all the accused are in fact members of that gang. (*Horwill, J.*) ARUMUGAM *v.* EMPEROR. **1938 M.W.N. 595.**

——Ss. 256 and 540—*Right to produce new witnesses after recording of plea of accused—Proper procedure.*

The wording of S. 256, Cr. P. Code, does not give the prosecution the right to require after the plea of the accused has been recorded, that witnesses shall be summoned whose names do not appear in the complaint, who were not produced originally or whose names were not divulged under S. 252, Cr. P. Code. It is however open to the prosecution to ask them to be examined under S. 540, if the required circumstances exist. (*Weston, I.C.S.*) BAL CHAND *v.* SUKH DEO. **1938 A.M.L.J. 78.**

——S. 259—Illegal order under—Setting it aside—Proper procedure. *See* CR. P. CODE, SS. 369 AND 259. **1938 A.M.L.J. 45.**

——Ss. 279 (1) and 278—*Objection that a juror is not an European British subject—Decision—Finality.*

An objection that a juror is not an European British subject is an objection under S. 278, Cr. P. Code, either under Cl. (*b*) or Cl. (*h*) and the decision of the Sessions Judge on the point is final under S. 279 (1). (*Pollock and Gruer, JJ.*) SURAJPAL SINGH *v.* EMPEROR. **1938 N.L.J. 185.**

——S. 285-A—*Construction—'And is so tried'—Meaning of.*

The words 'and is so tried' in S. 285-A, Cr. P. Code, mean 'if he is in fact so tried' or 'if he is eventually so tried,' for unless the European British accused was in fact tried in accordance with the provisions of S. 275, the Indian accused's ground for claiming a separate trial would disappear. (*Pollock and Gruer, JJ.*) SURAJPALSINGH *v.* EMPEROR. **1938 N.L.J. 185.**

——S. 285-A—*Joint trial—No claim for separate trial—Trial in different Sessions Court—Claim for separate trial—Refusal—Revision disallowed—Re-agitation in appeal from conviction—If permissible.*

Where an Indian accused originally wished to be jointly tried with the European accused, but when the case came before a different Sessions Court claimed to be separately tried, which was not permitted, and revision from which order was also dismissed, cannot in an appeal from the conviction in such trial, re-agitate the claim for separate trial. (*Pollock and Gruer, JJ.*) SURAJPALSINGH *v.* EMPEROR. **1938 N.L.J. 185.**

——S. 297—*Charge to jury—Charge under S. 366, Penal Code, against two persons—Proper direction.*

Where an allegation is made that two persons have joined in taking or enticing another, the direction to the jury should be that the prosecution must prove that the taking or enticing was by the accused persons or either of them. It is necessary to examine the evidence against each accused jointly charged with the particular offence. In dealing with the intention required under S. 366, it is wrong for the Judge to say that if the jury was not satisfied that the offence under S. 366 was made out against both the accused the alternative is under S. 366-A. If the intention required by S. 366 was not proved, the direction should be that the jury was bound to acquit them or one of them against whom intention had not been made out. (*Bartley and Henderson, JJ.*) KATYAYANI DASI *v.* EMPEROR. **A.I.R. 1938 Cal. 475.**

——S. 297—*Misdirection—Charges of dacoity and of conspiracy to commit dacoity against several accused—Omission by Judge to deal with evidence against each accused on charge of dacoity.*

In a case where there is a general charge of conspiracy against a number of accused to commit dacoity, and, at the same time, a charge against the accused for having committed a dacoity, it is most necessary that the Judge in summing up to the jury should distinguish between what is evidence against each of the accused on the charge of conspiracy and what is evidence against each of the accused on the charge of having committed the dacoity. That is more than ever necessary where the main evidence against the accused or some of them is that of an approver. The failure to do so would amount to misdirection or non-direction. (*Derbyshire, C. J. and Panckridge, J.*) RAZAK FAKIR *v.* EMPEROR. **42 C.W.N. 870.**

——S. 297—*Misdirection—Sexual offences—Evidence of prosecutrix—Omission to give jury special caution.*

The fact that the Judge's charge to the jury did not contain the special caution that when a man is charged with a sexual offence it is dangerous to rely on the uncorroborated evidence of the prosecutrix, is not a ground for setting aside the conviction if the absence of such caution could not have affected the verdict of the jury. (*Guha and Lethbridge, JJ.*) ABDUL GAFUR KOTWAL *v.* EMPEROR. **I.L.R. (1938) 1 Cal. 636.**

——S. 298—*Duty of Judge under—Absence of evidence to go before jury—Duty to direct verdict of not guilty.*

Under S. 298, Cr. P. Code, it is the duty of the Judge to decide all questions of law arising in the course of the trial. In every case there is a preliminary question, which is one of law, namely, whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is no evidence to go before the jury on which they can be properly directed to give a verdict, it is the duty of the Judge to take action under S. 298 and to ask the jury to return a verdict of not guilty. It is enough that there is some evidence. A scintilla of evidence clearly would not justify the Judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude the fact to be established. It is the duty of a Judge to make out a case for the accused on which he thinks that a verdict of not guilty may be properly returned, though the case has not been suggested by or on behalf of the accused. (*Venkataramana Rao, J.*) EMPEROR *v.* LABBAI KUTTI. **1938 M.W.N. 582.**

CR. P. CODE (1898), S. 298.

——S. 298—*Misdirection—Judge expressing his opinion strongly.*

The Judge not only may but should let his opinion on the evidence appear, provided that he leaves the decision fairly to the jury and does not take it out of their hands. There is no misdirection if the judge leaves every point of any importance to the jury, although his charge is for a conviction and his presentation of the defence evidence is at times coloured by the strong opinion he has formed. (*Guha and Lethbridge, JJ.*) ABDUL GAFUR KOTWAL *v.* EMPEROR. I.L.R. (1938) 1 Cal. 636.

——S. 309 (2)—*Contents of Judgment*

In a trial with assessors it is the duty of the presiding Judge to ascertain the opinion of the assessors after summing up the evidence to them if he thinks it necessary, and then to deliver a judgment. That ju[illegible] must conform to the provisions of S. 367, Cr. P. and must accordingly contain the reasons for the decision. The section is not complied with if the [illegible] merely states that he agrees with the opinion [illegible] assessors. (*Derbyshire, C. J. and Panckridge,* [illegible]) NIRMAL KUMAR BHOUMIK *v.* EMPEROR. 42 C.W.N. 896.

——S. 341—*Scope—Reference under—When competent—Case against two accused—One unable to understand proceedings—Reference of whole case—Competency.*

S. 341 of the Cr. P. Code, only applies to the case of an accused who is deaf and dumb, and the proceedings to be forwarded to the High Court under [illegible] only those relating to an accused person [illegible] made to understand the proceedings, thou[illegible] The section does not permit a reference [illegible] Court of a case in which there are two accused and one [illegible] able to under[illegible] would have no [illegible] to the accused [illegible] (*Wadia and Divatia, JJ.*) EMPEROR *v.* TRIMBAK DAMODAR. 40 Bom.L.R. 495.

——S. 342—*Warrant case—Examination of accused—Proper time for.*

The further examination of the prosecution [illegible] under S. 256 is not a part of the prosecution cas[illegible] A.I.R. 1923 Mad. 609 (F.B.) Rel. on. But the further cross-examination is not part of the defence and the defence [illegible] comprising three stages prosecution, further cross-examination of prosecution witnesses and defence, the examination under S. 342 can be held either immediately after the close of the first stage or immediately before the beginning of the third stage or for the matter of that at any time betw[illegible] MED NA[illegible]

——S. [illegible]

Right of [illegible]

An acc[illegible] Code, to [illegible] the charge. S. 350 gives the accused the right to have a *de novo* trial. The trial begins only after the framing of a charge. The section leaves the re summoning of witnesses entirely to the discretion of the Magistrate. If he does not feel it necessary to examine any witness afresh, it is not incumbent on him to do so. (*Horwill, J.*) HARICHANDRA REDDY *v.* EMPEROR. 1938 M.W.N. 587.

——S. 350 Proviso (b) and 530—*Scope—Change of Magistrate—Demand for resummoning and re-hearing of prosecution witnesses—Refusal—All witnesses recalled and cross-examined—Trial—If vitiated.*

CR. P. CODE (1898), S. 417.

Where after the prosecution witnesses had been examined and a charge framed, a new Magistrate takes up the case, his refusal to accede to the demand of the accused for re summoning and re-hearing of the witnesses is not an irregularity which vitiates the trial. And when all the witnesses are recalled and further cross examined before the Magistrate who decides this case, the accused cannot be said to be prejudiced by the refusal to re-summon and re-hear the witnesses, and the conviction cannot be set aside on that ground. (*Lakshmana Rao, J.*) RAMAMUNI REDDI, *In re.* (1938) 2 M.L.J. 41.

——Ss. 367 and 424—*Appellate Judgment—Contents.*

[illegible] bear the scrutiny of the High Court. (*Patterson, J.*) KALICHARAN SOM *v.* PRIYA NATH DAS. A.I.R. 1938 Cal. 522.

——Ss. 369 and 259—*Order of discharge under S. 259—If a Judgment—S. 369 if applies to judgments whether legal or illegal—Wrong order under S. 259—Proper remedy.*

An order of discharge under S. 259, Cr. P. Code must [illegible] Magistrate passing the order cannot vacate it. But the proper course is to refer the case to the appellate Court for setting it aside. (*Weston, I.C.S.*) MOHAMED YAHYA *v.* MANAK CHAND. 1938 A.M.L.J. 45.

——S. 386 (as amended)—*Warrant by Magistrate—Duty of Civil Court.*

The plain reading of S. 386 after the amendment of 1923 is that the warrant issued by a Magistrate to a [illegible] [illegible]mount of fine [illegible] accepted as [illegible] [illegible]nt to execute it. (*Almond, J. C.*) COLLECTOR OF PESHAWAR *v.* ABDUL MAJID. A.I.R. 1938 Pesh. 40.

[illegible]*bility—Two charges triable under Ss. 236 and 237—* [illegible] *prosecution on other.*

[illegible] (1), Cr. P. Code, would not apply to a case where the two charges do not fall within the scope of Ss. 236 and 237, Cr. P. Code, although they could have been tried together. In such cases the acquittal on the one would not bar a prosecution on the other, especially when the scope of the two prosecutions [illegible]

can be set aside.

In an appeal against an acquittal, the accused is entitled to ask the Court to consider all the evidence before it and all the possible grounds which may be raised against the conviction. In an appeal against the acquittal under S. 304, I. P. Code, if the accused who has been convicted under S.335, I.P. Code, is entitled to argue on the facts of the case to show that he has not committed an offence under S. 304, then although the acceptance of those arguments may not automatically

CR. P. CODE (1898), S. 436.

set aside the conviction under S. 335, I. P. Code, yet if the Court were satisfied that no offence was committed, it would undoubtedly exercise *suo motu* its powers under S. 439 (1), Cr. P. Code, and set aside the conviction. (*Horwill, J.*) PUBLIC PROSECUTOR *v.* PANCHAKSHARAM. **1938 M.W.N. 605.**

———**S. 436**—*"Further inquiry"—Meaning of—Order setting aside discharge and directing further inquiry—Inquiry—If to be begun afresh.*

A magistrate who is directed to make a further inquiry under S. 436 into the case of a person who has been improperly discharged is not bound to begin the inquiry afresh. Further inquiry does not mean merely an examination of witnesses, but a further consideration of the evidence. The inquiry re-commences where it was let off at the time when the improper order of discharge was passed. A magistrate is therefore justified upon perusing the evidence already taken in framing a charge. There is no obligation laid on the magistrate to begin the inquiry afresh. (*Horwill, J.*) HARICHANDRA REDDY *v.* EMPEROR. **1938 M.W.N. 587.**

———**S. 464**—*Evidence of civil surgeon—If evidence of prosecution—Opportunity to accused to rebut—Prosecution, if entitled to rebut evidence produced by accused.*

The evidence of a Civil Surgeon taken under S. 464 in order to decide whether an accused person is of unsound mind or not is not evidence produced by the prosecution. The examination of the Civil Surgeon is a duty placed by statute upon the Magistrate himself. If the accused seeks to produce other evidence in rebuttal of the Civil Surgeon's evidence, the prosecution is also entitled to produce evidence in rebuttal of the evidence of the accused. The burden of proving that the accused is of unsound mind and incapable of making his defence lies upon the accused and it is for him to lead evidence on the point in the first place and such evidence as is led on his behalf can be rebutted by the prosecution. (*Almond, J.C.*) EMPEROR *v.* SHERDIL SHER BAZ. **A.I.R. 1938 Pesh. 24.**

———**S. 476**—*Duty of Court—Opportunity to party against whom enquiry is directed to cross-examine witnesses.*

Where a Magistrate decides to hold a preliminary enquiry under S. 476, the Magistrate should give an opportunity to the party against whom the enquiry is directed to cross-examine the witnesses produced. If he refuses to allow such party to cross-examine the witnesses who were not examined before, the order cannot stand. (*Mackney, J.*) U BA HLA *v.* MAUNG TUN SEIN. **A.I.R. 1938 Rang. 297.**

———**S. 488 (3)**—*Arrears—Power of Court to issue one warrant and impose cumulative sentence of imprisonment.*

The intention of the Legislature was to empower the Magistrate after execution of one warrant only to sentence a person, who has defaulted in the payment of maintenance ordered under S. 488, to imprisonment for a period of one month in respect of each month's default. The section does not enjoin that there should be a separate warrant in respect of each term of imprisonment for one month. In other words, where arrears have been allowed to accumulate, the Court can issue one warrant and impose a cumulative sentence of imprisonment. (*Thom, C.J., Allsop, Bajpai, Ganga Nath and Ismail, JJ.*) EMPEROR *v.* BENI. **1938 A.L.J. 565=1938 A.W.R. (H.C.) 379=A.I.R. 1938 All. 386 (F.B.).**

———**S. 494**—*Discretion of Public Prosecutor—Withdrawal of prosecution.*

CRIMINAL TRIAL.

S. 494, Cr. P. Code, entrusts to the Public Prosecutor discretion to withdraw from the prosecution with the consent of the Court and his withdrawal puts an end to the case. The law gives him a real discretion in the matter and it is open to him to withdraw the case at any stage of the case even after it has commenced and before the return of the verdict of the jury. (*Venkataramana Rao, J.*) EMPEROR *v.* LABBAI KUTTI. **1938 M.W.N. 582.**

———**S. 498**—*Appeal to Privy Council—Grant of bail—Power of High Court.*

Once the High Court has passed orders in a criminal appeal, it becomes *functus officio* and has no seizin in the case. This seizin may be revived when the Judicial Committee has granted leave to appeal. The power of the High Court to deal with an application for bail pending the decision of the Privy Council appeal depends on whether they have been directed by the Privy Council to do so or not. If the Privy Council grants leave to appeal and directs the appellant to apply for bail to the High Court, bail should ordinarily be granted by them. (*Blacker, J.*) FAQIR SINGH *v.* EMPEROR. **40 P.L.R. 595.**

———**S. 512**—*Scope—Evidence taken under—Admissibility—Conditions—Onus of proof.*

S. 512, Cr. P. Code, which empowers a magistrate to take the depositions of certain witnesses in the absence of the accused enacts an exception to the principle embodied in S. 33 of the Evidence Act. Before evidence taken under S. 512, can be admitted on the ground that the deponents are dead, it is incumbent that the death of the witnesses must be proved by the party who wishes to tender such evidence. The fact of death must be proved like any other fact, and a mere report that a certain person is dead is not sufficient. (*Venkataramana Rao, J.*) EMPEROR *v.* LABBAI KUTTI. **1938 M.W.N. 582.**

———**S. 530**—Scope—Demand for re-summoning and re-hearing witnesses under S. 350—Non-compliance—Trial—If vitiated. *See* CR. P. CODE, SS. 350, PROVISO (2) AND 530. **(1938) 2 M.L.J. 41.**

———**S. 537**—Applicability—Presentation of complaint under S. 22 of Cattle Trespass Act to wrong Court—If curable. *See* CATTLE TRESPASS ACT, SS. 20 AND 122. **175 I.C. 662.**

CRIMINAL TRIAL—*Acquittal—Grounds—Discrepancies in statements and confession of accused—If justify acquittal or rejection of prosecution evidence.*

The fact that a statement made by the accused person does not agree entirely with his statements in the confession or with another statement made to the police is no ground for acquitting the accused when the prosecution has proved its case. The discrepancies in the statements and the confession are discrepancies created by the accused himself—not discrepancies created by the prosecution witnesses—and are no grounds for rejecting the evidence of the prosecution witnesses. (*Burn and Stodart, JJ.*) PUBLIC PROSECUTOR *v.* RAJU NAICKEN. **1938 M.W.N. 609.**

———Conviction—Basis of—Homicide—Decision as to—Facts to be taken into consideration—Intention—Relevancy. *See* PENAL CODE, SS. 304 (1) AND 302. **A.I.R. 1938 Rang. 156.**

———*Conviction—Bench of Magistrates—Magistrate signing judgement not hearing all the evidence—Effect on conviction.*

A conviction by a Bench of Magistrates is illegal, if the magistrates who sign the judgment have not heard all the evidence in the case. (*Horwill, J.*) VEERASWAMY REDDI *v.* VENKATASWAMY. **175 I.C. 874=1938 M.W.N. 591.**

CRIMINAL TRIAL.

——*Evidence—Believing defence witnesses or prosecution witnesses—Difference in results.*

To believe the evidence of the defence witnesses does not imply that the prosecution witnesses are deliberately lying, for, they may be speaking in good faith but in error: whereas if Court accepts the evidence of the

reliability.

A Court is not entitled to decide before hand that a witness cited by the defence is unworthy of credit. (*Mackney, J.*) NGA TA TE *v.* THE KING.

A.I.R.

——*Evidence—Prosecution under S*

——*Evidence of association prior to period of charge—Admissibility.*

In a prosecution under S. 401, I. P. Code, evidence of association before the period of charge is admissible to corroborate other evidence of association during that period. (*Horwill, J.*) ARUMUGAM *v.* EMPEROR.

1938 M.W.N. 595.

——*First information report—Admissibility.*

The first information report, unless the man who made it dies, is not admissible evidence of any fact which is contained in it: it merely proves that this was the original story which set the police in motion. (*Baguley and Mosely, JJ.*) THE KING *v.* MAUNG PO THI. A.I.R. 1938 Rang. 282.

——*Jurisdiction—Statement of accused disclosing offence not triable by magistrate—If ousts jurisdiction of magistrate.*

A statement by an accused person that the offence committed by him is a more serious one than one triable by the magistrate does not deprive the magistrate of

(1938) 2 M.L.J. 43.

CUSTOM—*Nattukottai Chetties—"Samans"—Right of foreign agents to.*

It is customary among Nattukottai Chetties to pay ten per cent. of the net profits to foreign agents as "sam..." Such a custom is well recognised. (*King and ... mana Rao, JJ.*) KARUTHAN CHETTIAR *v.* CH... BARAM CHETTIAR. 1938 M.W.N. ...

(1938) 2 M.L.J. 79.

——**(Punjab)**—*Abadi—* ... *non-proprietors—Terms of*

In the Punjab villages, it ... that the *abadi deh* is a com... tary body until partition has taken place; and when an outsider is allowed to settle permanently in the village and build a house in the *abadi deh* it is further to be presumed that he does so by license from the proprietors. It

of property, unless there is evidence to the contrary. When a non-proprietor is granted a site ... a village, one of these implied terms is t... transfer it, though it will be allowed ... own family. The addition of such a t... may be called a local custom, or preferably, usage. It is a question of fact whether such a restriction on transfer is to be taken as an implied term when a site is granted to a non-proprietor in any particular village. Generally, it will be presumed that the proprietary body

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intends the grant to be subject to a restriction on transfer and that this condition has been accepted by any non-proprietor accepting the grant. The presumption may be rebutted in a variety of ways. It may be shown that the course of dealings, between proprietors and non-proprietors over a long term of years has been ... indicate that no restriction on transfer is ... n a grant is made. But the presumption is ... by the mere fact that a number of *pucca* ... been built on the sites by the non proprietors in the village. (*Beckett J.*) CHUNI LAL *v.* BEANT SINGH. 40 P.L.R. 634.

——**(Punjab)**—*Shamilat—Pond reserved for common purposes—Rights of proprietor.*

... could be taken ... until partition, ... on any part of a pond reserved for the common purposes of the village or cut trees without the consent of the other proprietors. (*Tekchand, J.*) RATI RAM *v.* BALWANT.

40 P.L.R. 633.

——**(Punjab)**—*Succession—Appointed heirs' descendants—Right to succeed collaterally in family of appointee's natural father.*

The descendants of an appointed heir are not debarred from succeeding collaterally in the family of the appointee's natural father among Rajputs of Garshankar Tahsil in the District of Hoshiarpur. (*Addison, A. C. J and Din Mahomed, J.*) GULZARA *v.* QUTBA.

40 P.L.R. 672.

DEBTOR AND CREDITOR—Joint debtors—Decree against one—If bar to suit against other—Principles. *See* LEASE—ASSIGNMENT BY LESSEE.

40 Bom L.R. 497.

DECLARATORY DECREE. *See* SPECIFIC RELIEF ACT, S. 42.

...Construction—Reference to nature of suit ... of anomalous result.

...ing decrees one must have regard to the nature of the suit and the previous proceedings which led to the suit. A construction which leads to an anomalous result ought to be avoided. (*Niyogi, J.*) CHINTAMAN RAMJIPANT *v.* GOVIND VITHAL

175 I C. 753.

be considered sufficient to prove actual payment of con... ...f release in his favour. (*James* ... BANK OF BIHAR, LTD., CHAPRA

175 I.C 78=10 R.P. 575= ... R. 513=A.I.R. 1938 Pat. 380.

——*Construction—Boundaries—Mistake in description of property within—Rule to be observed.*

When the description of boundaries is precise and accurate such description ordinarily will override ... the description of property ... *Weston, I.C.S.*) RAM NATH

1938 A.M.L.J. 56.

...*yance or trust—Document containing both declaration of trust and conveyance.*

42 C.W.N. 937.

——*Construction—Conveyance—"Unto and to the use of".*

The words "unto and to the ... ordinary words of absolute conve...

Conveyancing Law and Practice, at any rate until 1926. (*Ameer Ali, J.*) KANTI CHANDRA MUKHERJEE *v.* JOHN BOISOGOMOFF. 42 C.W.N. 937.

——*Constructions— Rules — Construction against grantor.*

The rule as to construction against the grantor means that where in construing a document there is a doubt as to the quantity or quality of the estate conveyed, doubt should be dissolved in favour of the grantee. (*Ameer Ali, J.*) KANTI CHANDRA MUKHERJEE *v.* JOHN BOISOGOMOFF. 42 C.W.N. 937.

——*Construction—Rules—Reference to ultimate consequences.*

A deed is to be construed not by reference to the ultimate consequences of fact which might flow from its execution and adoption, but in the light of what it purports to say and the legal consequences of what it does say. (*Khundkar, J.*) BHABATARINI DEBI *v.* ASHMANTARA DEBI. A.I.R. 1938 Cal. 490.

——Construction—Sale deed—Passing of title—Intention as to—If to be gathered from the terms only—Extrinsic evidence — Admissibility. *See* EVIDENCE ACT, S. 92. 17 Pat. 318.

DEFAMATION. *See* TORT—DEFAMATION.

DYING DECLARATION. *See* EVIDENCE ACT, S. 32 (1).

ESTOPPEL—Landlord and tenant—Buildings erected by tenant—Landlord if estopped from pleading non-transferability. *See* LANDLORD AND TENANT — TRANSFERABLE TENANCY. 17 Pat. 358.

EVIDENCE—*Admissibility—Statements in prior suit.*

In a suit the point whether plaintiff's father *M* was bandhu of *J* was in question. The plaintiff produced a pedigree showing that *M* was bandhu and in proof of the pedigree relied upon certain previous statements of the plaintiff's father *M* made in a suit filed on behalf of the Secretary of State for India claiming the property left by *J* on the ground that no heir of *J* was in existence and that the property had escheated to the Crown. Thus the question of the alleged relationship of *M* with *J* was in controversy in that suit.

Held, that the statements of *M* relied upon were inadmissible. (*Bennet and Verma, JJ.*) BRIJ MOHAN *v.* KISHUN LAL. A.I.R. 1938 All. 443.

——*Age—Register of births and deaths—Entry in—Value of.*

An entry as to age in the register of births and deaths is *prima facie* evidence of what is stated in it. (*Costello and Panckridge, JJ.*) ALLIANZ UND STUTTGARTER LIFE INSURANCE BANK, LTD. *v.* HEMANTA KUMAR DAS. 42 C.W.N. 855

EVIDENCE ACT (I OF 1872), S. 30—*Confession of accused—If evidence against other accused.*

A confession made by a co-accused can only be taken into consideration against the other accused under S. 30 of the Evidence Act, but such confession cannot take the place of evidence, and is not evidence, against the other accused. (*Pandrang Row, J.*) RAMASWAMY GOUNDAN *v.* EMPEROR. 1938 M.W.N. 577.

——S. 32 (1)—*Applicability—Admission of dying declaration—Method of proof.*

The dying declarations of a deceased person are admissible under S. 32 (1) of the Evidence Act. The only satisfactory and reliable way of proving the dying declaration of a deceased person is to let the person who recorded it or in whose presence it was recorded directly prove the writing itself. Otherwise the proceedings would be reduced to a farce. No human being can be expected to remember word for word what he had written

long ago and either the witness will have to learn the evidence by heart before he enters the witnessbox or no dying declaration could be proved in a satisfactory manner at all. (*Almond, J. C. and Mir Ahmad, J.*) RAHIM GUL HANIF GUL *v.* EMPEROR. A.I.R. 1938 Pesh. 33.

——S. 32 (1)—*Dying declaration—Conviction if can be based on.*

It is of course a fact that for an accused person to be convicted on a dying deposition alone the Court must be quite satisfied that the dying deposition bears all the marks of truth, and it must be examined with care remembering that the statement is an *ex parte* statement, made as a rule in the absence of the accused without the accused having any chance of cross-examining the person who made it; but where the Court is satisfied that the man who made the dying deposition had a good opportunity of recognizing the person who attacked him, that he did recognize him, and that he was telling the truth when he made his dying deposition, a conviction can be passed solely on such confession. (*Baguley and Mosely, JJ.*) THE KING *v.* MAUNG PO THI. A.I.R. 1938 Rang. 282.

——S. 32 (1)—*Dying declaration—Recording of—Asking of relevant questions—Desirability.*

An injured man who is waiting to be operated on should not be subjected to any thing like a third decree cross-examination by the Magistrate who records his dying deposition; but the Magistrate should not content himself with merely recording the statement made by the injured man: he should ask him such simple questions as may occur to his mind in order that the dying deposition may be an account of some value. (*Baguley and Mosely, JJ.*) THE KING *v.* MAUNG PO THI. A.I.R. 1938 Rang. 282.

——S. 74—"*Public document*"—*Finger print slip—Extract from jail register—List of previous convictions—Admissibility to prove earlier convictions—Identity of accused with previously convicted person—Proof.*

A finger print slip taken in pursuance of a statutory duty cast upon police officers after a convict enters the jail is an act of the executive under S. 74 of the Evidence Act and is therefore a public document. So also the jail register which is written up by the jail authorities in the ordinary course of their duty as soon as a convict is admitted into jail is a public document. But before the finger print slips or the extracts from the jail register can be admitted in evidence as proof of previous conviction of the accused, the identity of the person whose name appears in the slip or jail register must be satisfactorily established to be that of the accused who is being tried. Where it is proved that the accused on trial before the Court had his finger prints taken in jail far away from his native place, soon after a person of his name was convicted of an offence, that is certainly very strong evidence indeed that the person bearing his name who was convicted of an offence was the very person who shortly afterwards had his thumb-impressions taken. But where the finger prints were taken elsewhere or taken in a place not the place of conviction, and taken sometime after the conviction, it cannot be said that the identity of the convicted person with the accused before the Court has been established. A calendar extract showing previous convictions would be confirmatory of the other evidence establishing the identity of the convicted person in the earlier cases with the accused before the Court. But the list of previous convictions contained in the finger print slips cannot be said to be satisfactory evidence of the previous convictions recited therein. (*Horwill, J.*) ARUMUGAM *v.* EMPEROR. 1938 M.W.N. 595.

EVIDENCE ACT (1872), S. 90. | EXECUTION.

——**Ss. 90 and 114**—*Document in official records—Nature of presumption raised.*

The circumstances that a document purporting to have been signed by a certain person is among official records is no proof that the document is 30 years old and no presumption under S. 90 of the Evidence Act, comes into play. (*Westen, I.C.S.*) UMRAO MAL *v.* GOPI NATH. **1938 A.M.L.J. 63.**

——**S. 92**—*Scope—Sale deed—Title to property sold —When passes—Intention of parties—Ascertainment—External evidence—Admissibility.*

Ordinarily the title to immoveable property transferred

pletely paid. In contracts of sale there are recitals of the receipt of the purchase money as well as terms providing for the passing of the property. The strictly

...Act. The passing of the consideration is on the other hand is a matter of fact and not a matter of fact, and the recital of this fact is different from the former contractual part as to the passing of the property. S. 92 will not prevent a party from disputing the recitals in the sale deed. If the terms of the contract as to when the property is to pass are ambiguous, then recourse may be had to external evidence with a view to determining what the intention of the parties was, but if the intention of the parties has been stated in unambiguous terms, then the terms must remain the sole criterion of the intention of the parties, and evidence cannot be introduced for the purpose of showing that the contract means something other than what it expresses in unambiguous terms. (*Courtney Terrell, C.J. and James, J.*) RADHAMOHAN THAKUR *v.* BIPIN BEHARI MITRA. **17 Pat. 318.**

——**S. 92, Proviso 3**—*Promissory note payable on demand—Collateral oral agreement not to make demand until certain condition is fulfilled—Admissibility.*

It is necessary to distinguish a collateral agreement which alters the legal effect of the instrument from an agreement that the instrument should not be an effective instrument until some condition is fulfilled, or, to put it in another form, it is necessary to distinguish an agreement in defeasance of the contract from an agreement suspending the coming into force of the contract. Where the promissory note is, by its express terms, payable on demand, that is at once, the obligation under the note attaches immediately. A collateral oral agreement not to make demand until certain specified condition is fulfilled

Proviso 3 of S. 92. . ADMINISTRATOR.

175 I.C. 449 = 48 L.W. 40 = A.I.R. 1938 P.C.

——**Ss. 114 (b) and 133**—*Accomplice Value—Independent corroboration—Necessity, if can be based upon.*

Under S. 114 (*b*) of the Evidence Act a Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. The evidence of one accomplice cannot be used as independent evidence to corroborate the evidence of another accomplice. Where there is a plurality of accomplices the Court might, while not losing sight of S. 114 (*b*) still be able to rely on the uncorroborated testimony of one or more out of a number either on the same or on different points. Moreover it is open to a Court to depart from the general rule, if it thinks that there are special circumstances in the case making it safe to do so, and in such cases, S. 133 of the Evidence Act makes it clear that conviction is not illegal merely because it is based upon the uncorrobrated testimony of an accomplice. (*Pollock and Gruer, JJ.*) SURAJPAL SINGH *v.* EMPEROR. **1938 N.L.J. 185.**

——**S. 115**—*Applicability—Different allegations as to nature of same mortgage.*

Where in a suit a party alleges that a mortgage was a simple one and in subsequent suit the same party says that the mortgage was a usufructuary mortgage and the opposite party on the other hand pleads in previous suit that the mortgage was a usufructuary mortgage and subsequently thinks that it was a simple one, the parties cannot be tied down by any rule of estoppel. In precise terms, S. 115, Evidence Act, would not apply. (*Bennet, Mohammad Ismail and Verma, JJ.*) KANHAIYA PRASAD *v.* MT. HAMIDAN. **A.I.R. 1938 All. 418 (F.B.).**

——**S. 115**—*Representation—Plea of estoppel — Fraud, if necessary.*

It is not necessary for the purpose of S. 115 that any fraud or deception should be pleaded. If it is found that any representation was intentionally made by one party and it was acted upon by the other party, the rule of estoppel will apply. (*Bhide, J.*) ABDULLAH SHAH *v.* MAHOMED YAQUB. **A.I.R. 1938 Lah. 558.**

EXECUTION — *Executing Court—Powers—Decree against unrepresented minor—Power of Court to go behind decree.*

A decree obtained against an unrepresented minor is a nullity and if it is brought to the notice of an executing Court that the decree sought to be executed was obtained against a judgment-debtor when he was a minor and was not represented by guardian *ad litem*, it is necessary for it before it executes the decree to determine whether there is a decree which can be executed. The rule is that an executing Court can go behind a void decree. (*Addison and Din Mahomed, JJ.*) PIR TAJ-UD-DIN *v.* KHAMBATTA. **A.I.R. 1938 Lah. 515.**

——*Right to—Decree obtained by* benamidar, *Right of true owner to execute.*

The true owner, if he can prove that the decree-holder is his *benamidar*, is entitled to execute the decree. (*Panckridge, J.*) PRADOSH CHANDRA BASU *v.* HUGH GORDON. **I.L.R. (1938) 1 Cal. 692.**

——*Withdrawal of proceedings — Right of decree-... petition for withdrawal—*

unqualified and absolute ... cution proceedings at any stage. The Court can refuse him permission to do so where the circumstances are such that some third party has become involved or has acquired some interest. Where the Court rejects the decree-holder's petition to

in coming to the conclusion that the bidder has acquired some legal interest as regards the property, that is not a matter, which is a fit subject for review under S. 115, *C. P. C. Costello and B* ...) SITA BOSE *v.* ROMESH CHA

EXECUTOR—*Duties of—Contract by testator or intestate—Duty of legal representative to perform.*

Prima facie it is the duty of a legal personal representative to perform all contracts of his testator or intestate, as the case may be that can be enforced against him, whether by way of specific performance or otherwise. If the contract be one that cannot be enforced against him for any reason such as the Statute of Frauds and is one that it would be disadvantageous to the estate to perform, it is a different matter, though it seems to be settled that he is not bound to plead the Statute of Limitations and may pay a statute barred debt unless it has been judicially declared to be so. Nor in the case of an enforceable onerous contract ought he to neglect any opportunity that may present itself of coming to terms with the other contracting party that may benefit the estate. But the breaking of an enforceable contract is an unlawful act, and it can never be the duty of an executor or an administrator to commit such an act. (*Lord Romer.*) AHMAD ANGULLIA *v.* ESTATE AND TRUST AGENCIES (1927), LTD.

175 I.C. 657 = A.I.R. 1938 P.C. 205 (P.C.).

FACTORIES ACT (XXV OF 1934), Ss. 60 (b) (i), 42 and 81—*Prosecution for allowing work to proceed beyond time fixed—Plea in defence—*Bona fide *mistake—Protection under S.* 81, *if available.*

Where the manager is prosecuted under S. 60 (*b*) (*i*) read with S. 42 of the Factories Act for allowing work to be done beyond the prescribed period, it is no defence to plead that the accused acted in good faith honestly believing in the clock in the factory to be correct and that he is protected by S. 81. That section does not apply to a manager; it was inserted primarily, if not entirely for the benefit of the inspecting staff. It cannot be said that the manager is acting under the Act. It is enough in a prosecution under the Act to prove that the accused has infringed the Act or rules under the Act and it is not necessary to show that accused intended to infringe the Act or the rules. (*Pollock and Gruer, JJ.*) PROVINCIAL GOVERNMENT C. P. *v.* SETH CHAPSI.

1938 N.L.J. 217.

FIRST INFORMATION REPORT. *See* CRIMINAL TRIAL—FIRST INFORMATION REPORT.

GIFT—*Date of—Presumption—Gift by mutation in Revenue records—Minor donee—Necessity of possession.*

In the case of a gift made by mutation in the revenue records, the presumption is that the donor made the gift on the date of his application for mutation. Where the donee is a minor and is living with the donor, the question of possession is not material. (*Bhide, J.*) MAL SHAH *v.* JABRU.

40 P.L.R. 621.

GRANT—*Chowkidari jagir—Resumability—Zamindar getting private services—Right to resume on ground of non-performance of services—Bengal Act VI of* 1870.

A Chowkidari jagir granted for Chowkidari work is a grant of a public nature and the services rendered by the Chowkidar are in their nature essentially public services. The lands held by him on service as remuneration for the performance of such duties are to that extent appropriated or assigned for public purposes. A Zamindar is not therefore ordinarily entitled to resume Chowkidari land. Even if the Zamindar has been accustomed to demand certain private services from the Chowkidar, he is not entitled to resume the Chowkidari land merely because those services are no longer rendered so long as the holder of the land is the Chowkidar of the village.

Quaere:—Whether a Chowkidari jagir is liable to resumption under Bengal Village Chowkidari Act (VI of 1870) on the ground that the Chowkidar receives pay from the Chowkidari fund. (*Courtney-Terrell, C.J. and James, J.*) BHAGI MALIK *v.* SATYABADI OTA.

17 Pat. 315.

GUARDIANS AND WARDS ACT (VIII OF 1890) Ss. 4 (2) and 41 (3)—*Guardian—If includes a* defacto *guardian—Power to order* defacto *guardian to deliver property in his possession.*

A *defacto* guardian is a 'guardian' within the meaning of S. 4 (2) of the Guardian and Wards Act and on his removal or discharge the Court has power under S. 41 (3) to require him to deliver any property in his possession or control belonging the ward. (*Niyogi, J.*) ABAJI *v.* DAMODAR ABAJI. 1938 N.L.J. 202.

——**S. 29 (b)**—*Certified manager—Power to create occupancy tenancy without permission of Court.*

When a certified manager creates an occupancy tenancy, whether deliberately or inadvertently, by giving a lease without the previous permission of the Court the landlord is not bound by it. It is not in any way an intolerable restraint on efficient management to provide that the creation of a permanent tenancy should not be made without the Court's permission. It is not a matter of any difficulty for a manager to approach the Court and obtain the necessary permission. The question whether the act opposed is a prudent one or not is immaterial. (*Grille, J.*) GOVINDRAO BALWANTRAO *v.* RUMA ATMARAM.

A.I.R. 1938 Nag. 314

——**S. 41 (3)**—*Direction to deposit cash—Security, when permissible.*

Where the only object is to protect the minor's property the object can well be served by directing the discharged guardian to furnish solvent security for payment of any amount that may be found due on scrutiny of accounts. It is hard on a guardian, to be called upon to deposit a large amount in cash. (*Niyogi, J.*) ABAJI *v.* DAMODAR ABAJI. 1938 N.L.J. 202.

——**Ss. 47 and 48**—*Provision for maintenance in order appointing guardian—If appealable.*

Where in an order appointing a guardian a provision is also made fixing the maintenance allowance for the minor, such a provision is not open to appeal. (*Stone, C.J. and Bose, J.*) MT. BHULI *v.* RAJABAI.

1938 N.L.J. 195.

HINDU LAW—*Adoption—Widow—Power to adopt—Hindu dying leaving surviving him his widow and his son's widow—Adoption by son's widow during lifetime of father's widow—Validity.*

Where a Hindu dies leaving behind him his own widow and the widow of his predeceased son an adoption by the widow of the son during the lifetime of the father's widow is not valid. The son, whose widow makes the adoption, having died during the lifetime of his father, the estate vests in the widow of the father and she cannot be divested or the estate by any act of the son's widow who at the time of the adoption holds no position in the family and is merely entitled to a pittance. (*Addison and Din Mahomed, JJ.*) PIARE LAL *v.* HEM CHAND. A.I.R. 1938 Lah. 539.

——*Alienation—Father—Alienation not supported by necessity—If void or voidable.*

An alienation of ancestral property by a Hindu father without legal necessity or justifying cause is not void *ab initio*, but voidable, and can only be avoided by his son who can also satisfy the alienation. (*Rangnekar and Wadia, JJ.*) GOVIND GURUNATH *v.* DEEKAPPA.

40 Bom. L.R. 539.

——*Alienation—Father—Mortgage—Money borrowed for litigation to establish adoption of only minor son—Validity.*

HINDU LAW.

A mortgage executed by a Hindu father for money borrowed for the purpose of carrying on a litigation to establish the adoption of his only minor son is one for legal necessity or in any case for the benefit of thefamily as a whole and in particular for the benefit of the minor son. (*Rangnekar and Wadia, JJ.*) GOVIND GURUNATH *v.* DEEKAPPA. 40 Bom.L.R. 539.

——*Alienation—Father—Mortgage by—Necessity or benefit—Proof—Duty of alienee to inquire.*

To justify an alienation of family property by the father or manager of a joint Hindu family, there must be a need, or the transaction must be entered into for the benefit of the estate. Even if in fact there was no need or in fact there was no benefit to the estate, if the creditor who is bound to inquire into the necessity for

sufficient or reasonably credited necessity is not a condition precedent to the validity of the alienation by way of mortgage. Nor is the creditor bound to see to the application of the money. What is a legal necessity or what is for the benefit of the family cannot admit of one single and uniform answer. It must depend on the circumstances of each case. A transaction entered into for the sake of family is binding on those who are benefitted by it. (*Rangnekar and Wadia, JJ.*) GOVIND GURUNATH *v.* DEEKAPPA MALLAPPA. 40 Bom.L.R. 539.

——Alienation—Manager—Mortgage to finance new venture—If binding on family. *See* HINDU LAW—JOINT FAMILY—BUSINESS. 17 Pat 386.

——*Alienation — Validity—Right to challenge—Mortgage by Hindu father—Second mortgagee taking mortgage subject to first—Right to question validity of first mortgage.*

A stranger cannot question a transaction which is recognised by the principal person whose interests are affected by it. Where a Hindu father executes a mort-

that in fact there was no

gage. (*Rangnekar and Wa*

NATH *v.* DEEKAPPA. 40 Bom.L.R. 539.

——*Debts—Father—Immoral debts—Liability of joint family property.*

The joint family property cannot be taken in execution of a decree passed against the father for payment of a debt, which is found to be for immoral purpose. (*Bennet and Verma, JJ.*)

JIT SINGH.

——*Debts — Guardian*

authorized to carry on business of minor—Promissory note by—Liability of minor—Creditor's right of direct reco

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ditors of the business can proceed directly against such assets for liabilities properly incurred by the guardian. A Hindu died leaving a will by which he bequeathed all his property, consisting, *inter alia*, of a business which he was carrying in his own name, to his minor son, the 1st defendant. The second defendant was by the will appointed guardian and vahivatdar of the estate, and he was authorized by the will to manage the estate and carry on the business. The second defendant managed the estate and carried on the business and it was found that the estate was benefitted by the business so carried on. The second defendant executed a promissory-note for the purpose of the business. A suit was brought on the basis of that promissory-note against the minor and the guardian and a decree was claimed against the minor also.

Held, (1) that the guardian was not shown to have acted improperly and the creditor was subrogated to the position of the guardian who had an indemnity against the assets of the business; (2) that the guardian, as executor under the will, and having been authorized to run the business, was entitled as against the minor beneficiary to be indemnified out of the assets of the business which he was authorized by the will to employ in the business, though he was personally liable for the debts incurred by him; (3) that the minor was therefore liable on the note, but his liability was limited to the assets of the business and to that extent the creditor was entitled to a decree against the assets of the business (*Rangnekar, J.*) VISHWANATH GANSHET *v.* RAGHUNATH GANU. 40 Bom L.R. 458.

——*Debts—Immorality—Connexion between—Necessity to prove.*

A general charge of immorality to make the debt not binding on the family property is wholly insufficient, and the connexion between the immorality and the debt must be proved. A person, who had been squandering his estate and whose immoral character was well known and who although he was a lambardar, could not even be trusted to pay in the land revenue, borrowed certain amount for the purchase of some property, which purchase was never effected:

Held, that there was a connexion between the mortgage debt and the immoral purpose and it was known to creditors and so the mortgage was not binding. (*Bennet and Verma, JJ.*) BED RAM SINGH *v.* INDERJIT SINGH. A.I.R. 1938 All. 437.

——*Debts—Manager—Promissory note by manager for his own urgency for purchasing land—No recital that he was manager or that purchase was for family—Subsequent partition—Property purchased divided ... ibers—Liability of family for debt.*

defendant who was the elder brother of

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indicate that the land was originally purchased for the

did the 1st defendant describe himself as

manager of the family. It was also not

the land purchased was beneficial to the family. There was also no indication that in order to buy the land, it was necessary to borrow money and

Held, that the mere fact that the land purchased in the sole name of the 1st defendant was subsequently divided amongst all the defendants did not by itself show that the purchase was intended for the benefit of the family or that in point of fact it resulted in any benefit to the family as such, and that the 2nd and 3rd defendants were therefore not liable onthe note.

HINDU LAW.

(*Madhavan Nair and Stodart, JJ.*) PANGUDAYA PILLAI *v.* UTHANDIYA PILLAI. **(1938) 2 M.L.J. 33.**

——*Family arrangement—Validity—Conditions.*

The arrangement to be a valid family arrangement must be one concluded with the object of settling *bona fide* a dispute arising out of conflicting claims to property, which was either existing at the time, or was likely to arise in future. *Bona fide* is the essence of its validity, and from this it follows that there must be either a dispute or at least an apprehension of a dispute which is avoided by a policy of giving and taking; or else all transfers or surrenders will pass under the cloak of a family arrangement. Thus a deed which is essentially one to which the formal assent of the members of the family and the members of the governing body, was taken, for the purpose of curing a disability in the settlor to revoke what he had done by a previous deed does not constitute a family arrangement. A.I.R. 1932 Cal. 600, Foll. (*Khundkar, J.*) BHABATARINI DEBI *v.* ASHMANTARA DEBI. **A.I.R. 1938 Cal. 490.**

——*Gift—Validity—Gift in favour of deity not in existence.*

The principle of Hindu Law which invalidates a gift other than to a sentient being capable of accepting it, does not apply to a bequest to a trustee for the establishment of an image and worship of a Hindu deity after the testator's death, nor does it make such a bequest void. Further no distinction can be made between a bequest for religious purposes and a gift *inter vivos* for identical purposes. Nor is it necessary that the gift must be to trustees as distinct from Thakur not yet brought into being, as the interposition of trustee has nothing to do with the question. (*Khundkar, J.*) BHABATARINI DEBI *v.* ASHMANTARA DEBI. **A.I.R. 1938 Cal. 490.**

——*Guardianship—Step-mother and aunt—Competition between—Choice.*

Where both the aunt and step-mother of a minor boy of 11 years claimed to be appointed as his guardian; it was held that the step-mother's interests were adverse to those of the minor and that the minor could not be happy with her and that hence the aunt was the proper person to be appointed. (*Stone, C.J. and Bose, J.*) MT. BHULI *v.* RAJABAI. **1938 N.L.J. 195.**

——*Joint family—Business—New business started by father—Debts incurred in—Liability of sons.*

When the business of a joint Hindu family to finance which money has been borrowed in a new business and not an ancestral business, the sons are not liable for the payment of the loan contracted by the father for that business, unless the transaction was for the benefit of the family or to the benefit of the estate or it was supported by legal necessity. If, for instance, ancestral property has ceased to be remunerative, and there is no way of maintaining the family except by alienating that property and investing the proceeds in some business, the alienation can be upheld as one for valid necessity. (*Bhide and Beckett, JJ.*) PRABH DAYAL *v.* BASANT LAL. **40 P.L.R. 678.**

——*Joint family—Business—New business started by father—Son participating in it—Money borrowed for business—Charge on family property.*

If a son after attaining majority participates in the business newly started by his father, he must be taken to have accepted it as a family business, and the money borrowed for the business by the father would be a charge on the family property. (*Bhide and Beckett JJ.*) PRABH DAYAL *v.* BASANT LAL. **40 P.L.R. 678.**

HINDU LAW.

——*Joint family—Business—New venture started by manager—Mortgage of family property to finance venture—If binding on all members—Tests.*

The power of the manager of a joint Hindu family to enter into transactions for the support of the family and to start new ventures is to be judged (when in exercise of such power the family property is charged or alienated by the manager) by the consideration whether that transaction was one into which a prudent owner would enter. Augmenting the means of livelihood of the members, unless speculating or risky, must be taken to be beneficial to the family. Where the new venture is one for the benefit of the family and one which has the express approval of most of the adult members of the family, a mortgage of joint family property executed by the manager to finance the venture is binding on the members of the family whether they in fact profited by the venture or not, provided the venture was one which a prudent manager would undertake and provided funds were in fact required to finance it. (*Agarwala and Varma, JJ.*) CHHOTEY LAL CHAUDHURY *v.* DALIP NARAIN SINGH. **17 Pat. 386.**

——*Joint family—Capacity to become member of Co-operative Society.*

A Hindu joint family can be a member of a Co-operative Society. (*Horwill, J.*) VILLUPURAM URBAN CO-OPERATIVE BANK *v.* BALASUBRAMANIA MUDALI. **1938 M.W.N. 567.**

——*Limited owner—Position of—Daughter realising decree for arrears of profits—Restitution—Estate, if liable for.*

It is true that a widow or other limited heir is not a tenant-for-life but is owner of the property held by her subject to certain restrictions on alienation and subject to its devolving upon the next heir of the last male owner upon her death and the whole estate is for the time being vested in her and she represents it completely, but a widow or other limited heir is not a trustee for the reversioners and she has absolute power of disposal of the income of the property inherited by her. She is not bound to save any portion of the income and she can spend the whole of it upon herself or give it away during her life to whomsoever she likes. After the death of her father a daughter inherited his estate as a Hindu female. She instituted a suit against co-sharer for arrears of profits and obtained a decree. On appeal, the amount was increased. Pending second appeal to High Court she realized the amount decreed. The High Court in second appeal reduced the amount and the judgment-debtor applied under S. 144, C. P. Code, for refund of the excess amount realized by her.

Held, that her claim for profits was a personal claim in that she was asserting a personal claim of hers in respect to income over which she had absolute control. Hence, the property inherited by her from her father was not liable after her death for the refund of the amount claimed by the judgment-debtor.

Held, further, looking at the matter in another way, that the amount which the judgment-debtor sought to recover, inasmuch as the decree of the lower Appellate Court was set aside in appeal by the High Court, never became an income in the true sense of the word; the decretal amount fixed by the lower Appellate Court was realized by her subject to the result of the appeal pending in the High Court. She realized it in her personal capacity and she had to refund it in her personal capacity. (*Thom, C.J., Bajpai and Mahammad Ismail, JJ.*) KRISHAN LAL *v.* MUHAMMAD ISHAQ. **A.I.R. 1938 All. 426 (F.B.)**

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——*Minor—Promissory note by mother and ... in renewal of note executed by father—Lia... minor.*

It is within the competence of a guardian of a Hindu minor by executing a promissory note to make the minor liable to the extent of the joint family property in his hands. Where a Hindu widow, acting as the guardian of her minor son, executes a promissory note in renewal of a promissory note executed by the minor's father, the minor is bound by the same. But his liability is limited to the assets of the estate in his hands. (*Leach, C.*...

40 Bom.L.R. 458.

——*Religious Endowment—Dedication—Essentials—Construction of deed.*

In the case of a dedication to an idol which cannot itself physically hold lands, it is not necessary though it is usual to vest the lands in trustees. Nor is it necessary that there should be any express words of gift to the idol. No religious ceremony such as sankalpa or samarpan is necessary, and a clear unequivocal man... of intention to create a trust and vesting of th... the donor or other as a trustee is enough to... the dedication. Where the deed ran "... for the ...

make them debutter, and rights thereto vest in ... and from this day I become co...

Consensus of family members—If sufficient.

Though a dedication once made cannot in the absence of express reservation be revoked a consensus of the f... settlor t... into sec... rights o... ly veste... family c... from ge... account... can con... property... male an... the deity. (*Khundkar, J.*) BHABATARINI DEBI *v.* ASHMANTARA DEBI. A.I.R. 1938 Cal. 490.

——*Religious endowment—Direction to accumulate—Validity.*

A direction to accumulate is not ... benefit the settlor or members of ... pense of the idol or if its object is ... as to be opposed to public policy. ... for accumulation is hit by S. 17, T... would not render the dedication i... *J.*) BHABATARINI DEBI *v.* ASHMANTARA DEBI.

A.I.R. 1938 Cal. 490.

——*Religious endowment—Mahant—Installation of successor—Practice.*

In the normal case of the death of a Mahant, the members of the fraternity will be fully aware of the vacancy in the office, and the usual practice will be for the installation of his successor usually nominated by him, to take place on seventeenth day after the death. On the other hand, when the Mahant resigns during his

HINDU LAW.

...nity of confirming or refusing to confirm the nominee. As regards notice of the Mahant's intentions, this is not a matter of strict formalities, and the practice of sending a runner round with a verbal intimation meets the situation. Again, as regards confirmation by the Bhek, it does not involve anything in the nature of an ...

the forehead and the money presents made by them are a part of the ceremonies, and may well be held to establish confirmation of the person installed. (*Lord Thankerton.*) SATNAM SINGH *v.* BHAGWAN SINGH.

175 I.C. 772=1938 A.W.R. (P.C.) 148=
A.I.R. 1938 P.C. 216 (P.C.).

——*Religious endowment—Mahant—Property acquired by—Nature of.*

The fact that properties have descended from guru (religious preceptor) to chela (religious disciple) does not necessarily lead to the conclusion that a property, ...

he nor his natural relative can succeed to the property ... however no reason for ... cquire private property ... own exertions. If he ... cannot be inherited by ...

v. NIHAL CHAND. ... I.C. ...—
1938 A.W.R. (P.C.) 145=
A.I.R. 1938 P.C. 195 (P.C.).

——*Religious endowment—Shebait—Nomination as shebait valid—Provisions about devolution after his* ...

... to the devolution of the office after his death are invalid. (*Khundkar, J.*) BHABATARINI DEBI *v.* ASHMANTARA DEBI. A.I.R. 1938 Cal. 490.

——*Reversioner—Consent to alienation by widow—Heirs of reversioner, if bound.*

Where a reversioner consents to an alienation by a widow, his heirs are bound by such consent and if the alienation is binding on the one it is equally binding on the other. (*Weston, I.C.S.*) UMRAO MAL *v.* GOPI NATH. 1938 A.M.L.J. 63

HINDU LAW.

——*Succession—Bandhu—Heritability—Test.*

A bandhu or a bhinna gotra sapinda in order to have heritable rights must not be beyond the fifth degree from the common ancestor. (*Bennet and Verma, JJ.*) BRIJ MOHAN *v.* KISHUN LAL.

A.I.R. 1938 All. 443.

——*Widow—Alienation—Consent of reversioner—Proof.*

When a 'stringent equity' arising out of an alleged consent of reversioners is sought to be enforced against them, such consent must be established by positive evidence, and should not be inferred from ambiguous acts. (*Weston, I.C.S.*) UMRAO MAL *v.* GOPI NATH.

1938 A.M.L.J. 63.

——*Widow—Alienation—Right of third persons to challenge.*

In the case of a Hindu widow it is open to the reversioners to challenge the legality of an alienation made by her but this right is not one of which a third person can take advantage. *A* advanced a sum of money to three brothers forming a joint Hindu family and jointly owning two properties, the advance being secured by mortgage of one of the properties. One of the brothers subsequently died intestate and childless, leaving behind a widow. *A* instituted a suit on his mortgage. Before a preliminary decree was passed in the suit, the widow brought a suit for partition of the joint property and mortgaged her interest in the property, for the purpose of raising a loan, in favour of *B*. *A* obtained a final decree in his suit and purchased the property mortgaged to him in execution thereof. A preliminary decree was passed in the suit for partition under which the widow was declared entitled to a third share in the joint property. *B* then filed a suit on his mortgage and obtained a preliminary decree. Later on, *A* alleging that the price realized by sale of the property mortgaged to him was insufficient, applied for a personal decree against the mortgagors and a decree was passed to that effect, the widow's liability being limited to her husband's interest. *A* attached the widow's undivided share in the property not mortgaged to him and filed a suit for declaration that he was entitled to satisfy his personal decree out of the widow's undivided share in the remaining property in priority to *B*.

Held, that *A's* claim had no priority over the mortgage executed by the widow in favour of *B* in the sense that *A* was entitled to execute his decree against the property covered by that mortgage. (*Panckridge, J.*) SAROJENDRA K. DUTT *v.* BINAPANI DASSI.

A.I.R. 1938 Cal. 468.

INCOME-TAX ACT (XI OF 1922), Ss. 2 (i) and 4 (3) (viii)

—*Agricultural income—Income of dairy when amounts to.*

Where cattle are wholly stall-fed and not pastured upon the land at all, doubtless, it is trade and no agricultural operation is being carried on: where cattle are being exclusively or mainly pastured and are nonetheless fed with small amounts of oil cake or the like, it may well be that the income derived from the sale of their milk is agricultural income. But between the two extremes there must be a number of varying degrees, and the task for the Income-tax Officer is to apply his mind to the two distinctions and to decide in any particular case on which side of the fence the matter falls. The Income-tax Officer has to see whether the cattle derived sustenance to a material extent from the produce of the ground, and whether they did so or not is entirely a question of fact for him and one which cannot be reviewed by the High Court. (*Roberts, C. J. Dunkley and Spargo, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* KOKINE DAIRY, RANGOON.

A.I.R. 1938 Rang. 260 (F.B.).

INCOME-TAX ACT (1922), S. 23.

——**Ss. 3 and 9**—*Association of individuals—Persons inheriting under will as residuary legatees and jointly managing and getting profits—Assessment as association of individuals—Propriety.*

The assessees, two brothers, became entitled as residuary legatees under the will of their grandfather to certain house properties in Bombay in the year 1929. They got possession of the properties and managed it as joint owners and derived profit therefrom.

Held, that as soon as they elected to retain the properties and manage them as a joint venture producing income, they became an association of individuals within the meaning of S. 3 of the Income-tax Act, and they were properly liable to be assessed as the owners of the properties under S. 9. (*Beaumont, C. J. and Blackwell, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* DWARKANATH HARISCHANDRA.

40 Bom.L.R. 455.

——**S. 22 (4)**—*Fresh proceedings under—Findings of prior officers—Binding character.*

There is no foundation for the suggestion that because an earlier Income-tax Officer was disposed to fasten on one particular default and said that he might possibly accept the explanation given in regard to others, it means that when a recommencement of the whole proceedings has been directed the subsequent revenue officers are to bind themselves to the obvious facts when the case is taken up again. (*Roberts, C. J. and Dunkley, J.*) N. A. CONCERN *v.* COMMISSIONER OF INCOME-TAX, BURMA.

A.I.R. 1938 Rang. 287.

——**Ss. 22 (4) and 23 (4)**—*Calling of evidence for inquiry—Power of Income-tax Officer.*

It is the requirement of the Income-tax Officer which is to be satisfied by the assessee under sub-S. (4) of S. 22 and not what the assessee thinks the Income-tax Officer should, in the circumstances of the case, have required. In other words the final arbiter of what is required is the Income-tax Officer and not the assessee. It would therefore be entirely for the income-tax authorities to determine what evidence they consider relevant for the purposes of their enquiry and to contend that a certain pieces of evidence which they considered to be relevant was not relevant at all to the matter at issue would be in a way to encroach upon their domain. Similarly, if an Income-tax Officer calls for all the previous accounts relating to the various businesses conducted by the assessee, but the assessee withholds some of them and the Income-tax Officer utilizes the accounts produced by the assessee in making his estimate, it cannot be argued that those accounts which were not produced by the assessee were not required for the purpose of the assessment. The withholding of some of the account books which the assessee had been called upon to produce amounts therefore to a non-compliance with the terms of the notice issued under sub-S. (4) of S. 22 and entails all the penalties laid down in sub-S. (4) of S. 23. A.I.R. 1931 All. 417, Dist.; A. I. R. 1929 Mad. 60, Rel. on. (*Addison and Din Mahomed, JJ.*) TULSI DAS NAGIN CHAND *v.* COMMISSIONER OF INCOME-TAX, PUNJAB.

A.I.R. 1938 Lah. 551.

——**S. 23 (4)**—*Assessment under—Income-tax Officer calling upon assessee to produce all account books—Assessee withholding some.*

What happens in a subsequent year cannot be taken to be a criterion for what should have happened in the previous year, and if an order made by the Income-tax Officer is not open to objection on any legal ground, it cannot be set aside merely on the ground that in any subsequent year he himself, or his successor did what he

INCOME TAX ACT (1922), S. 25-A.

refused to do previously. Where therefore an Income-tax Officer calls upon the assessee to produce all the account books but the assessee withholds some, the Income-tax Officer is entitled to make assessment under S. 23 (4) even if he bases the assessme on the same material in the account bo the assessee in the previous year. *Mahomed, JJ.*) TULSIDAS NAGIN MISSIONER OF INCOME-TAX, PUNJAB.

A.I.R. 1938 Lah. 551.

——Ss. 25-A, 26 (2) and 26-A—*Applicability—Hindu undivided family assessed as such—Separation by partition—Separated members constituting themselves into firm—Application for registration and for assessment under S. 26 (2)—Competency—Proper procedure for assessment.*

The assessees who were a joint Hindu family consisting of a father and his seven sons and who were hitherto assessed as an separated during the year of account, after the father and his seven sons into a firm and applied to the Inco register the firm under S. 26-A of the and to make the assessment under S. 26 (2).

Held, (1) that there had been no succession within

joint family as such and to hold each member liat his proportionate share of the tax so assessed. *mont, C. J. and Blackwell, J.*) COMMISSION INCOME-TAX, BOMBAY *v.* JESINGBHAI.

40 Bom. L. R. 452.

——S 66 (3)—*Application under—Appearance of Advocate-General if necessary.*

In applications under S. 66 (3) to the High Court it

Income tax. That is the practice which should be

Where a bond stipulated that the amount of debt shall be paid by yearly instalments and in case of three success able, t the cr due. year b recove does it to stop DAS *v*

INSU

admitted age.

Where according to the rules of a Life Insurance Company it is obligatory upon the proposer to submit in

JAMMU & KASHMIR INFANT MARRIAGE PREVENTION REGULATION, S. 3.

the Proposal Form some proof of age and he does, in fact, submit such proof, on the faith of which the company places upon the policy an endorsement to the effect

KUMAR DAS. 42 C.W.N. 855.

—— Life insurance policy—Construction — Money made payable to "self or wife"—Meaning and effect of —Trust in favour of wife of assured—If created. *See* MARRIED WOMEN'S PROPERTY ACT, S. 6.

(1938) 2 M.L.J. 22 (F.B.).

INTEREST — *When suspended — Test—Conduct of lender.*

Interest may be suspended when failure to pay principal is due to such conduct on the part of the lender as

special Acts—Conflict between—Priority—Rule.

It is a clear principle of law that when there is a con with a special kind acted subsequently operty, it is by the must be governed operty. The pro-

v TULJARAMRAO. 40 Bom.L R. 461.

——*Jurisdiction of Court—Act giving power to executive authority to make special orders—Breach of order—Validity of order—Power and duty of Court to*

Rangnekar, Wadia and Wassoodew, JJ.) EMPEROR *v.* YARMAHOMED AHMADKHAN.

40 Bom.L R. 483 (F.B.).

——*Provisos—Interpretation and use of—If extend scope of main provisions.*

A proviso in a statute is properly used to indicate that a general provision to which it relates does not apply to instances which the proviso cuts out of that general provision. A proviso is also used at times to

16 Mys L J. 273.

JAMMU AND KASHMIR INFANT MARRIAGE PREVENTION REGULATION, S. 3—*Marrying*

girl under 14—*Plea of absence of knowledge—If open.*

Where a person marries a girl under 14 years of age it is no defence that he did not know the girl to be under 14 years or that from her appearance he thought that she was of greater age. (*Kichlu and Wazir, JJ.*) STATE *v.* AHED LONE. **40 P.L.R. J. & K. 49.**

LANDLORD AND TENANT—*Occupancy holding—Surrender by widow—Limitations as to.*

A widow cannot surrender any rights in an occupancy holding except to an existing co-tenant. (*Darling, S.M. and Marsh, J.M.*) BALDEO *v.* MURLIDHAR. **1938 A.W.R. (B.R.) 238.**

———*Rent—Decree for—Execution sale—Reversal—Restitution—Mesne profits awarded to tenant—If can include rent payable by tenant to landlord.*

Where mesne profits are awarded to a tenant against his landlord in proceedings for restitution consequent on the reversal of an execution sale, such profits should not include the rent payable by the tenant to the landlord for the period in question. The landlord is entitled to the rent for the period, which must therefore be deducted from the mesne profits awarded against the landlord. (*Dhavle, J.*) KUNJ KUER *v.* BRIJMOHAN PRASAD. **1938 P.W.N. 511.**

———*Transfer by tenant of holding piecemeal to different person—Suit by landlord—Burden of proof—Custom—Pleading and proof—Duty of defendant.*

Where the landlord in his suit questions the transfers made by his tenant, a defence by the tenant that there is a custom to transfer is not sufficient, when the holding has been transferred in different portions to different persons. In such a case, in order to defeat the claim of the plaintiff-landlord it is necessary for the tenant-defendant to prove a custom not merey of transferring the holding but also transferring the holding in different parts to different persons. The onus is entirely on the tenant. Once the plaintiff comes to prove a case which would entitle him to question the transfer from the original tenant, it is entirely for the defendant to set up custom and to prove it which would defeat the plaintiff's claim. The fact that the Court does not frame the necessary issue or that neither party addressed his mind to this question does not in anyway assist the defendant on whom lies the entire burden. (*Wort, A.C.J. and Manohar Lall, J.*) NARENDRA NATH PATRA *v.* BHAGABAT CHANDRA MALLIK. **1938 P.W.N. 506.**

———*Transferable tenancy — Onus—Lease created before Transfer of Property Act and not governed by Bihar Tenancy Act—If transferable—Erection of permanent buildings—Effect—Estoppel.*

A tenancy not governed by the Bihar Tenancy Act, and coming into existence before the Transfer of Property Act (not being governed by that Act also) cannot be held to be transferable without the consent of the landlord. There is no distinction in this respect between a lease for homestead and a lease for residential purposes. Under the general law one of the incidents of a tenancy, whether permanent or otherwise, in India prior to the T. P. Act or the Bengal Tenancy Act, is non-transferability; and if the tenant contends that it is transferable, the onus is upon him to show it. The mere fact that permanent buildings have been erected upon the land cannot in any way alter the incidence of the tenancy. At most it can be said that if there had been a representation by the landlord which led the tenant to behave that he had a permanent tenancy and therefore erected buildings, there may be an estoppel against the landlord. (*Wort and Varma, JJ.*) BANSI SINGH *v.* CHAKRADHAR PRASAD. **17 Pat. 358.**

LAND TENURE—Chowkidari jagir—Nature of—Resumability by Zamindar—Non-performance of private services to Zamindar—If justifies resumption. *See* GRANT—CHOWKIDARI JAJIR. **17 Pat. 315.**

———Tabedari *tenure—Nature and incidents—Right of members of holder's family—Non-performance of services by holder—Effect.*

Tabedari tenures are a form of inferior ghatwali tenures. The holder of the tenure does not hold it on behalf of the family and the other members of the family have no right in the land while it is in his hands. The mere fact that the holder has ceased to perform the duties of the tenure makes no difference and the nature of the tenure is not altered by the fact that the services are no longer performed. (*Wort, J.*) NARAN SINGH *v.* BAIKUNTH SINGH. **A.I.R. 1938 Pat. 375.**

LEASE—*Assignment by lessee—Decree for rent against assignee remaining unsatisfied—Subsequent suit for rent against original lessee—If barred—Joint debtors—Decree against one—When bar to suit against others—C. P. Code, S.* 11.

Where there is a joint liability, judgment against one joint debtor operates as a bar to a subsequent claim against the other joint debtors, the principle being that there is only one debt and only one cause of action, and the debt being merged in the judgment, there is no remaining cause of action against the other joint debtors. On the other hand, where the liability of more than one debtor is either joint and several, or several only, a judgment against one is no bar to a subsequent claim against the others, because in such a case the cause of action against each debtor is distinct, and the fact that the cause of action against one debtor is merged in the judgment has no effect upon the cause of action against the other debtors. Where a lease containing a covenant by the lessee to pay the rent reserved during the term and not containing any covenant against assignment of the lease is assigned by the lessee, the lessor has a separate cause of action for rent against the original lessee and against the assignee. The original lessee is liable on his covenant, that is by privity of contract, and the assignee is liable by privity of estate, that is by virtue of the relationship which exists between him and the landlord, although as between the assignee and the original lessee, the assignee is primarily liable. But the lessee is not a mere guarantor for the assignee. A judgment for rent obtained by the lessor against the assignee, which remains unsatisfied, cannot operate as a bar to a subsequent claim against the original lessee on the covenant. (*Beaumont, C. J. and Wadia, J.*) MUNICIPAL CORPORATION OF THE CITY OF BOMBAY *v.* VASANTLAL FULCHAND. **40 Bom.L.R. 497.**

———*Construction—Terms if amount to cultivating partnership.*

Where the terms of the tenancy are that the tenant is to pay half the produce and a fixed sum which varied apparently from year to year but which is entered in jamabandis as certain amount, the terms of cultivation amount to a lease and not to cultivating partnership. (*Grille, J.*) GOVINDRAO BALWANTRAO *v.* RUMA ATMARAM. **A.I.R. 1938 Nag. 314.**

———Transferability—Tenancy not governed by T. P. Act or Bihar Tenancy Act—Incidents of—Transferability—Onus of proof—Erection of permanent buildings by tenant—Effect—Estoppel. *See* LANDLORD AND TENANT—TRANSFERABLE TENANCY. **17 Pat. 358.**

LEGAL PRACTITIONER—*Authority — Compromise.*

In the absence of a power-of-attorney a pleader is not competent to effect a compromise so as to bind hi

LEGAL PRACTITIONERS ACT (1879), S. 12.

client.. (*Din Mahomed, J.*) JARNAIL SINGH *v.* NARAIN KAUR. **40 P.L.R. 664.**

LEGAL PRACTITIONERS ACT (XVIII OF 1879), S. 12—*Conviction under S. 409, I. P. Code—If a ground for removal from rolls.*

character.

Held, that though the above circumstances made the case distressing, the Courts have a duty to the public and to the profession itself, and that that duty could

———**S. 13**—*Bribing to procure false affidavits—Tampering with witnesses—Removal from rolls.*

Where a pleader bribes certain witnesses who are likely to be summoned by the opposite side in connexion with an election petition, into swearing affidavits to the effect that they do not know anything about the matter

A.I.R. 1938 Rang. 294.

LETTERS PATENT (Calcutta), Cl. 12—*Suit for land—Suit for royalty—Question of title between defendants.*

A suit for arrears of royalty on a certain colliery is not a suit for land although there is a question of title as between the defendants. (*Ameer Ali, J.*) KANTI CHANDRA MUKHERJEA *v.* JOHN BOISOGOMOFF. **42 C.W.N. 937.**

LIMITATION ACT (IX OF 1908), S. 6—*Applicability—Suit by ex-minor and assignee from former within three years of attainment of majority by latter—Benefit of S. 6—If available.*

The benefit of S. 6 of the Limitation Act can be claimed by an assignee of the person who is entitled to that benefit in a suit where both the assignor a join in the suit as plaintiffs, so long as the

ting of two minor brothers—Alienation by mother as guardian of only item of property owned by them——Suit by elder brother to set aside more than three years of his majority on behalf of himself and minor brother

of the house. The suit was brought more than three years after the 1st appellant attained majority. It was found that there was no other prop them and that they were being mai aunt. There was no finding that the the manager of a joint family.

LIMITATION ACT (1908), S. 14.

Held, that though the ordinary presumption in the case of a Hindu joint family possessed of ancestral property was that the eldest brother was the manager, that

appellant, it was not barred as regards the minor 2nd appellant, who could continue the suit. (*Rangnekar and Wadia, JJ.*) BHIKARCHAND *v.* LACHHMANDAS. **40 Bom. L.R. 521.**

———**S. 10**—*Applicability—Test—Trust not declared by specific words.*

To save limitation under S. 10 of the Limitation Act, it must be shown that the defendants are persons "in whom property has become vested in trust for any specific purpose." Trusts which have not been declared by any specific words but which the law would imply from the existence of particular facts or fiduciary relations are excluded from the operation of the section. One useful test for determining whether any particular trust is within the provisions of the section or not is to see if a suit ...se of following the trust property in the trustee would be to restore it to the trust. KALI PADA DE *v.* HARI DASI DASI. **I L R. (1938) 1 Cal. 652.**

—*Applicability—Trustees* de son tort.

Trustees *de son tort* would come within the operation of S. 10 of the Limitation Act, but the existence of a trust must be first established before the section may be applied against them. (*Biswas, J.*) KALIPADA DE *v.* HARI DASI DASI. **I.L.R. (1938) 1 Cal. 652.**

———**S 12**—*"Time requisite"—Copying stopped owing to want of correct information—Holidays intervening—*

on 11—2—1934, but as 11—2—1934 and 12—2—1934 were holidays, the information was supplied on 13—2—1934.

...ould not be supplied on ...eing holidays, the appli... ...he 11th and 12th Feb... requisite for obtaining ..., *J.*) B. K. RAI *v.* THUMAN SINGH **I.L.R. 1938 Nag. 342.**

... d 2—*Failure of suit owing to negli...—Prosecution, if in good faith—Righ... to deduction of time.*

to apply ...egligence ...f and his applied

JMBHIRMULL. **A.I.R. 1938 Cal. 377.**

———**S. 14**—*Indulgence under—When can be granted.*

Indulgence should be granted under S. 14 of the Limitation Act only in cases where an error was an error ... prudent ... I. C. 702 ... SINGH.

——Ss. 20 and 21 (3) (b)—*Applicability—Loan by Hindu manager—Subsequent partition in family—Part payment and endorsement by manager—If binds other separated members — "Manager for the time being."*

A person who as manager of a joint Hindu family executes a promissory note for a debt binding on the family cannot, after partition from the other coparceners, keep it alive as against the other members by making endorsements of part-payments on the note under S. 20 of the Limitation Act. Payments made after the partition are not payments made by the "manager for the time being" within the meaning of S. 21 (3) (*b*) of the Limitation Act. (*Madhavan Nair and Stodart, JJ.*) PANGUDAYA PILLAI *v.* UTHANDIYA PILLAI. **(1938) 2 M.L.J. 33.**

——**S. 20**—*Payments when save limitation.*

The provisions of S. 20 of the Limitation Act, when they speak of a payment of interest or principal, refer to the intention of the debtor in making the payment; payment of interest means that the debtor intended to pay towards interest; payment of principal means that the debtor intended to pay towards the principal. When the debtor makes a payment he must intend to pay either towards interest or towards principal; he must have one or other of these two intentions. Consequently, if the argument be that the sum was not paid towards interest as such, then it must have been paid towards principal, and therefore the endorsement brings the payment within the scope of the section. (*Roberts, C. J. and Dunkley, J.*) KHAN SAHIB *v.* UCHIL AHMED LEBBAY. **A.I.R. 1938 Rang. 280.**

——**S. 20 (1)**—*"Debt"—"Persons liable to pay the debt"—Hindu joint family—Debt due by—Part payment by one member after partition in family—If keeps alive debt against others.*

The joint liabilities of the members of a Hindu joint family for a family debt is not a debt within the meaning of S. 20 of the Limitation Act, so that one member by making a part-payment can keep the debt alive against all the others. The members of a joint family are not, for the purposes of S. 20, "persons liable to pay the debt" when the debt in question cannot be levied from them personally, but is merely recoverable by sale of the family property. Much less or they "persons liable to pay the debt" when by reason of a partition the joint family has disappeared and the debt is recoverable merely by sale of the property got at the partition on foot of a decree made against those divided members, the operation of which decree is contingent on their still retaining possession of the said property or some of it. (*Madhavan Nair and Stodart, JJ.*) PANGUDAYA PILLAI *v.* UTHANDIYA PILLAI. **(1938) 2 M.L.J. 33.**

——**S. 21**—Mahomedan minor—*De facto* guardian—Power to acknowledge debt. *See* MAHOMEDAN LAW—MINOR. **1938 M.W.N. 671.**

——**Art. 75**—*Applicability—Instalment bond with default clause—Starting point—Waiver—Nature of.*

Where an instalment contains a default clause, limitation runs under Art. 75 of Limitation Act from the date of default unless there has been waiver. Waiver must be something more than mere negligence. (*Weston, I. C. S.*) MENDO *v.* AMRA. **1938 A.M.L.J. 50.**

——**Art. 85**—*Mutual account—What constitutes—Criterion of shifting balance—Account initially mutual, if can cease to be so.*

To constitute a mutual account, there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side being merely complete or partial

discharges of such obligations. The test of mutuality is that the dealings between the parties should be such, that the balance is sometimes in favour of one party and sometimes in favour of the other. If the balance is always in favour of one party in the very nature of the transactions, then the case is one in which there are not separate mutual dealings. On the other hand, the mere fact that the defendants have been debtors throughout does not show that the accounts were not mutual. Whether an account is mutual or not depends upon the natute of the dealings between the parties. It is sufficient for an account to be mutual, if the dealings are such that the balance might have been in favour of either party and it is not essential that the balance should in fact have been in favour of the defendants at some stage. Art. 85 applies where the nature of the business between the parties is such as to give rise to reciprocal demands, that is to say, where the dealings are such that sometimes the balance is in favour of one party and sometimes in favour of the other. Although the criterion of shifting balance is not conclusive to show that the account did not start as or did not continue as a mutual one yet when an account has started as mutual one, and thereafter one side is always indebted to the other and the course of dealings between the parties consists merely of partial repayments of that indebtedness and incidental and passing small transactions creating independent obligations on one side, but insignificant in amount and never such as would by their nature be likely to result in that party being able in a position to make a demand on the other, the account ceases to retain its character of mutuality. Where therefore the accounts between the parties for a sufficient length of time merely show repayments on account by defendants to the plaintiffs to reduce their indebtedness, it cannot be said that the account continues to be a mutual one at all. (*Mosely and Dunkley, JJ.*) BHIMBAI MORARJI & CO. *v.* HARGOVIND MOHANLAL. **A.I.R. 1938 Rang. 270.**

——**Art. 90**—*Starting point— Ignorance of legal consequences—If can extend time.*

The starting point of limitation is the knowledge that something has been omitted or done. This knowledge must be the knowledge of all the facts; if the plaintiff is lulled into a sense of security by being led to believe that something was done which was not in fact done, or that something was not done which was in fact done, clearly time cannot run against him. But once he knows the true facts, it is for him to judge of their legal consequences, and he cannot afterwards say that he did not know what those legal consequences might be. Where a suit is brought against an advocate for neglect or misconduct in and about his duties as professional adviser in failing to join certain party in appeal, the fact that the plaintiff was aware of the neglect at the institution of the appeal but knew it to be actionable as such only when the appeal was lost, does not extend time. (*Roberts, C.J., Ba U and Dunkley, JJ.*) S.A.A. ANNAMALAI CHETTYAR *v.* N. M COWASJEE. **A.I.R. 1938 Rang. 258 (F.B.).**

——**Art. 90 and S. 24**—*Suit against advocate for negligence—Provision of law applicable.*

Limitation applicable to a suit brought against an advocate for neglect or misconduct in his professional duties is that prescribed by Art. 90 and not by S. 24, as such suit arises on negligence arising out of contract between principal and agent and not out of tort. (*Roberts, C.J., Ba U and Dunkley, JJ.*) S.A.A. ANNAMALAI CHETTYAR *v.* N. M. COWASJEE. **A.I.R. 1938 Rang. 258 (F.B.).**

LIMITATION ACT (1908), Art. 91.

——Art. 91—*Plea of bar under—Onus—Suit to set aside deed brought about by undue influence.*

Where a suit is brought by a lady to set aside a deed executed by her by misrepresentation and undue influence of a person who stood in a fiduciary relation to her and ... -den ... out ... of time and that she had ... facts constituting the fraud or misrepresentation at a date beyond the statutory period. (*Roberts, C.J. and Dunkley, J.*) RAHIMA BIBI *v.* MUSTAFA A.I.R. 1938 Rang. 264.

——Art. 120—*Suit to have order of withdrawal of suit vacated—L...*

In a suit to h... vacated and to p... cause of action ... of the suit from ... Art. 120 of the ... *terson, JJ.*) B... *v.* AJIT KUMA...

——Art. 13... *clause—Effect—Acceptance of overdue ...—"Waiver."*

A default clause ... that in default of ... the whole money ...

... the default clause ... run. (*Leach, C J. and Madhavan Nair, J.*) AHAMMU *v.* KUNNU MAHOMED HAJI. 1938 M.W.N. 671.

——Art. 136—*Starting point.*

Under Art. 136 of the Limitation Act, the starting point of limitation is the time when the vendor is first entitled to possession. (*S. K. Ghose and Nasim Ali, JJ.*) PULIN BEHARY MANDAL *v.* ... HALDAR.

——Art. 138—*Inapplicability — ... not in possession at date of sale.*

Art. 138 of the Limitation Act does not apply to a case where the judgment debt... not in possession at the date of the sale. (*S. K. G...*

...

This right to sue does not terminate with his death but passes on to his heirs. (*Weston, I.C.S.*) UMRAO MAL *v.* GOPI NATH. 1938 A.M L.J. 63.

——Art. 164—*Knowledge of decree—Burden of proof.*

Where an application to set aside an ... is made more than 30 days after the dat... the onus is on the defendant to show tha... the same within 30 days of his knowledge of the decree. The onus cannot be shifted by the bare denial of knowledge made by the defendant. (*Patterson, J.*) BENGAL COAL CO., LTD. *v.* BAUL CHANDRA MUKHERJI. A.I.R. 1938 Cal. 535.

——Arts. 181 and 182—*Applicability—Decree for*

MADRAS H. R. E. ACT (1927), S. 9.

possession on payment of money in future—Execution—Limitation for execution.

Art. 182 of the Limitation Act has no application to the ... movable pro... of money on ... plicable to an application for execution of such a decree; and time begins to run from the date of the decree or at any rate on the date fixed for payment of the amount. (*Beaumont, C.J. and Wassoodew, J.*) GOPAL SATTU *v.* DNYANU MARUTI. 40 Bom.L.R. 512.

——Arts 181 and 183—*Applicability—Mortgage suit in High Court—Application for final decree for sale—Limitation.*

... sale in a mort...

... tion. *See* ... 40 Bom.L.R. 507.

MADRAS ABKARI ACT (I OF 1886), S. 64—*Scope—Accused found in possession of fermented wash—Presumption of guilt.*

... fermented ... offence ... on of the ... APPU ... C. 896= ... L.L J. 43.

MADRAS CITY CIVIL COURT ACT (VII OF 1892), Ss. 3 and 5 (1)—*Scope and effect—Suit pending in Court of Small Causes—Transfer to City Civil Court—Jurisdiction of latter Court to try—C. P. Code, S.* 24 (*a*).

S. 3 of the Madras City Civil Court Act merely sets ... the City Civil Court is ... the City ... competent to try and dispose of a Small Cause suit that is transferred to it. S. 3 does not prevent the City Civil Court from trying a suit which is transferred to it from the Court of ... Act gives the judge of the ... and dispose of any suit

——S. 5 (1)—"By that Court"—Meaning—Small Cause suit—Transfer to City Civil Court—Jurisdiction of latter Court to try. *See* MADRAS CITY CIVIL COURT ACT, Ss. 3 AND 5 (1). 1938 M.W.N. 565.

... out leave of Insolvency Court—Subsequent application to Insolvency Court for stay—Maintainability. *See* PROVIN...

MADRAS ... ACT (II OF 1927), Ss. 9 (7) and ...

MAHOMEDAN LAW.

Mutt holding properties granted to it for purposes of worship, lighting, etc.—Public worship and religious instruction carried on—Nature of institution—Liability to make contribution to Board.

Certain lands were granted to the head of a mutt for the purpose of defraying the cost of lighting of lamps and performance of pujas at the shrines within the mutt and other lands were held by it for the maintenance of worship in it. Public worship took place within its precincts, and there was also religious instruction provided for members of the Vira Saiva sect. The properties of the mutt were for some time treated as if they were the private properties of the family of the head of the mutt.

Held, that the mutt was a public religious endowment and was a mutt of the character contemplated by Madras Act II of 1927, and the Board had the right to call upon those in charge of the mutt to make the contribution under S. 69 of the Act;

Held further, that a mutt would not fall within the purview of the Act unless it can be regarded as being a public religious endowment, and in a proper case the entries in the register could be relied on to ascertain the nature of the grant. (*Leach, C.J. and Madhavan Nair, J.*) VEERAYYA *v.* BOARD OF COMMISSIONERS FOR H. R. E., MADRAS. **(1938) 2 M.L.J. 85.**

MAHOMEDAN LAW—*Minor*—De facto *guardian—Power to acknowledge debt.*

Under the Mahomedan law a *de facto* guardian has no right to acknowledge a debt of his ward and to bind him by the acknowledgment. (*Leach, C.J. and Madhavan Nair, J.*) AHAMMU *v.* KUNHU MAHOMED HAJI. **1938 M.W.N. 671.**

———Sajjadanashin—*Meaning—Duties of—Succession to—Rules governing.*

The *sajjadanashin* is the spiritual preceptor of a religious institution. He has the privilege of imparting to his disciples spiritual knowledge. He has charge of the spiritual affairs of a religious institution, while the mutawalli has charge of its temporal affairs. In some cases both the offices may be combined in one and the same person. The succession to the office depends on rules if any made by the founder and in their absence by usage. (*Sir Shadi Lal, J.*) MAULE SHAH *v.* GHANE SHAH. **175 I.C. 454= A.I.R. 1938 P.C. 202 (P.C.).**

———Takia—*What is.*

A *Takia* is a place where a *fakir* or *dervish* resides before his pious life and teachings attract public notice and before disciples gather round him and a place is constructed for their lodgment. It is recognized by law as religious institution and a grant or endowment to it is a valid *wakf*. (*Sir Shadi Lal, J.*) MAULE SHAH *v.* GHANE SHAH. **175 I.C. 454= A.I.R. 1938 P.C. 202 (P.C.).**

———*Wakf—Creation of—Necessity—Facts to be proved to show declaration.*

Whether a dedication was made or not is a question of fact, to be proved in the same way as any other fact, and it is for the Court to decide in each case whether the evidence adduced suffices to prove the fact. One thing is absolutely certain, and that is that in order to create a wakf, there must be a dedication of specific property to the charitable purpose. Where the deceased on several occasions during his lifetime expressed an intention of building a mosque some day and then on his death-bed expressed the pious hope that, if he did not recover so as to be able to carry this intention into effect himself, his son would do so, but never declared that any particular piece of land should be reserved for the site of the proposed mosque and building, or that

MORTGAGE.

the expenses of their execution should be met from any particular fund:

Held, that there was no declaration of wakf by the deceased. (*Roberts, C.J. and Dunkley, J.*) RAHIMA BIBI *v.* S. MUSTAFA. **A.I.R. 1938 Rang. 264.**

MARRIED WOMEN'S PROPERTY ACT (III OF 1876), S. 6—*"Policy"—Meaning of—Proposal and declaration of assured—If part of the policy—Reference to for ascertaining to whom money is to be paid—Permissibility.*

The word "policy" in S. 6 of the Married Women's Property Act means a document or documents evidencing the contract between the parties and constituting the policy. If the document known as the "policy" stands alone, and does not incorporate in it any other document, only the "policy" can be looked at, but if it expressly incorporates another document, *e.g.*, where the policy contains a provision making the proposal and declaration of the assured part of the policy, then such proposal or other document must be deemed and treated as part of the policy of insurance. The Court must therefore in such a case look to the proposal or declaration also to discover to whom the insurance money is payable in a case when the "policy" proper does not itself contain any words indicating to whom the money shall be paid. (*Leach, C.J., Madhavan Nair and Varadachariar, JJ.*) KRISHNAN CHETTIAR *v.* VELAYEE AMMAL. **1938 M.W.N. 561=48 L.W. 25= A.I.R. 1938 Mad. 604=(1938) 2 M.L.J. 22 (F.B.).**

———S. 6—*Trust—Insurance policy—Money payable to "self or wife"—Meaning and effect of—If creates trust in favour of wife of assured.*

Where the money under a policy of insurance is made payable to "self or wife," the words "self or wife" can be construed to mean that the policy is to be for the benefit of the assured or in the event of his death before the policy matures, it is to be for the benefit of his wife. That is the only reasonable interpretation to be placed upon the words "self or wife"; there is therefore a trust created in favour of the wife of the assured in the event of the assured dying before the policy matures. And there can be a contingent trust under S. 6 of the Married Women's Property Act. (*Leach, C.J., Madhavan Nair and Varadachariar, JJ.*) KRISHNAN CHETTIAR *v.* VELAYEE AMMAL. **1938 M.W.N. 561= 48 L.W. 25=A.I.R. 1938 Mad. 604= (1938) 2 M.L.J. 22 (F.B.).**

MESNE PROFITS—Assessment—Execution sale of tenant's holding by landlord—Subsequent reversal—Restitution—Award of mesne profits to tenant—Rent due to landlord by tenant—If to be deducted. *See* LANDLORD AND TENANT—RENT. **1938 P.W.N. 511.**

MINOR—*Representation—Minor impleaded as defendant with other relation—Minor held not validly represented.*

Where a minor was impleaded as a defendant along with his father as well as some other relations whose interest was joint with the minor, it cannot be said that he was properly represented before the Court and that his interests were sufficiently safeguarded by the other members of his family. (*Addison and Din Mahomed, JJ.*) PIR TAJ-UD-DIN *v.* KHAMBATTA. **A.I.R. 1938 Lah. 515.**

MORTGAGE—*Construction—Mortgage comprising features of usufructuary and simple mortgage—Covenant to pay—Right of sale.*

In a mortgage where there are certain provisions which indicate a usufructuary mortgage and certain provisions which indicate a simple mortgage, and contains

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merely a covenant to pay without any hypothecation, or provision that on failure to pay the mortgaged property could be sold, there is no right of sale on the mere failure to pay the mortgage money. (*Bennet, Mohammad Ismail and Verma, JJ.*) KANHAIYA PRASAD *v.* MT. HAMIDAN. A.I.R. 1938 All. 418 (F.B.).

——*Later mortgage in substitution of earlier one—Invalidity of—Right of mortgagee to sue on earlier mortgage.*

Where a mortgagor executes a new and later mortgage deed for consideration comprising the principal and interest due on earlier mortgage deed and the later mortgage deed is found to be invalid through no fault of the mortgagee the mortgagee is entitled to sue on the earlier mortgage deed. (*Bennet, Mohammad Ismail and Verma, JJ.*) KANHAIYA PRASAD *v.* MT. HAMIDAN. A.I.R. 1938 All. 418 (F.B.).

——*Mortgage suit—Costs—Personal decree for—If can be passed.*

In a mortgage suit, a personal [illegible] be passed. (*Henderson, J.*). S [illegible] AHAD BAX. [illegible]

——Priority—Agreement to [illegible] Mortgage thereafter in favour o[illegible] decree for specific performance o[illegible] back to date of agreement. *See* [illegible] 100.

——*Release by mortgagee in favour of mortgagor—Subsequent sub-mortgage to another—Arrangement between mortgagor and mortgagee that deed of release to* [illegible] *sub-mortgagee.*

S, a usufructuary mortgagee, executed a deed on May 1922 by which she purported to release to one *M*, one of the mortgagors, his share in the mortgaged property. While *M* was procuring registration of the deed, *S* [illegible] 14th July, 1922, to *B* a sub-mortgage of [illegible]

[illegible] ween *M* and *S* was arrived at on 9th [illegible] which it was agreed that the deed of [illegible] treated as a valid and operative document but *M* should not be entitled to take possession of his share until end of 1339 F. From April 1928, until delivery [of] possession *S* was to pay *M* annually some amount. [illegible] undertook to redeem sub-mortgage to *B* by end of 1339 F. and if necessary, to give further security to *B* for balance in order that *S* might be able to place *M* in pos[session] [illegible]

wh[illegible] tra[illegible] under the deed of release were t[illegible] modified form from April 1928 and [illegible] postponed to the right enjoyed by *B* [illegible] bond of 14th July, 1922. Therefor[e] [illegible] under the mortgage was definitely [illegible] not resist the claim of *B* to remain in [illegible] mortgaged property. It might be [illegible] was not bound by the assignment o[f] [illegible] assignment might work to his dis[advantage] [illegible] could not claim to oust *B* from enjoyment of his property unless he could demonstrate that the debt to *B*, which was incurred on 14th July, 1922, had been satisfied, whether *S* might recover his property by assigning other securities to *B* or whether *S* or *M* might be able to satisfy *B* by paying the proportionate amount of the mortgage debt. (*James and Chatterji, JJ.*) BANK OF BIHAR, LTD., CHAPRA *v.* MAHOMED ISMAIL. 175 I.C. 78 = 10 R.P. 575 = 4 B.R. 513 = A.I.R. 1938 Pat. 380.

——*Suit on—Defence that debt is paid off—Transaction between cultivator and rice mill owner—Accounts produced by the defendants only—Decision of lower Court—Value—Interference.*

Where in respect of a mortgage transaction between a Burman cultivator and a Chinese rice mill owner, a suit is brought and the defendants plead that the debt is paid off by deliveries of paddy and produce account books in support thereof and plaintiffs without produc[illegible]

HLA *v.* MA NGWE SINT. 175 I.C. 457 = A.I.R. 1938 P.C. 223 (P.C.).

[illegible] RELIEF ACT [illegible] [illegible]nt mortgage decree [illegible] *See* MYSORE C. P. C. REGULATION, O. 34, R. 5. 16 Mys L J. 282.

MYSORE CIVIL PROCEDURE CODE REGULATION (III OF 1911), O. 21, R. 43—*Movables of judgment-debtor attached and entrusted to surety bond—Failure of surety to produce same in Court—Execution against surety—Arrest and imprisonment—Subsequent execution against judgment debtor—Value of movables attached before—If to be deducted.*

[illegible] [bel]onging to the judg[ment-debtor] [illegible] attached and seized [illegible] and then entrusted [illegible] [a] undertaking to produce the movables before Court whenever called to produce them, and [illegible] arrested and sent to [illegible] [pro]ceeded to execute his decree against the judgment debtor, but the latter contended that the value of the movables attached and taken away from his possession should be deducted from [illegible] under the decree and that [illegible] [entit]led to execute against him [illegible] [w]as found that there was no [illegible] [judg]ment-debtor and the surety [illegible]

[illegible] entire decretal debt, he [illegible] [p]roperties attached and [illegible] in the decree to the [illegible] goods attached, the [illegible] proceed against the [illegible] to account to him for [illegible]. (*Shankaranarayana*[illegible]) LAKSHMIAH *v.* [illegible] 16 Mys.L J. 284 = 43 Mys. H.C.R. 339.

LIMITATION ACT (1908), Art. 44.

revision petition, the plaintiff is not entitled under S. 14 (1) of the Limitation Act to the exclusion of the period during which he was prosecuting the revision case in the High Court, even assuming that the expression "Court of Appeal" used in that section is wide enough to include a Court of revision, as the High was not unable to entertain the revision petitior defect of jurisdiction or any cause of a like (*Mukherjea, J.*) MEGHMALA DEBI v. ... PARHYA. 42 C W.N. 1051 = A.I.R. 1938 Cal ...

morgage ...

——Art. 64—*Account stated*- ... *balance*.

A mere statement of the balance which is due on a particular date cannot be called an account stated within

...

of same party.

Where independent obligations are created between the parties and the accounts are never closed even though annual balances are struck, the fact that the balance has been in favour of same party during the last few years does not take the transaction out of the category of Art. 85. (*Bennet and Ismail, JJ.*) GOPI NATH v. CHAMELI. A I.R. 1938 All. 504.

——Arts. 91 and 142—*Applicability of—Void and voidable instruments—Claim with reference to separable legal part.*

...

property handed over in pursuance of it cannot be claimed until the instrument is avoided either by the act of parties or through the Court. In the latter no legal

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parts can be separated from the illegal, then the relief

...

Bose and Digby, JJ.) ASARAM v. LUDHESHWAR. A.I.R. 1938 Nag. 335 (F. B.).

——Art. 144—*Applicability—Proceedings under Agra Tenancy Act.*

Art. 144 of the Limitation Act does not apply to the proceedings under the Agra Tenancy Act, as it comes in the 1st schedule of the Act prescribed by S. 3 of the Act which has not been applied to the Tenancy Act

MAD. REV. RECOVERY ACT (1864), S. 40.

because it has its own schedule dealing with limitation (*Darling, S. M. and Bomford, J. M.*) NIMAR AHIR v. RANG NATH TIWARI. 1938 R. D. 602.

——Art. 182 (5)—*Step-in-aid—Notice under O. 21, R. 22, C. P. Code—Effect of.*

...

BHAI & CO. 40 Bom.L.R. 678.

... OF 1908), S. ... *permanently— ... d subsequently Rs. 19-12 0 per annum for ever—Suit for rent—Lawful*

...

payable for the first seven faslis and subsequently the rent should be payable for ever at the rate of Rs. 19-12-0 per annum. *P* sued *D* claiming Rs. 959 7-0 as rent for ...odying ... that ...ntend- ...d was ... Act. ...dence. ..., T. P. ...Act. ... 26 (3), Madras Estates Land Act, and the real question to be decided was what was the lawful rent payable by *D* at the time when the grant was made. (*King, J.*) ZAMINDAR OF BIRIDI ESTATE v. KUNJO KUMARI DEVI. A.I R. 1938 Mad. 769.

MADRAS IRRIGATION CESS ACT (VII OF 1866) S 1, Proviso—*Inamdar getting water from Government channel—Rights of—Extent of—Anicut diverting water and supply channel remaining unaltered—Dry land brought under wet cultivation—Liability to cess.*

The extent of an inamdar's right to water for irrigation from a Government stream or channel under the Proviso to S. 1 of the Irrigation Cess Act is governed by the physical dimensions of the supply channel and not by ...ight pass along the ...t a greater supply of ...f, nevertheless under ...viously be variable ...season each year. ...from the stream

...

use it in any way he pleases He is not limited to the

...

...ars. (*Burn and Stodart, JJ.*) SECRETARY OF ...TATE v. PONNAMMAL. 48 L.W. 180 = 1938 M W N. 733 = (1938) 2 M L J. 244.

MADRAS REVENUE RECOVERY ACT (II OF 1864), Ss. 40 and 42—*Scope—"Encumbrance"—Sale of property of Malabar Jenmi—Effect on Kanom demise—Property in possession of tenants under Kanomdar claiming value of improvements—Purchaser's right to actual possession.*

Where the property of a jenmi in Malabar subject to a Kanom demise is sold for arrears of revenue due by

MAHOMEDAN LAW.

the jenmi, the purchaser gets title to the property free of the Kanom encumbrance. But the tenants under the Kanomdar who are in possession of the property and who are entitled to be paid the value of improvements effected by them are not holders of any encumbrance within the meaning of S. 42 of the Revenue Recovery Act. The purchaser cannot therefore claim actual possession of the property from the tenants under S. 40 of the Act, but is entitled only to symbolical possession. (*Madhavan Nair and Abdur Rahman, JJ.*) AYYA PATTAR *v.* KRISHNAN. 48 L.W. 249=(1938) M.W.N. 837=(1938) 2 M.L.J. 337.

MAHOMEDAN LAW — *Applicability of alien law.*

Mahomedans can only be governed by an alien law by reason of custom, and the question in each case is whether the custom has been established. (*Bose, J.*) HAJI ISA HAJI NOOR *v.* SARU BAI. **A.I.R. 1938 Nag. 324.**

———*Wakf—Contents of deed—Particular form of words—If necessary.*

The deed of wakf should contain a statement conveying the idea that executant relinquished his possession as owner and took possession as mutwalli. However no particular form of words is necessary to convey this idea. Where a statement in the deed was: 'As long as I am alive I shall remain the mutwalli of the property made a wakf of and shall abide by all the conditions laid down in this deed of wakf'. It was held that this statement amounted to a statement that the possession of the executant ceased as a private owner and his possession began as a mutwalli. (*Bennet and Verma, JJ.*) ALIMUNNISA BIBI *v.* MOHAMMAD ABDUR RAHMAN. **1938 A.L.J. 727=A.I.R. 1938 All. 485.**

———*Wakf—Creation valid—Mutation not made properly—If affects validity of wakf.*

If the deed of wakf was validly created, then the mere fact that subsequently members of the family of executant were negligent in getting mutation made in the correct manner when the system of khewats was first introduced with the first Revenue Act, (U.P. Act 19 of 1873) (Agra) at a much later date, is a matter which has no bearing on the question of the validity of the wakf. (*Bennet and Verma, JJ.*) ALIMUNNISA BIBI *v.* MOHAMMAD ABDUR RAHMAN. **1938 A.L.J. 727=A.I.R. 1938 All. 485.**

———*Wakf—Genuineness of intention—Language—If a test.*

No distinction in form can be made between a deed of wakf which the executant does not intend should be brought into force and one which he intends to be genuine. (*Bennet and Verma, JJ.*) ALIMUNNISA BIBI *v.* MOHAMMAD ABDUR RAHMAN. **1938 A.L.J. 727=A.I.R. 1938 All. 485.**

———*Wakf—Mutwalli—Powers—Permanent lease.*

Under the Mahomedan law a mutwalli is not entitled to make a permanent lease of property which is wakf. (*Bennet and Verma, JJ.*) ALIMUNNISA BIBI *v.* MOHAMMAD ABDUR RAHMAN. **1938 A.L.J. 727=A.I.R. 1938 All. 485.**

MARRIED WOMEN'S PROPERTY ACT (III OF 1874), S. 6—*Applicability—Mere statement in proposal that the object of policy was for 'family provision'.*

Where there is no mention in the policy itself that it was for the benefit of the wife and children but there is a statement in the proposal form that the object of the policy was for "family provision," such statement is not sufficient to bring the policy within the ambit of S. 6. Most married men taking out insurance policies on their lives payable only at death do so with the intention of

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making provision for their family, but it does not follow that they intend to divest themselves of all interest in the policy and to create an irrevocable trust in favour of the wife or children. (*Pollock, J.*) MT. RAHIBHAI *v.* RATANLAL HIRALAL. **176 I. C. 79=A.I.R. 1938 Nag. 321.**

MORTGAGE—Mortgage suit—Claim by mortgagor defendant to abatement of mortgage money—Set off or counter-claim in respect of — Permissibility —Proper remedy. *See* C. P. CODE, O. 8, R. 6. **19 P.L.T. 585=1938 P.W.N. 603.**

———*Prior and subsequent—Each mortgagee purchasing property in execution of his decree—Subsequent mortgagee not impleaded in prior mortgagee's suit—Suit by latter for possession against subsequent mortgagee — Maintainability — Subsequent mortgagee, if liable to redeem prior mortgage after limitation.*

A prior mortgagee who brings a suit on his mortgage without impleading the subsequent mortgagee and purchases the property in execution of his decree, cannot maintain a suit for possession against the subsequent mortgagee who has obtained possession of the property by purchasing it in execution of his mortgage decree. In such a suit, the subsequent mortgagee cannot be compelled to redeem the prior mortgage, if the right to enforce that mortgage has become barred by limitation. (*S. K. Ghose and Patterson, JJ.*) GURUPRASAD SUKUL *v.* TARINI CHARAN DEBNATH. **42 C.W.N. 1065.**

———*Subrogation—Equitable doctrine of—Scope of rule.*

The equitable doctrine of subrogation existed in India prior to 1st April 1930. Where a person lends money to a mortgagor for the purpose of paying off a prior mortgage and the mortgagor with the money so borrowed discharges the mortgage, the lender is subrogated to the rights of the mortgagee whose mortgage is so redeemed. He is subrogated to the rights of the mortgagee not by means of assignment at all. He acquires, notionally, a position analogous in every way to that of prior mortgagee without an assignment having been effected. There is no privity of contract between him and the mortgagee and his rights arise by virtue of an equitable doctrine extending as a matter of law to India before the Act. (*Roberts, C.J. Dunkley and Spargo, JJ.*) BANK OF CHETTINAD LTD. *v.* MAUNG AYE. **A.I.R. 1938 Rang. 306 (F.B.).**

———*Subrogation—Right of vendee paying off mortgage debt—Payment—If should be in addition to purchase money.*

Under the law of subrogation as it stood prior to the enactment of S. 92 of the Transfer Property Act in 1929, a purchaser of the mortgaged property who pays off a mortgage debt out of the purchase money is entitled to claim subrogation. There is no warrant for the view that payment should be in addition to the purchase money and not out of it. (*Venkatasubba Rao and Abdur Rahman, JJ.*) SRINIVASALU NAIDU *v.* DAMODARASWAMI NAIDU. **1938 M.W.N. 708=A.I.R. 1938 Mad. 779.**

———*Substituted security—Mortgage of some items of family property by one co-parcener of Hindu family—Partition suit by other co-parcener—Decree allotting mortgaged properties to plaintiff—Right given to plaintiff to payment of amount out of share allotted to mortgagor—Decree for substituted security for mortgagee—Execution—Rights of mortgagee and of non-mortgagor co-parcener.*

One of two brothers of a Hindu family executed a mortgage of two items of property to the appellant. In a partition suit by the son of the other brother who had

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deceased, to which the appellant was
final decree allotted to the plaintiff the n

of the properties allotted to the branch of the mortgagor. rtgage The ist the The certain amounts out of the sale proceeds under the direction contained in the final decree in the partition suit.

Held, (1) that the appellant's right to execute his decree was subject to the right declared in favour of the plaintiff in the partition suit to receive a cash sum out of the proceeds of the properties sold; (2) that the plaintiff in the partition suit was entitled to a charge on the properties sold for the amount awarded by way of owelty and h against the appellant; (3) a substituted whole of the regardless of of that share, but only a right to proceed against the net share of his mortgagor after making allowance for deductions to be met under the partition decree; that is, that the substituted security to which the mortgagee was entitled should not be more than the share of the mortgagor. (*Wadsworth, J.*) RAT VELU CHETTIAR *v.* SUBRAMANIAM CHETTY. 48 L.W. 215=A.I.R. 1938 Mad.

——*Usufructuary mortgage—Advance to mort and provision for repayment in instalments fo of years—Mortgagee put in possession and annual profits towards debt—Form of mortgage.*

Where the essence of transaction is one of loan and security, there being an advance to the mortgagor-debtor and provision for repayment to the creditor by annual instalments for a term of years, and the put in possession of the property and retain the net annual profits against the the mortgagor, the interest mortgaged is mortgagee obtains by going himself from that usufruct fructuary mortgage. The immaterial. (*Wort and V*) GHOSH *v* BAIJNATH PANDEY. A.I.R. 1938 Pat. 388.

——*Validity—Absence of consideration.*

A mortgage transaction is a nullity if no consideration has passed. (*Din Mahomed, J.*) LALA *v.* JOGE RAM. 40 P.L.R. 784.

MUSSALMAN WAKF ACT (XLII OF 1923) (as amended by Bombay Act XVIII of 1935) Ss. 10 and 10 B—*Jurisdiction to try offences fined to District Court.*

After the Bombay Amending Act of Bombay Presidency, and presumably Sind is concerned, it is not now the scheme of the Act that offences under the Act should be punished only by the District Court as the only Court contemplated by the Act for the Amending Act has n the offence under S. generally to offences whole. The scheme the Act are ordinary criminal proceedings to be tried by

PARTNERSHIP.

ing purpose—Sub-tenant under—Status of.

For the purpose of determining whether a sub tenant is an under-raiyat as defined by S. 4 (3) of the Orissa Tenancy Act or not, what the Court has to see is whether in accordance with S. 5 (2), the right to hold the land was acquired by the alleged raiyat for the purpose of cultivation or not. If the tenancy at its inception was not one for any agricultural purposes but for residential and house building, it is not a raiyati tenancy and the sub-tenant is not an under-raiyat. (*Rowland, J.*) SURYAMAL SARAF *v.* SRIRAM NAIDU. 1938 P.W.N. 532.

OUDH COURTS ACT (IV OF 1925) S. 12 (2)—*Last day for application under, a holiday—Filing on the next day—If in time.*

application under s on a holiday, it (*Zia-ul-Hasan* LAL. 1938 O.W.N. 706.

OUDH RENT ACT (XXII OF 1886), Ss. 5 and 6—*Unregistered perpetual lease conferring heritable rights—Value and effect of.*

ing. (*Darling, S.M. and Bomford, J.M.*) SHEO PRATAP SINGH *v.* DILRAJI. 1938 R.D. 599.

——Ss. 108 (8) and 127—*Notice of ejectment— ntiff—Absence of nt—Liability to*

in favour of the been given effect to in the along accepted by the defend- predecessors who had trans- hts, it is not open in a suit to contest the notice of ejectment to plead that there was no transfer of occupany rights in favour of the plaintiff's predecessors. The proper remedy is to set aside the transfer in the Civil Court. In the absence of that the defendant cannot resist ejectment as a trespasser. (*Darling, S.M. and Marsh, J. M.*) RAMPHER *v.* BUDHAI MURAO. 1938 A.W.R. (B R.) 263.

partition cannot include properties in which each of the parties does not claim an interest. (*Beckett J.*) RISAL SINGH *v.* CHANDGI. 40 P.L.R. 767.

consistent course of conduct, and indeed, by the express erned. (*Bose, J.*) HAJI A.I.R. 1938 Nag. 324.

ry—Partner's right in

PARTNERSHIP ACT (1932), S. 4.

Where a partnership firm is styled 'X, factory' it is improbable that the ownership rights of the partners of that firm would be confined to the business and machinery and would not include the building in which the business is conducted and the machinery is contained. (*Collister and Bajpai, JJ.*) SUNDAR SINGH *v.* COMMISSIONER OF INCOME-TAX. 1938 A.L.J. 610= A.I.R. 1938 All. 452.

PARTNERSHIP ACT (IX OF 1932), Ss. 4, 5 and 6 —*Association of men for business—Inference—Things necessary to constitute partnership.*

When more than one businessman associate together for the purpose of carrying on a business, it is legitimate to infer that they are not doing it for philanthropic purposes but intend to make a profit out of it; also that they all intend to share in the benefit of the proceeds. The person who actually conducts the business acts on behalf of all his associates, that is to say, on behalf of all who are joint proprietors with him. He does not act for his own separate and exclusive benefit. His intention is obviously to further the business as a whole for the benefit of all who own the concern. That is all that is necessary to constitute a partnership within the meaning of Ss. 4, 5 and 6 of the Partnership Act. (*Bose, J.*) HAJI ISA HAJI NOOR *v.* SARU BAI. A.I.R. 1938 Nag. 324.

——**S. 46**—*Examination of accounts—Rights of plaintiff.*

If it is necessary to examine the account books of the firm from an earlier date in order to discover what credits are still due to the partnership, the examination of these accounts would not be barred out by the plaintiff's acceptance of the existing accounts as correct. (*Beckett, J.*) RAM SUKH MAL *v.* HAR SAHAI MAL. 40 P.L.R. 753.

——**S. 46**—*Suit for accounts—Right of retiring partner—Accounts already inspected by him.*

A suit to enforce the right provided in S. 46 of the Partnership Act is generally called a suit for an account, which means an account taken by a Court. The right is not affected by the fact that the retiring partner may have already inspected the accounts of the firm. (*Beckett, J.*) RAM SUKH MAL *v.* HAR SAHAI MAL. 40 P.L.R. 753.

PATENTS AND DESIGNS ACT (II OF 1911), S. 53—*Infringement of—What constitutes.*

S. 53 of the Patents and Designs Act creates three separate acts which are unlawful. The first is to apply the design in the way decribed; the second is to do anything with a view to enable the design to be applied in the way described in the statement of the first of the offences and the third is to expose or cause to be exposed for sale the article under the conditions specified under head (*b*). The acts referred to in the Patents and Designs Act must, in order to constitute offences under the Act, be committed in British India. (*Beaumont, C. J. and Wadia, J.*) CALICO PRINTERS ASSOCIATION *v*, MITSUBISHI SHOJI KAISHA, LTD. 40 Bom.L.R. 661.

PENAL CODE (XLV OF 1860), S. 71—Different offences out of same act—Separate convictions and sentences—If justified. *See* WIRELESS TELEGRAPHY ACT, SS. 3 AND 6. 1938 M.W.N. 823= (1938) 2 M.L.J. 281.

——**S. 99**—*Private defence—Right—Conditions and limits to exercise of—Charge of rioting and unlawful assembly—Plea of private defence—Sustainability.*

In considering whether the right of private defence exists and can be pleaded in defence to a charge of rioting and unlawful assembly the nature of the apprehended danger must be looked at and it has also to be seen whether there was time to have recourse to the police authorities, it has always to be borne in mind that whether both the parties are determined to fight and to go to the disputed land fully armed in full expectation of an armed conflict in order to have a trial of strength, the right of private defence disappears. Where the object of the accused is not to prevent an aggression but to try out their strength by means of a pitched battle, there can be no room for the plea of right of private defence. There can be no right of private defence where the right is premeditated on both sides unless the object of the assembly is shown to have been to repeal forcible and criminal aggression. If a man prefers to use force in order to protect his property when he can, for the protection of such property, easily have recourse to the public authorities, his use of force is made punishable by the Penal Code no matter what the intention of that person may be. (*Manohar Lall and Chatterji, JJ.*) SATNARAIN DAS *v.* EMPEROR. 1938 P.W.N. 593=19 Pat.L.T. 504.

——**S. 124-A**—*Offence under — Exhortation to hearers to join Communist or Bolshevik party.*

The speech which amounts to an exhortation to the hearers to join the Communist or Bolshevik party is not in itself seditious within the meaning of S. 124 A. (*Blacker, J.*) PINDI DAS *v.* EMPEROR. A.I.R. 1938 Lah. 629.

——**S. 124-A**—*Seditious slogans.*

Shouting objectionable slogans in a meeting such as "destroy the dishonest Government" and "long live bloody revolution" is sedition within the meaning of S. 124-A. (*Blacker, J.*) PINDI DAS *v.* EMPEROR. A.I.R. 1938 Lah. 629.

——**Ss. 147 and 158**—*Charge under—Dispute as to possession of land—Question of title—If can be gone into.*

In cases of rioting and unlawful assembly arising out of disputes as to possession of land, it is open to the Court to go into the question of title incidentally in order to decide whether it could believe the evidence of possession and to see which of he parties was really acting in exercise of his right or whether a party was making out a pretence to engage in a pitched battle. (*Manohar Lall and Chatterji, JJ.*) SATNARAIN DAS *v.* EMPEROR. 1938 P.W.N. 593=19 Pat.L.T. 504.

——**S. 182**—*Naraji petition against report of officer —Enquiry into—Duty of Magistrate before prosecuting petitioner.*

Where a naraji petition is submitted to a Magistrate against the report of an Officer, the Magistate should judicially enquire into the allegations made by the petitioner before taking any action against him under S.182, I. P. Code. (*Bartley and Khundkar, JJ.*) N. MUKERJEE, CIRCLE OFFICER, VISHNUPUR *v.* RAMKINKAR PALIT. 67 C.L.J. 583.

——**S. 300**—*Murder — Injuries inflicted very serious and several in number.*

Where the injuries inflicted by the accused on the deceased were of a very serious nature and several in number, one wound cutting the neck and severing the fourth cervical vertebra, another wound cutting the skull and exposing part of the surface of the brain, etc.

Held, that the accused had intented to kill the deceased and that they were guilty of murder. (*Roberts, C. J. and Spargo, J.*) TUN KHINE *v.* EMPEROR. A.I.R. 1938 Rang. 331.

——**Ss. 300 Excep. 1 and 302**—*Conditions necessary for application of Exception—Interval of time between provocation and the killing—Effect.*

For the Excep. 1 to S. 300, I. P. Code, to apply, the accused must be deprived of the power of self control

PENAL CODE (1860), S. 302.

by provocation which is not only grave but also sudden. Where the accused after seeing the deceased committing adultery with his wife, waited for the deceased to return and then permitted him to go to sleep and thereafter spring on the deceased and killed him, the circumstances were *held* to be such that the provocation was both grave and sudden within the meaning of Excep. 1 to S. 300 I. P. Code, and that the accused was not guilty of an offence under S. 302, I. P. Code, but could only be convicted under S. 304. (*Bennet and Varma, JJ.*) BALKU *v.* EMPEROR.

1938 A.L.J. 689.

——S. 302—*Concerted attack—Doubt as to who*

attackers inflicted the fatal
for withholding the death
all of them. But a person
benefit of a lenient sentence at his trial, may sometimes be allowed to benefit by his good fortune, provided the sentence passed is
and Spargo, J.) T

——S. 302—*Evidence—Benefit of doubt.*

Where the prosecution evidence is of a partisan character and there is a doubt regarding the very presence of some of the prosecution witnesses at the spot and further though they say that cutting
ing weapons were carried by the accused,
is found on the complainants, there is suf
of doubt in the case and the accused
benefit of that doubt. (*Tek Chand an*
AHMAN *v.* EMPEROR.

——S. 304, Part 2—*Accused strik*
iron rod—Sentence.

The deceased and the accused were
day the accused's father began to dig
close to the wall of the deceased's house. The deceased begged him to dig it a little distance away so as to avert any danger of his
an altercation anc
grappled with each
accused came up wi
course was being
struck a blow on th
down dead.

Held, that the accused must be credited with the knowledge that the heavy iron rod was likely to cause

unnecessarily severe. There was no antecedent enmity between the parties. The quarrel arose very suddenly. The choice of weapon was fortuitous and was not one which indicated any real intention to kill or to cause serious injury. The accused saw his father grappling with another man and to that extent there was some provocation to him to commit the act he did. These were extenuating circumstances.
v. EMPEROR, A.I

——S. 323—Offence under—
peace. *See* CR. P. CODE, S. 514—
THE PEACE.

——S. 403—*Offence under—Proof.*

Not only has the prosecution in a case of criminal misappropriation to prove that the accused received the money and has not accounted for it but also to prove that he converted it to his own use. Proof of receipt and failure to account is naturally a long way towards proof of misappropriation, but it is not the whole way (*Skemp, J.*) GHULAM HAIDER *v.* EMPEROR.

A.I.R. 1938 Lah. 634.

——S. 403—*Offence under—Proof of receipt and retention—Presumption—Plea of return or refund—Onus.*

When once it is proved that a Patwari knowingly received certain sum of money in excess of the land revenue and retained it, without properly accounting for it, then the presumption arises that the money continued to remain with him and as such when a plea of return or refund is raised, the onus is on the accused to prove return or give any other reasonable explanation. *ur and Niyogi, JJ.)* PROVINCIAL GOVERNMENT, . AND BERAR *v.* SHANKAR GOPAL.

1938 N.L.J. 259.

——S. 448—*Offence under—Accused entering house assertion of claim—In-*

... the accused persons entered a house about which there was a dispute, in the absence of the complainant ... it in the assertion of
have known that their
complainant, who was admittedly in possession and legally they must be presumed to have the intention to 'annoy' at any rate and that, therefore, they were guilty of the offence under S 448, I. P. Code. (*Bhide, J.*) GHULAM AHMAD *v.*

PRACTICE.

hile one cannot allow
n taken in substance
and properly tried,
not be warranted in
laim on that ground
gby. JJ.) ASARAM
38 Nag. 335 (F.B.).

——*Duty of Court—Illegality not pleaded—Taking*

Bose, J. A Court can,
egality which emerges in
pleaded. But a court
should not go out of its
ferences from facts capable of another construction to tend to the conclusion that there has been illegality of so grave a nature neither pleaded nor raised by the issues. It should be still more
(*Stone, C. J., Bose*
AESHWAR.
38 Nag. 335 (F.B.).

——*Issues—Fraud—To be specific.*

Pleadings and issues on the averment of fraud, undue influence, coercion, etc. should be very specific based on definite allegations, because fraud, coercion, etc. are all separate categories in law. (*Stone, C. J. and Bose, J.*) TULSIRAM KHIRCHAND *v.* CHUNNILAL PANCHAMSAO.

A.I.R. 1938 Nag. 391.

inform the Court what time should be necessary for enabling them to be ready with their evidence. The practice of first fixing a peremptory date without hearing the parties and then informing them through their pleaders would not generally further the ends of

PRACTICE.

justice. (*S. K. Ghose and Nasim Ali, JJ.*) KAZIMADDI SARDAR *v.* MAKRAMALI MOLLA.

67 C.L.J. 516.

——*Appellate Court—Interference—Credibility of witnesses—Opinion of trial Court.*

Where the Court below has had the advantage of noticing the demeanour of witnesses and has given reasons for rejecting their testimony, the appellate Court will not ordinarily disagree with the Judge of the lower Court in his estimate of the evidence of the witnesses. (*Bennet and Ismail, JJ.*) GOPI NATH *v.* CHAMELI. A.I.R. 1938 All. 504.

——*Commissions—Local investigation—Second Commission—Issue of—Grounds—Duty of Court.*

Where local investigation of a piece of land is essential and the report and map prepared by a commissioner are found by a Court unsatisfactory, the Court should issue a fresh commission. (*Agarwala and Chatterji, JJ.*) DEB NARAIN KUNDU *v.* AMRITA LAL.

A.I.R. 1938 Pat. 421.

——*Parties—Transposition—Setting aside safeguarding of rights.*

Where a respondent has been transposed as an appellant before the time for appeal has expired, it is inequitable to treat him, when the transposition is set aside and after he has allowed the time to appeal to pass, as a person against whom the decree has become final by reason of his not having appealed. (*Stone, C. J. and Puranik, J.*) MULJI SICKKA & CO. *v.* NURMOHAMMAD. A.I.R. 1938 Nag. 377.

——*Pleadings—Amendment—Suit for declaration of title to immoveable properties—Plaintiff also claiming as sub-mortgagee—Amendment to insert prayer for sale on mortgage in case sale found not to confer title—If one setting up new case—Prayer for sale—If inconsistent with prayer for declaration of title.*

Plaintiff who claimed certain properties under a sale and also as a sub-mortgagee filed a suit claiming a declaration that he was the full owner of the plaint properties. He also asserted his rights as sub-mortgagee and the rights of his mortgagor as against the defendant and he prayed the Court to give directions in respect of the working out of the relative rights of the respective parties in case the Court should hold that the defendants who claimed a charge had any right to redeem. Plaintiff afterwards applied for an amendment of this plaint by inserting an alternative prayer to the effect that if the Court held that the sale to the plaintiff did not pass any title, the plaintiff was entitled to a mortgage decree for sale. This was allowed. It was afterwards contended that the suit as framed was not maintainable.

Held, that the suit as originally filed included an alternative claim based on the plaintiff's mortgage right, that even without the amendment it was open to the Court to treat it in the alternative as a suit for sale and that if it was not prayed for in the plaint the Court could grant the relief which was not inconsistent with the facts of the case when the defendants were not at any disadvantage in the course of the trial by reason of the defect in the pleadings, and that suit was maintainable.

Held further, that by the amendment the plaintiff was not setting up any new case or asking for a relief not originally asked for in the plaint. (*Madhavan Nair and Stodart, JJ.*) RAMANATHAN CHETTIAR *v.* SHRI DOWLAT SINGJEE THAKORE SAHIB.

1938 M.W.N. 785.

PRECEDENTS—*Decision of division Bench of High Court—Duty of other division Benches—Division Bench not agreeing with former division Bench—Proper procedure—Differing decision without reference t Bench—Duty of other division Benches.*

Where a division Bench of the High Court do agree with the decision of another division Bench same Court, it is its duty as a matter of constitu refer the matter to a larger Bench. If, instead o so, it disagrees with the view of the other Bench division Benches of the High Court, would be cc tionally bound to follow the prior decision of th division Bench. (*Fazl Ali and Manohar Lall* MAHABIR DAS *v.* UDIT NARAIN VARMA.

19 P.L.

——*Privy Council's rulings—Duty to follow.*

It is not open to the Courts in India to quest principle enunciated by the Board, which must th be followed irrespective of the inconvenient and e assing results which may attend the application principle. (*Stone, C.J. and Niyogi, J.*) MST. PADI *v.* VIKRAM. 1938 N.L.

——*Statements unnecessary for proper deci Value of.*

Statements which are not necessary to the d which go beyond the occasion and lay down a rul is unnecessary for the purpose in hand have no b authority on another Court, though they may have merely persuasive efficacy. Hence the view of a on a certain section of the Income-tax Act which w necessary for the decision is not binding on the in tax authorities. (*Derbyshire, C. J., Khundka Mukherjea, JJ.*) MAHALIRAM RAMJEEDAS, *matter of.* A.I.R. 1938 Cal. 557 (

PRE-EMPTION—*Circumvention of—Sale collu treated as mortgage—Proof of real nature of tr tion—Evidence Act, S. 92, if a bar.*

The right of a plaintiff to pre-empt a transaction cannot be defeated by mere collusion between the and vendee and by giving to a transaction of s guise of a mortgage or that of a gift. It is th nature of the transfer and not its form that ultimately go to decide, as to whether a right to emption arises. Further it is always open to a pl in a pre-emption suit to prove by evidence th nature of the transaction in question. S. 92 evidence cannot apply, as the plaintiff in such a not a party to the document concerned. (*Iqbal A J.*) JAGDEO SINGH *v.* MAHABIR SINGH.

1938 A.L.J. 668=A.I.R. 1938 Al

PRINCIPAL AND AGENT—*Suit by princi accounts—Maintainability—Accounts in possess principal—Duty to make out* prima facie *liabi agent.*

An agent merely by handing over to his prin set of account books is not absolved from the li to explain them; but where the principal wh possession of all the account books sues the ag accounts, he is expected to disclose such particul will establish a *prima facie* liability of the a account. It is not open to any principal, who h all the accounts of his agent in his possession to e the machinery of the Court for examining his ac on the off-chance of making his agent liable f sum which on such examination may be found du him. (*Fazl Ali and Chatterji, JJ.*) SHIVA P *v.* HANUMAN BUX. A.I.R. 1938 Pat

PROMISSORY NOTE—*Original cause of ac Falling back upon—Permissibility—Promissor found to be not genuine.*

A promissory note on which a suit was file pardanashin lady was found to have been manufa and not a genuine one. But it was found that

PROV. INSOLV. ACT (1920), S. 4.

was actually due on previous transactions and that no transaction of loan had taken place at the time of the execution of the note.

Held, that the plaintiff was entitled to fall back upon the original loan. (*Bennet and Ismail, JJ.*) GOPI NATH *v.* CHAMELI. A.I.R. 1938 All. 504.

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 4—Applicability—Application to set aside sale held by receiver under orders of Court. *See* PROVINCIAL INSOLVENCY ACT, SS. 68 AND 4 A.I.R. 1938 Nag. 320.

——S. 35—*Jurisdiction to annul adjudication*—

jurisdiction, S. 35 of the Provincial Insolvency Act empowers the Insolvency Court to annul the adjudication on the ground of want of jurisdiction. The Judge sitting insolvency is competent to revise his own order or an order of his predecessor adjudicating a person an insolvent on the ground of want of jurisdiction. Where the act of insolvency, a fraudulent transfer, relied on as the basis of the petition by the creditor on which the adjudication order is made, was committed more than three months prior to the date of the petition, the adjudication order is without jurisdiction, because there is no act of insolvency on which an adjudication order can be made. Such an adjudication can be annulled under S. 35. (*Leach, C.J. and Madhavan Nair, J.*) KUMARAPPA CHETTIAR *v.* CHIDAMBARAM CHETTIAR. 48 L.W. 239.

——Ss. 68 and 4—*Applicability—Sale by receiver under orders of Court—Setting aside—Time.*

perty of which the insolvent is the trustee should be sold, and merely invites bids under the instructions of the Court, and refers the bids received to the Court which accepts the highest bid, the sale, if a sale be held to have taken place, is not the act of the receiver and S.

A.I.R. 1938 Nag. 320.

PROVINCIAL SMALL CAUSE COURTS ACT

time

de of

Where an applicant to set aside an *ex parte* decree, not only failed to furnish the security within the time prescribed but furnished a security different from that ordered to be furnished, a Court if it sets aside the *ex parte* decree under such circumstances, its order is both illegal and *without* jurisdiction and can be set aside in revision. (*Ismail, J.*) MARGHA BHAI *v.* BIRENDER NATH CHATTERJI. 1938 A.L.J. 742= 1938 A.W.R. (H.C.) 434.

——S. 25—Powers under—Order setting aside *ex parte* decree—Interference. *See* PROVINCIAL SMALL

Cause Courts Act applies to a suit for the price of fruit removed by the defendants from certain trees in the

PUNJAB REDEMPTION OF MORTGAGES ACT (1913), S. 12.

assertion of a contested claim or right. Such a suit is cognisable by a Court of small causes. (*Beckett, J.*) BACHITTAR SINGH *v.* RAHIM BAKHSH.

——Sch.

band for re

Jurisdiction of Small Cause Court.

Art. 28 of the Second Schedule to the Provincial Small Cause Courts Act contemplates a suit between rival claimants to the property of an intestate. There must be a claim made by an heir as such, which claim

a similar claim; A suit by a husof his deceased the plaintiff has succeeded to his wife's property, is not excluded by Art. 28 from the cognizance of the Small Cause Court. (*Venkatasubba Rao and Abdur Rahman, JJ.*) VEDAKANNU NADAR *v.* GNANAYYA NADAR. 1938 M.W.N. 833.

——Sch. II, Arts. 35 (ii) and 4—Applicability—Suit for price of fruit removed in assertion of right. *See* PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II, ARTS. 4 AND 35 (*ii*). 40 P.L.R. 720.

PUBLIC GAMBLING ACT (III OF 1867), S. 4—*Essentials for conviction.*

The only crime under the Public Gambling Act is being found in the place where gambling is going on and it is no offence to gamble in a public place as long as a person is not found doing it. The persons not

A.I.R. 1938 Lah. 631.

OF LAND ACT (XIII

avour of non-agriculturist— by Deputy Commissioner— Alienee's right to refund of money—Contract Act, S. 65.

If a member of an agricultural tribe effects a permanent alienation of his land in favour of one who is not a member of an agricultural tribe, the alienation is not void If sanction of the Deputy Commissioner has S. 14 of fructuary It also ity Com- cannot be avoided by the alienee when such sanction is refused, as under the law it automatically becomes a usufructuary mortgage for such term, not exceeding 20 years, as the Deputy Commissioner fixes. It is obvious, therefore, that S. 65 of the Contract Act does not apply and the alienee is not entitled to sue for refund of the money. (*Addison, Ag. C.J. and Din Mahomed, J.*) JALAL DIN *v.* HUKAM CHAND. 40 P.L.R. 772.

PUNJAB PRE-EMPTION ACT (I OF 1913), S. 22 (5) (b)—*Extension of time—Power of Court.*

A.I.R. 1938 Lah. 606.

PUNJAB REDEMPTION OF MORTGAGES ACT (II OF 1913), S. 12—*Disposal of petition without touching merits—If without jurisdiction.*

The law contemplates the disposal of petitions under the Redemption of Mortgages Act on grounds other than those which touch the merits of the petition and it empowers the Collector to dispose of those petitions on those grounds. For a Collector therefore to dismiss an application on grounds other than merits is not to

refuse jurisdiction inasmuch as this is a manner of exercising jurisdiction permitted by the Act. A.I.R. 1929 Lah. 513, Diss. (*Addison, Ag. C. J. and Din Mahomed, J.*) PRABHU MAL *v.* CHANDAN.

A.I.R. 1938 Lah. 638.

——**S. 12**—*Order of dismissal—Suit not brought within one year—Effect of.*

Under S. 12, a party against whom an order of dismissal is made under any of the sections of the Act enumerated there, is bound to institute a suit to establish his rights in respect of the mortgage within one year under Art. 14, Limitation Act, and if he fails to do so, his righ is lost for ever. 40 P.L.R 245 = A.I.R. 1938 Lah. 512, reversed. (*Addison, Ag.C.J. and Din Mahomed, J.*) PRABHU MAL *v.* CHANDAN. **A.I.R. 1938 Lah. 638.**

——**S. 12**—*Person aggrieved—Who is.*

Any person against whom any order is made under Ss. 6 to 11 is a person aggrieved within the meaning of S. 12. (*Addison, Ag.C.J. and Din Mahomed, J.*) PRABHU MAL *v.* CHANDAN. **A.I.R. 1938 Lah. 638.**

RECEIVER—*Liability of—Liability after discharge.*

Where before a receiver was discharged, objections were taken by the parties to the propriety of the entries in the accounts filed by the receiver and they were referred to a Commissioner and were dealt with by him andobjections were also considered by theCourt, it cannot be said that the propriety of the accounts was not considered by the Judge at the time when the receiver's accounts were passed and he was discharged. However, if there is any liability attached to the receiver other than which appears on the face of the accounts and if such liability is not enquired into or determined by the Court at the time of discharging the receiver, a separate suit for determination of such liability will lie. (*Nasim Ali and Henderson, JJ.*) MATHURAMOHAN CHAKRAVARTI *v.* LALMOHAN CHAKRAVARTI.

A.I.R. 1938 Cal. 597.

RECORD-OF-RIGHTS—*Entries in—Presumption of correctness—Difference between successive records—Which to prevail.*

There is a statutory presumption of correctness attaching to a record-of-rights; where the entries in successive records differ from one another, the presumption attaches to the latest entry. (*Rowland, J.*) SURYAMAL SARAF *v.* SRIRAM NAIDU.

1938 P.W.N. 532.

REGISTRATION ACT (XVI OF 1908), Ss. 2 (6) and 17 (1) (b)—*Right to collect and remove leaves—Grant—Registration—Necessity.*

A right to collect and remove leaves from the trees for a certain period is a licence coupled with a grant amounting to profits *a prendre* and not lease. Such grants are of "immovable property" within the definition of S. 2 (6) as relating to "benefits to arise out of land" and so require registration under S. 17 (1) (*b*). (*Stone, C.J. and Puranik, J.*) MULJI SICKKA & CO. *v.* NURMOHAMMAD. **A.I.R. 1938 Nag. 377.**

——**S. 2 (9)**—*'Crop'—Leaves if included.*

The word 'crop' in S. 2 (9) might include leaves of a tree. (*Stone, C.J. and Puranik, J.*) MULJI SICKKA & CO. *v.* NURMOHAMMAD. **A.I.R. 1938 Nag. 377.**

——**S. 17 (1) (b)**—Right to collect and remove leaves—Grant—Registration—Necessity. *See* REGISTRATION ACT, SS. 2 (6) AND 17 (1) (*b*).

A.I.R. 1938 Nag. 377.

——**S. 34**—*Sub-Registrar's opinion as to executant's age—Weight to be attached.*

Under S. 34, Registration Act, an enquiry as to whether any of the parties concerned in the registration is a major or not is not one of the duties imposed on

the Registrar. The opinion of the Sub-Registrar as to the executant's age when the document was presented for registration cannot be accepted as evidence of his age at all, much less conclusive evidence. (*Grille, J.*) KISAN ISARAMJEE *v.* MT. JAIWANTI.

A.I.R. 1938 Nag. 385.

——**S. 49**—Applicability — Permanent lease—No rent payable for first seven faslis—Provision for payment of Rs. 19-12-0 per year subsequently for ever—Deed not registered—Admissibility to prove terms of grant. *See* MADRAS ESTATES LAND ACT, S. 26 (3).

A.I.R. 1938 Mad. 769.

——**S. 49**—Collateral purpose—Letter giving addressee lien over certain properties—Recital that properties are now with another having equitable mortgage—Admissibility to prove acknowledgment of equitable mortgage. *See* LIMITATION ACT, S. 19.

1938 M.W.N. 785.

——**S. 49**—*"Collateral purpose"— Meaning of—Suit for possession after redemption of mortgage—Mortgage unregistered of value over Rs. 100—Admissibility in evidence—Reference to mortgage for proof of right to redeem—Permissibility—Oral evidence—Admissibility.*

In a suit for possession, the plaintiffs claimed to have deposited mortgage monies in Court and sought to redeem two mortgages of 1921, one for Rs. 300 and the other for Rs. 100 both of which were unregistered. The defendant produced those deeds and pleaded that on their true construction he was a lessee and not a mortgagee. Plaintiff sought to rely on the deeds to show that his rights were as mortgagee and that he could redeem.

Held, (1) that the documents being unregistered were inadmissible in evidence and could not be looked into and the purpose for which the plaintiff sought to look into them could not be regarded as a collateral purpose; (2) that the fact that the defendant himself put in the documents as proof of his title did not help the plaintiff, as the plaintiff could only succeed on the proof of his title as a mortgagor and could not take advantage of the attempted use sought to be made by the defendant of the inadmissible documents; (3) that no other evidence, such as oral evidence could be given for the purpose of establishing the plaintiff's case, by reason of S. 91 of the Evidence Act. (*Wort, A.C.J. and Manohar Lall, J.*) BHUKHAN MIAN *v.* RADHIKA KUMARI DEBI.

19 Pat.L.T. 489 = 176 I.C. 35 = 11 R.P. 38 = 4 B.R. 667.

——**S. 73 (1)**—*"Agent authorised as aforesaid"—Meaning of.*

The words "as aforesaid" in the phrase "or agent authorised as aforesaid" in S. 73 (1) of the Registration Act are not mere surplusage and they can only refer to the special agent mentioned in S. 32 and S. 33 of the Act. An application to the Registrar under S. 73 (1) by a person who is not such an agent does not lie, and the Registrar's order on such an application is, therefore, illegal and invalid. (*Addison, Ag.C.J. and Din Mahomed, J.*) GANESH DASS *v.* MAHOMED HUSSAIN.

40 P.L.R. 718.

RELIGIOUS ENDOWMENT—*Mahant—Powers of alienation—Permanent lease by—Validity.*

A limited owner, such as the *Mahant* of an Asthal, is competent to create derivative tenures and estates conformable to usage. The idol's estate is left with the benefit of an augmentation of rent from time to time, and it is within the competence of the *Shebait* to grant a permanent lease in the ordinary course of management. (*Fazl Ali and Manohar Lall, JJ.*) MAHABIR DAS *v.* UDIT NARAIN VARMA.

19 Pat.L.T. 570.

SALE OF GOODS ACT (III OF 1930), S. 16 (1)—*"Fitness for particular purpose"—Meaning—Sale of boiler—Boiler not conforming to Government regulations and therefore not fit for use—Breach of implied warranty of fitness.*

The plaintiff who wished to start the manufacture of carbon-paper went to the defendant, a manufacturer's agent, for advice and on his advice placed an order with him for a boiler for use in connection with his carbon-paper plant at his factory. As the boiler supplied by the defendant did not conform to the requirements of the Indian Boilers Act and the Regulations made thereunder, the boiler inspecting authorities refused to issue a certificate and the plaintiff consequently could not use the boiler for the purpose required by him. In a suit

articular purpose
object to which
mere fact that a
to facto a breach
of the implied warranty of fitness, although it raises a *prima facie* presumption that the goods were not fit. (*Derbyshire, C.J. and Ameer Ali, J.*) JOSEPH MAYR *v.* PHANI BHUSAN GHOSH. I.L.R. (1938) 2 Cal. 88.

——S. 16 (1)—*'Particular purpose'—Meaning of.*

Per *Ameer Ali, J.*—The article is not to be fit generally, not to be fit for the "purpose" of the buyer; it must be fit for a particular purpose notified to the seller and notified in a particular way so that the seller shall know that his skill and judgment is relied upon t[illegible]
ply an article which shall be fit for that purpose.
byshire, C.J. and Ameer Ali,
PHANI BHUSAN GHOSE.

——S. 16 (1) and (2)—*I*[illegible]

principle from the
ntability. The con-
es the goods to be
the particular des-
fitness requires the
goods to be reasonably fit for use for the particular purpose for which they were ordered. In both cases they are required to be intrinsically fit, and not fit having

of minor plaintiff—Lien—If extends against minor—Change of next friend—Right to withhold documents from new next friend.

Where a solicitor is engaged by the next friend of a minor plaintiff, the client is the next friend and not the minor, and it is to the next friend, and not to the minor, that the solicitor looks for his costs. Though the solicitor has a lien enforcible against the next friend, the lien

his costs of the suit from the old next friend. He cannot withhold the documents, e
friend by pleading his lien.
Rangnekar, J.) JHAVERY
GANGJI.

SPECIFIC RELIEF ACT (1877), S. 56.

SPECIFIC PERFORMANCE—*Right to—Doctrine of mutuality—Meaning of.*

A contract to be specifically enforceable must be mutual, which means that at the time of the contract it must be enforceable by either of the parties against the other. Thus, if on account of certain circumstances existing at the time of the contract, as for example personal incapacity of one of the parties or the nature of the contract itself, it was incapable in law of being enforced

TRA *v.* LALIT KRISHNA MITRA.
42 C.W.N. 1090.

ACT (I OF 1877), S. 27 (b)—
lier contract—Onus.

The onus is upon the subsequent purchaser to prove that he is a transferee without notice of the earlier contract so as to bring himself within the exception provided by S. 27 (*b*) of the Specific Relief Act. (*Mukherjea, J.*) DEBENDRA NATH MITRA *v.* LALIT KRISHNA MITRA. 42 C.W.N. 1090.

——Ss. 54 and 57—*Grant by Government of license to supply electricity—Start of work to supply electricity by Government within area of license—Licensee, if entitled to injunction.*

The deposit of Rs. 500 under R. 11 of the rules under the Electricity Act is not only not a consideration for the license but it is not even a fee for the license. It is

is extremely doubtful whether an injunction can be granted at all under S. 54. Even assuming that this license

the license shall refrain from taking any particular action. The Government has the inherent power to generate and supply electricity under this Act if it so
e covenant either
into the terms of
ernment an obliga-
y within the area of
ter, JJ.) LAHORE
ELECTRIC SUPPLY CO., LTD., *v.* SECRETARY OF STATE. A.I.R. 1938 Lah. 585.

——S. 56—*Scavenging rights—Injunction to restrain persons from doing scavenging work—Plaintiff claiming exclusive right of scavenging—Maintainability—Custom making rights transferable—Validity.*

Doing scavenging work is not a trade or a business or a profession involving skill. The right to do scaveng-

cular houses. Nor can a custom making scavenging
, as it
The
essive
Law.

STAMP ACT (1899), S. 35.

(*Venkataramana Rao, J.*) RAGHUDU *v.* ERRAIYA.
1938 M.W.N. 806 = 48 L.W. 258.

STAMP ACT (II OF 1899), S. 35—Scope—Promissory note not properly stamped—Admissibility—Suit on debt—Maintainability. *See* EVIDENCE ACT, S. 91.
1938 M.W.N. 722 = (1938) 2 M.L.J. 189 (F.B.).

SURETY—*Right of—Administration bond—Right of surety to obtain discharge.*

A surety to an administration bond cannot claim an absolute right to obtain a discharge from his bond for the asking. But the Court is not powerless to grant relief in a suitable case. The Court may make such orders as the facts and circumstances of each case may call for after holding an enquiry into the allegations of maladministration. (*Costello and Biswas, JJ.*) PROHLAD CHANDRA FARICAL *v.* PABAN CHANDRA FARICAL. **42 C.W.N. 1058.**

TELEGRAPH ACT (XIII OF 1885), S. 20—Wireless receiving set without license—Offence. *See* WIRELESS TELEGRAPHY ACT, SS. 3 AND 6.
1938 M.W.N. 823 = (1938) 2 M.L.J. 281.

TORT—*Defamation—Libel—Cause of action—Unskilful reproduction of plaintiff's work of art—Intention of defendant—Relevancy.*

An artist can maintain an action for libel for damage caused to his reputation by an unskilful reproduction of his work. In such an action, the intention of the defendant is not relevant to the question whether or not there is a libel. The defendant, therefore, cannot avoid liability by proving that his intention was good, for once there is a libel, although it is technical, the law presumes that there must be damage. (*M.C. Nair, J.*) KRISHNAPPA *v.* SWAMI AKHANDA NANDA.
42 C.W.N. 1045.

——*Defamation—Libel—Implied defamation—Right of action.*

On general principles a plaintiff would be entitled to succeed in an action for libel on the ground that there was implied defamation. (*McNair, J.*) KRISHNAPPA *v.* SWAMI AKHANDA NANDA.
42 C.W.N. 1045.

——*Negligence—Suit for damages—Driver of bus overtaking tram on cross-roads.*

It is a negligent and dangerous act on the part of the driver of a bus to overtake another vehicle on a cross-road and it is far more dangerous to overtake a tram on the cross-road, for, this necessitates entering the opposing line of traffic and driving in the opposite direction to that which the cross traffic is entitled to anticipate. (*McNair, J.*) E. J. WILLIAMS *v.* MAHOMED SULEMAN. **A.I.R. 1938 Cal. 587.**

——*Wrongful attachment—Suit for damages—Proof of malice and absence of reasonable and probable cause, if necessary—Damages for loss arising independent of the wrongful attachment, if can be recovered.*

In order to entitle one to damages for a wrongful attachment of property, it is not necessary to prove malice and the absence of reasonable and probable cause. The plaintiff cannot in such suit be entitled to damages on account of any loss which arose not out of the original act of wrongful attachment, but out of something entirely independent. (*Allsop, J.*) QAIM HUSAIN *v.* PIRBHU LAL. **1938 A.L.J. 654 =**
1938 A.W.R. (H.C.) 447 = A.I.R. 1938 All. 508.

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 6 (a)—*Expectancy—Future income to be derived from scavenging work to be done—Mortgage of—Validity.*

A mortgage of future income to be derived from the work of scavenging to be done is invalid, as the subject of the transfer is an expectancy or a possibility within the meaning of S. 6 (*a*), T. P. Act. (*Venkataramana Rao, J.*) RAGHODU *v.* ERRAIYA.
1938 M.W.N. 806 = 48 L.W. 258.

——**S. 53**—*Fraudulent transfer—Inference from circumstances.*

It is not correct perhaps to say that there is any distinction between consideration which should be valid for the purposes of the Contract Act but not valid for the purpose of S. 53 of the Transfer of Property Act. A decree-holder in execution of his decree attached land belonging to the judgment-debtor. One *T* objected to the attachment on the ground that the land in dispute had been leased to him before the attachment. According to him the terms of the lease were that the period of the lease was for 20 years and certain sum was reserved as annual rent which was not to be paid to the lessor but to his creditors in discharge of debts due to them by the lessor. These creditors had not obtained any decree, in other words, there was not any genuine pressure being put upon the judgment-debtor to prefer these creditors. Besides this there was no evidence showing that the judgment-debtor had given possession to the lessee and moreover there was no proof whether the annual rent which was to be paid to the creditors had actually been so paid.

Held, that in these circumstances the transfer was with intent to defeat and delay the creditors and it was not a case of preferring or favouring one creditor at the expense of another. The transfer was therefore void as against the decree-holder within the meaning of S. 53. (*Dalip Singh and Bhide, JJ.*) TEJ BHAN *v.* CHANDI SHAH. **A.I.R. 1938 Lah. 564.**

——**S. 53**—Suit under—If can be stayed under S. 7 of U. P. Encumbered Estates Act. *See* U. P. ENCUMBERED ESTATES ACT, S. 7. **1938 O.A. 548.**

——**S. 53-A**—*Notice—Facts from which it could be inferred.*

A granted to *C* a registered licence to collect and remove Tendu leaves while there was unregistered licence in existence in favour of *B*, a bidi merchant. *C* and *B* worked together for many years, this relationship lasting beyond the commencement of the unregistered lease. *C* was present in the district over which the licences were granted for some time. Some disputes arose over collections in the neighbouring lands resulting in suit being filed against *C* by *B*. *B* had done many open and widespread acts under his unregistered lease in the last collecting season. In a suit brought by *C* on his registered licence for damages for collecting leaves ever after his lease, the question arose whether *C* had notice.

Held, that *C* had notice. S. 53-A operated to prevent *A* from stopping or interfering with *B's* collecting leaves. *B* was entitled to do acts under the terms of unregistered licence. In so doing *B* was not trespasser or tort-feasor. (*Stone, C.J. and Puranik, J.*) MULJI SICKKA & CO. *v.* NURMOHAMMAD. **A.I.R. 1938 Nag. 377.**

——**S. 58 (f)**—*Creation of equitable mortgage—All title deeds—If to be deposited.*

A deposit of some of the title deeds relating to a property is enough to create a valid equitable mortgage over the entire property if it is the intention of the parties that the mortgage should be in respect of the entire property to which the documents of title relate. It is not necessary, to create an equitable mortgage, that all the title deeds or even all the material title deeds should be deposited; it is sufficient if the deeds deposited are material evidences of title and are proved to have been deposited with the intention of creating a mortgage. (*Madhavan Nair and Stodart, JJ.*) RAMANATHAN

T. P. ACT (1882), S. 58.

CHETTIAR *v.* SHRI DOWLAT SAHIB.

——Ss. 58 (f) and 59—*Depos* ... *advance of money already complete*— ... *tion of memorandum reciting deposit—Registration—If necessary—Validity of equitable mortgage without registration.*

... pleted before the memorandum is written, and is a past transaction. The writing is therefore only a memorandum or record of a complete transaction, and does not require registration. Its non-registration does not make the equitable mortgage invalid, as the document does not constitute the bargain between the parties. (*Madhavan Nair and Stodart, JJ.*) RAMANATHAN CHETTIAR *v.* SHRI DOWLAT SINGJEE THAKORE SAHIB.

1938 M.W.N. 785.

——**S. 58 (f)**—*Equitable sub-mortgage of equitable mortgage—Validity.*

An equitable sub-mortgage of an equitable mortgage can be validly made. There is nothing in S. 58 (*f*), T. P. Act, against the validity of an equitable sub-mortgage of a mortgage created by deposit of title deeds. (*Madhavan Nair and Stodart, JJ.*) RAMANATHAN CHETTIAR *v.* SHRI DOWLAT SINGJEE THAKORE SAHIB.

1938 M.W.N. 785.

——**S. 79**—*Applicability—Absence of advances subsequent to second mortgage—Right of prior mortgagee to priority.*

Where a mortgage is executed by way of continuing security for the payments of all debts due and thereafter may be due by the mortgagor and a subsequent mortgagee takes the mortgage of the same property with knowledge of the prior mortgage and the prior mortgagee thereafter does not make any advances, the prior mortgagee is entitled to priority not only in respect of principal sum but also interest accruing on it. As there ... amount secured by the prior mortgage was fixed at certain amount for purpose of S. 79 will not disentitle the first mortgagee to priority in respect of interest on that sum. (*Iqbal Ahmad and Harries, JJ.*) ALLAHABAD BANK, LTD. *v.* BENARES BANK, LTD.

1938 A.L.J. 658 = 1938 A.W.R. (H.C.) 421 = A.I.R. 1938 All. 473.

——**S. 82**—*Mortgage over three properties—Mortgagor selling property No. 3 to X—X* ... *sideration agreeing to pay off entire mo*... *gagee subsequently buying property No. 1* ...

... gagee a sum of money which on calculation was found sufficient to discharge the mortgage. The agreement between the mortgagor and *X* was that the latter should with that sum free not only property No. 3 which he was purchasing but also the other two properties. *X* did not pay as agreed upon. A few years later, the mortgagee purchased from the mortgagor property No. 1. The mortgagee by his conveyance did not expressly take ...

T. P. ACT (1882), S. 108.

... On the other ... eyance that *X* ... mortgage by ... the mortgagee was competent to realise the said money from *X*. The price paid by the mortgagee represented the true values of the property in an unencumbered State. In a suit by ... mortgagor and that, therefore, property No. 3 alone was liable for the whole of the debt and properties Nos. 1 and 2 were not liable to contribute. (*Mitter and Edgley, JJ.*) NIRUPAMA DEVI *v.* SURABALA DASSI.

42 C.W.N. 1004 = A.I.R. 1938 Cal. 618.

——**S. 92 (as amended by Act XX of 1929)**—*S. 92 if retrospective.*

The general principle is that very clear words must be discoverable before retrospective effect can be given to a statute so as to take away a vested right which accrued before the date of its commencement. It cannot be inferred that because in S. 63 of the Amending Act some sections were stated expressly not to be retrospective, the remainder are so. S. 92 is not retrospective in its effect by reason of the lack of such clear words contained in the Act as would be necessary to lead to a contrary decision. (*Roberts, C.J., Dunkley and Spargo, JJ.*) BANK OF CHETTINAD, LTD. *v.* MAUNG AYE.

A.I.R. 1938 Rang. 306 (F.B.).

——**(as amended in 1929), S. 92**—*Scope — If retrospective — Purchaser of mortgaged property discharging portion of mortgage debt prior to amendment—Claim to partial subrogation—Sustainability.*

S. 92 of the T. P. Act, as amended in 1929, is not retrospective, and under the law which prevailed prior to the amendment a purchaser of mortgaged property discharging a portion of the mortgage debt prior to the amending Act could invoke the doctrine of subrogation and claim partial subrogation. (*Venkatasubba Rao and* ...) SRINIVASALU NAIDU *v.* ...

...**8 = A.I.R. 1938 Mad. 779.**

——**(as amended in 1929), S. 92**—*Vendee of mortgaged property undertaking to discharge prior mortgage—Payment of prior mortgagee — Right to subrogation.*

A vendee of the equity of redemption in mortgaged properties who pays off prior mortgages on the properties out of the sale price left with him under an express ... for such payment of prior ... to subrogation under S. 92 ... Act, as amended in 1929, ...

... *of deceased lessee—If can be sued for rent.*

A suit for rent cannot be decreed against some only of the heirs of a deceased lessee, when the plaintiff lessor admits an assignment of the lease in favour of another does not prove that the heirs continue to be in possession. (*S. K. Ghose and Patterson, JJ.*) LAKSHMINARAYAN ROY *v.* GIRJA SANKAR CHATTERJI.

——S. 111—*Registered lease granted before expiry of unregistered lease—Effect.*

Though the effect of granting a registered lease would be to determine the unregistered 'lease' unexpired at such date, it does not cause it to disappear as though it had never been rendering acts done under it in the past and before the grant of the registered 'lease' unlawful, as though done by a trespasser. (*Stone, C.J. and Puranik, J.*) MULJI SICKKA & CO. *v.* NUR-MOHAMMAD. **A.I.R. 1938 Nag. 377.**

——S. 123—Applicability—Buddhist religious gifts. *See* BUDDHIST LAW (BURMESE). **A.I.R. 1938 Rang. 303.**

TRUST—*Public or private—Criterion—Intention of founder as gathered from circumstances.*

Where a Hindu acquires land with the object of building a temple to perpetuate the name of his family and to benefit the public and creates a trust by building it and endowing properties and provides for regular payment of ground rent by means of a permanent arrangement and makes a provision for the appointment of any Hindu as Mutwalli in certain contingency and reserves to the public the right and liberty to examine the accounts, the circumstances are such as to indicate that the trust created is a public trust. (*Thomas, C.J. and Zia-ul-Hasan, J.*) RAM DULAREY *v.* RAM LAL. **1938 O.W.N. 660.**

——*Trustee—Power to set up adverse title.*

Per *Vivian Bose, J.*—No person who has accepted the position of trustee or of *quasi* trustee and has acquired property in that capacity can be permitted to assert an adverse title on his own behalf until he has obtained a proper discharge from the trust with which he has clothed himself. (*Stone, C.J., Bose and Digby, JJ.*) ASARAM *v.* LUDHESHWAR. **A.I.R. 1938 Nag. 335 (F.B.).**

UNITED PROVINCES AGRICULTURISTS' RELIEF ACT (XXVII OF 1934), S. 5—*Advance to cultivator secured by hypothecation of sugarcane crop—Nature of transaction—Decree in respect of, if comes under S. 5.*

Where an advance was made to a cultivator which was secured by hypothecation of certain sugarcane crop and further the parties entered into an agreement whereby the cultivator agreed to sell his sugarcane so as to ensure that the lender would obtain repayment of the money advanced to him it was held that in effect the agreement to sell the sugarcane crop was security given to the lender for the money which he had advanced and that it was impossible to regard the advance made to the cultivator as payment in advance of part of the purchase price. In substance and in fact the advance was in the nature of loan to enable the cultivator to produce and harvest his crop and an agreement to sell the crop was a way of ensuring that the lender or purchaser receives back his money. That being so, a decree passed upon the basis of that transaction was a decree for money within the meaning of S. 5. (*Iqbal Ahmad, Harries and Rachhpal Singh, JJ.*) HAR PRASAD *v.* SEWA. **1938 A.L.J. 694=A.I.R. 1938 All. 461 (F.B.).**

——S. 5—*"Any decree for money"—Meaning of.*

The phrase "any decree for money" in S. 5 means a decree for money passed upon the basis of an advance in cash or in kind or upon the basis of a transaction which substantially amounts to a loan within the meaning of the Act. (*Iqbal Ahmad, Harries and Rachhpal Singh, JJ.*) HAR PRASAD *v.* SEWA. **1938 A.L.J. 694=A.I.R. 1938 All. 461 (F.B.).**

——S. 5 (1)—*"Any decree for money"—Meaning of—Interpretation of statut s—Plain meaning.*

It is one of the recognized canons of interpretation of statutes that the words used in a statute should normally be given their plain and ordinary meaning. But if such a method of interpretation leads to manifest anomalies and is calculated to defeat the professed and declared intention of the Legislature it is open to the Courts to give a go-by to the rule mentioned above and so interpret the words used as to give effect to the intention of the Legislature. While the words "any decree for money" in S. 5 are of general application, a consideration of the other provisions of the Act leads to the conclusion that these words were used by the Legislature in a restricted and not in a general sense. The words "any decree for money" used in S. 5 mean decree for money passed with respect to a loan as defined by the Act, and cannot apply to a decree for damages for false and malicious prosecution. (*Iqbal Ahmad, Harries and Rachhpal Singh, JJ.*) CHATURBHUJ *v.* MAUJI RAM. **1938 A.L.J. 628=1938 A.W.R. (H.C.) 437=A.I.R. 1938 All. 456 (F.B.).**

——S. 5 (1)—*Court that passed decree—Meaning of.*

The interpretation of "Court which passed a decree" in S. 37, C. P. Code, cannot be put on the words "the Court" that "passed" the decree in S. 5, Agriculturists' Relief Act for the reason that an application under S. 5 is not an application "in relation to the execution of" a decree. An application under S. 5 (1) can be made only to the Court of first instance that dealt with the suit or to the Court to which the business of the Court of first instance that decided the suit may have been transferred and not the Court which may have passed either in appeal or in revision the ultimate decree in the cause. (*Iqbal Ahmad, Harries and Rachhpal Singh, JJ.*) CHATURBHUJ *v.* MAUJI RAM. **1938 A.L.J. 628=1938 A.W.R. (H.C.) 437=A.I.R. 1938 All. 456 (F.B.).**

——S. 5 (2)—*Order under—Power of High Court to revise.*

The Court exercising jurisdiction under S. 5 of the Act is a Civil Court, and as such, subordinate to High Court. High Court is therefore in accordance with S. 115, C. P. Code, competent to revise the order passed by a Court under S. 5, Agriculturists' Relief Act. There is nothing in that Act that can be interpreted to divest High Court either expressly or by necessary implication of the revisional jurisdiction conferred by S. 115, C. P. Code. The mere denial to the decree-holder of a right of appeal cannot warrant the inference that the Legislature intended to bar the revisional jurisdiction of High Court. The provision in Cl. (2) of S. 5 that "the decision of the appellate Court shall be final" means no more than this, that the order passed by the appellate Court cannot be made the subject of a second appeal. The provision about the finality of the decision of the appellate Court contained in Cl. (2) of S. 5 cannot therefore warrant the inference that the Legislature intended in any way to limit or control the revisional jurisdiction conferred on High Court by S. 115, C. P. Code. (*Iqbal Ahmad, Harries and Rachhpal Singh, JJ.*) CHATURBHUJ *v.* MAUJI RAM. **1938 A.L.J. 628=1938 A.W.R. (H.C.) 437=A.I.R. 1938 All. 456 (F.B.).**

——S. 6—*S. 6 does not interfere with any substantive right and is hence retrospective.*

It is well established that nobody has a vested right in procedure, and statutes of limitation, as distinguished from statutes of prescription, are generally regarded as Acts regulating procedure and would govern all proceedings from the moment of their enactment even though the cause of action might have accrued before the Acts

came into existence. S. 6 of the United Provinces Agriculturists' Relief Act does not interfere with any substantive right and hence has retrospective operation. (*Collister and Bajpai, JJ.*) KALYAN SINGH *v.* AJHUDHYA PRASAD.

1938 A.L.J.

——S. 6—"*Decree*" and '... *tion*"—*Meaning of.*

The word 'decree' appearing ... applies ... decree passed prior to the commencement of the Act and ... xecution ... applica ... mmencement of the Act. (*Collister and Bajpai, JJ.*) KALYAN SINGH *v.* AJHUDHYA PRASAD.

1938 A.W.R. (H.C.) 445=1938 A.L.J. 724=

——S. 33—*Appeal by for* ... *red judicated by trial Court in suit* ... *fee.*

In an appeal by *P* for reduction ... judicated by the trial Court in a suit ... due from *P* to *D* *ad valorem* ... charged in either case, *i.e.*, whether *D* has or has not sought and obtained a decree under S. 33 (2), on the amount by which reduction is sought, the amount being calculated according to Art. 1 of Sch. I, Court-Fees Act. *P* cannot be allowed to put an arbitrary value on the memorandum of appeal. (*Collister and Bajpai, JJ.*) PAHLAD SINGH *v.* NIADAR SINGH.

1938 A.L.J. 708=1938 A.W.R. (H.C.) 443= A.I.R. 1938 All. 467.

UNITED PROVINCES DISTRICT BOARDS ACT (X OF 1922), S. 34—*Purchase by member of Board at auction—If acquires interest in a contract of the Board—Offence under S. 169, I. P. Code, if contemplated by section.*

It is difficult to say that according to language of S. 34 of the United Provinces District Boards Act, by purchasing property at an auction sale, the property being that of the Board, a member would be acquiring an interest in a contract of the Board. If given a general interpretation, the words would mean that at any auction sale of the Board, no member can bid S. 34 was never intended to ... it refers only to S. 168. ... CHAUBE *v.* EMPEROR.

1938 A.W.R. (H.C.) 453=A.I.R. 1938 All. 513.

UNITED PROVINCES ENCUMBERED ESTATES ACT (XXV OF 1934), S. 7—*Applicability—Suit under S. 53 of Transfer of Property Act—If a suit in respect of a debt.*

It would involve stretching the language of S. 7 of the United Provinces Encumbered Estates Act considerably further than is justifiable, to hold that the words 'proceedings' in respect of any public or private debt includes all proceedings which can have any ultimate bearing not merely on any public or private debt but on the property available to meet the same. Hence a suit under S. 53 of the Transfer of Property Act against the debtor cannot ... *Yorke, JJ.*)

——S. 7 ... *formance of c* ... *of a debt.*

There can be no doubt that in the majority of cases a suit for specific performance of contract would not be a proceeding "in respect of a debt"; but where in a contract of sale the greater part of the consideration for the sale which was agreed upon between the parties was in lieu of prior debts which were due from seller to the purchaser, it cannot be said that the suit for specific per... ure of a pro... object of the ... were due from ... ited Provinces ... proceedings ...

NARAIN. 1938 A.L.J. 705= 1938 A.W.R. (H.C.) 456= A.I.R. 1938 All. 479.

——S. 7 (1) (a)—*Stay—Who can order.*

... proceedings forth... under the Act ... any such Court. ... the civil Judge ... and it is clear that he had purported to sign the order staying proceedings in his capacity as civil Judge and not in his capacity as special Judge, there could be no objection whatsoever. (*Collister and Bajpai, JJ.*) KANHYA LAL *v.* MAHESHWAR NARAIN. 1938 A.L.J. 705= 1938 A.W.R. (H.C.) 456=A.I.R. 1938 All. 479.

UNITED PROVINCES LAND REVENUE ACT (III OF 1901), S. 4 (16)—'*Sub proprietor*'—Sirdar *not exercising any proprietary rights.*

Where the *sirdars* recorded as such do not exercise ...

SINGH. 1938 R.D. 565.

——S. 32—*Record of rights—Revision—Duty of Revenue Courts.*

Where a record of rights is prepared at a revision of the records, the Revenue Courts are concerned only with ... containing the details ... Land Revenue Act. Any ... ecorded co-sharers as a whole and their transferees have acquired any rights by prescription or not, is not for the Revenue Courts to decide. (*Drake Brockman, S. M. and Knox, J. M.*) JADUNATH SINGH *v.* MUHAMMAD AHMAD ALI KHAN. 1938 R.D. 591 (2).

——S. 34—*Mutation—Right to—Possession on the basis of decree of Civil Court—Effect of pending appeal against decree of Civil Court.*

Where a party has obtained possession because of a decree of Civil Court, clearly on that basis he is entitled to mutation, though an appeal may have been preferred against the decree of the Civil Court. So long as he is not dispossessed as the result of a reversal of Civil Court's decree by the High Court, his rights ... *arsh, J. M.*) ...

1938 R.D. ...

... imperfect. The mere ... mokammal" or perfect thing as saying that ...

U. P. LAND REVENUE ACT (1901), S. 117.

(*Bennet and Varma, JJ.*) CHANDRA JANG SINGH *v.* SITA RAM. **1938 A.L.J. 641 = 1938 A.W.R. (H.C.) 382 = A.I.R. 1938 All. 469.**

——**S. 117**—*Applicability—Absence of any interest outside his thok—Right to share in lands in other thoks.*

Where the applicant is shown in the khewats as the possessor of certain numbers appertaining to his thok and he has no interest outside his thok, he is not the holder of land in common with the owners of other thoks and hence he cannot get any share of any lands recorded in other thoks. (*Bennet and Verma, JJ.*) CHANDRA JANG SINGH *v.* SITA RAM. **1938 A.L.J. 641 = 1938 A.W.R. (H.C.) 382 = A.I.R. 1938 All. 469.**

——**S. 218**—*Reference—Absence of illegality or impropriety—If justified.*

In the absence of any illegality or impropriety in the order passed, a Commissioner would not be justified in referring the case to the Board of Revenue under S. 218 of the Land Revenue Act. (*Darling, S. M. and Marsh, J. M.*) RAM RAN VIJAI PRASAD SINGH *v.* RAM SIDH. **1938 R.D. 625.**

——**S. 220**—*Review—Who can exercise power of.*

Only the Board of Revenue, under S. 220 of the Land Revenue Act, can review its order. (*Darling, S.M. and Marsh, J. M.*) RAM RAN VIJAI PRASAD SINGH *v.* RAM SIDH. **1938 R.D. 625.**

WASTE LANDS (CLAIMS) ACT (1863), Ss. 21 and 23—*Land treated as ownerless wrongly—Absence of claim—Government if can relinquish possession.*

Where owing to some mistake certain plot of land was included in the list of lands which appeared to be ownerless, but no attempt was made to correct nazul record, it is open to government under Ss. 21 and 23 of the Waste Lands (Claims) Act to relinquish possession, if it had been taken. (*Roughton, F. C.*) R. S. B.V. BUTI, *In re.* **1938 N.L.J. 268.**

WILL—*Absence of probate—Effect.*

Where a will is not probated, no rights whatsoever can be founded upon that will. (*Fazl Ali and Manohar Lall, JJ.*) MAHABIR DAS *v.* UDIT NARAIN VARMA. **19 Pat.L.T. 570.**

——*Grant of probate—Onus of proof.*

The onus *probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. If a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. (*Roberts, C. J. and Dunkley, J.*) EUSOOF AHMED *v.* ISMAIL AHMED. **A.I.R. 1938 Rang. 322.**

——*Will made by sick and dying person—Degree of understanding required.*

Wills are too frequently made by the sick and dying; the degree of understanding therefore which the law requires is such as may reasonably be expected from persons in that condition. It is not enough that a testator is able to answer familiar and usual questions. He must be able to exercise a competent understanding as to the general nature of the property, as to the state of his family, and as to the general condition and claims of the objects of his bounty, as to the nature of the instrument which he executes and as to the general nature and general objects and the provisions which it contains; if he can do that, though he may be very feeble and debilitated in understanding, and be at the point of death, it is enough. (*Roberts, C. J. and Dunkley, J.*) EUSOOF AHMED *v.* ISMAIL AHMED. **A.I.R. 1938 Rang. 322.**

WIRELESS TELEGRAPHY ACT (XVII OF 1933), Ss. 3 and 6—*Wireless set without licence—Offence—Subsequent issue of licence to take effect from date earlier than date of offence—Effect—Conviction—If justified—Separate conviction and sentence under Telegraph Act—Sustainability.*

The accused was convicted under Ss. 3 and 6 of the Wireless Telegraphy Act, of being in possession of a wireless receiving set without a licence and also of working the same without a licence under S. 20 of the Telegraph Act, and sentenced to separate fines under each of the offences. It appeared that the accused had been taking out licences for some years before the offence and that actually a licence had been issued by the post-master to take effect from a date earlier than the date on which the accused was said to have been in possession without a licence.

Held, (1) that the accused was guilty of an offence under Ss. 3 and 6 of the Wireless Telegraphy Act and that the issue of a licence subsequently would not give a sort of pardon in respect of an offence already committed; (2) that there was no justification for a separate conviction under S. 20 of the Telegraph Act or for a separate sentence under that section.

Quaere: Whether the use of a wireless set without a licence would amount to an offence under S. 20 of the Telegraph Act. (*Pandrang Row, J.*) A. S. PANDIAN *v.* EMPEROR. **1938 M.W.N. 823 = (1938) 2 M.L.J. 281.**

WORDS AND PHRASES—'*Pukhtadar*'—*Meaning of.*

Pukhtadar is generally taken to be a translation or the equivalent of sub settlement holder', but the word is vaguely used by people who have all sorts of fancy rights and comes to mean little more than heritable and transferable rights. (*Drake Brockman, S. M. and Knox, J. M.*) JADUNATH SINGH *v.* MUHAMMAD AHMAD ALI KHAN. **1938 R.D. 591 (2).**

WORKMEN'S COMPENSATION ACT (VIII OF 1923), S. 3 (1)—*Accident "arising out of employment"—Foundry Mistry killed by lightning while running metal from furnace to chimney.*

Where the deceased who was employed as a foundry mistry was killed by lightning while he was at his work running metal from a furnace to the bottom of a metal chimney.

Held, that the deceased was exposed to an extra risk of damage by lightning through the nature of his occupation and the accident must, therefore, be deemed to have arisen out of his employment. (*Derbyshire, C. J. and Costello, J.*) MANAGER, GOURI SANKAR JUTE MILLS *v.* KHANTAMONI DASI. **42 C.W.N. 1093.**

——**S. 30**—*Finding by Commissioner that deceased was workman—Interference in appeal.*

Where there is evidence upon which the Commissioner could come to the conclusion that the deceased was a servant and a workman within the meaning of the Act, it would be wrong for the High Court in appeal to disturb his finding although there is some evidence suggesting that the deceased was an independent contractor. (*Derbyshire, C.J. and Costello, J.*) MANAGER, GOURI SANKAR JUTE MILLS *v.* KHANTAMONI DASI. **42 C.W.N. 1093.**

WRONGFUL ATTACHMENT. *See* TORT.

II—SELECT ENGLISH CASES.

18, para. 4 (d)— *ssport—Alien igno-*

officer, ...
in the execution of t

less the prosecution proved that the person having in his possession the forged passport had guilty knowledge of the fact that it is forged. The words of the article do not put any such burden upon the prosecution and the words of the article negative the view that the prosecution is required to carry such a burden. CHAJUTIN v. WHITEHEAD. (1938) 1 K.B. 506.

BROKER—*Stocks and shares—Shares bought for the customer and shares deposited by customer sold out by brokers—Subsequent purchase of the same by brokers at profit—Nature of transactions—Fraud—Nature of the brokers' transactions kept secret from customer—Rights of customer—Conversion—Damages.*

O. Company carried on
In October 1929, the plaint

Co. as margin. He duly received a contract note purporting to show

and as a result between October and December he

COMPANY.

company went into the market and bought the required market price which was very much the date of the original order by

transactions as far as the company were part of a fraudulent system of business, selves fraudulent in their inception, con-

would only have had a special property which, on the facts of the case, even had the transaction been honest throughout, would not have given them the right to dispose of the shares, for there never had been default. On the actual facts the disposal of the deposited shares amounted to nothing short of conversion and the client on each occasion on which the shares were sold had vested in him a right to damages for conversion which would be measured by the value of the shares at the date of the conversion. SOLLOWAY v. MCLAUGHLIN. 1938 A.C. 247.

COMPANY—*Borrowing money by—Memorandum and promissory note signed by a director and secretary ... onally by ... ders Act ... consolidation of prior loans—Sufficient memorandum.*

A company B. G., Ltd., borrowed money from time

cent. per annum thereon and pay the amount in certain

sealed; and (*ii*) that the memorandum was bad as it did not specify full particulars.

Held, that the contract was duly executed in accordance with S. 29 of the Companies Act, 1929 and was therefore signed "personally by the borrower" within the requirement of Money lenders Act, 1927. It was not necessary that it should be under seal. The memorandum was sufficiently full in particulars as it indicated that it was in consolidation of previous loans. *In re* BRITISH GAMES, LIMITED. (1938) 1 Ch. 240.

CONTRACT—*Hire purchase—Vendor not owning the article on date of agreement—Purchase by vendor later—Delivery of same to hirer—Hirer accepting it—Hire in arrear—Vendor taking possession terminating the contract—Hirer if can plead that vendor showed no title—Date when vendor should show title.*

At the end of 1935 *W* (defendant) entered into negotiations with D. Co. (plaintiffs) for the purchase of a motor lorry. *W* could not pay cash for it and he entered into a hire-purchase agreement on 7th February. The plaintiffs bought a lorry some days later and delivered it to be defendant. The defendant having got into arrears of hire amount, the plaintiffs exercised the right which they had under the hire-purchase agreement of terminating the hiring and possessed themselves of the lorry. In an action by D. Co. for the balance of agreed depreciation money and arrears of instalments due, the defendant pleaded that it was an implied condition of the agreement that the plaintiffs owned the lorry on the date of the agreement, that as the plaintiffs admittedly did not own it on that date but only some days later, they had no title to hire and the contract was bad.

Held, that the material time when the implied condition as to warranty of title arises is the date when the bailment or delivery takes place and not the actual moment of signing of the agreement. On the date of delivery the plaintiffs were the owners and therefore the agreement was satisfied. *Karflex, Ltd.* v. *Poole*, (1933) 2 K.B. 251, Expl. MERCANTILE UNION GUARANTEE CORPORATION, LIMITED *v.* WHEATLEY. (1938) 1 K.B. 490.

———*Vendor and purchaser—Contract to sell land—Payment to be by instalments—Failure in payment of certain instalments—Clause providing for forfeiture of instalments paid if default in payment of further instalments—If in the nature of a penalty—Court, if can relieve, against it and direct return of instalments paid.*

By an agreement in writing dated 2nd November, 1927, it was agreed that the defendant company would sell and the plaintiff would purchase for 321,000*l.* the lands, etc., belonging to the defendant company in Tasmania. Of this 4,000*l.* was paid by the date of the agreement and the balance was made payable in certain instalments on the dates specified in the agreement. Cl. (12) of the agreement provided that "if the purchaser shall make default in the payment of any of the other instalments mentioned in cl. (2) hereof or any part thereof on the due dates as provided in the said clause the land company may . . . . by notice in writing . . . . rescind this agreement and may either enter into possession of any lands, etc., remaining unsold whereupon all moneys already paid by the purchaser shall be absolutely forfeited to the Land company and this contract shall subject as aforesaid thereupon become absolutely null and void. . . . ." Certain sums were paid by the plaintiff in instalments as provided in the agreement but subsequently he failed to pay an instalment that fell due in May, 1931. Thereupon the defendants gave him notice that they rescinded the contract under cl. (12) of

the agreement and forfeited the amounts already paid. In an action to recover the instalments already paid,

Held, that though cl. (12) provided that on rescission the contract became null and void, it did not mean that the contract became void *ab initio* in the sense of treating the contract as though it had never existed at all. The claim to refund could not be as for recovery of money had and received because the money was rightly paid under the contract and thereon it became the money of the defendants. The provision in the contract that if the plaintiff should fail to pay any of the instalments the defendant should be entitled to retain the money paid is not in the nature of a penalty as there is nothing unconscionable in the stipulation. There is nothing unconscionable on the part of the vendor, who has contracted to part with his land on agreed terms, to enforce the contract if he so desires. This is not a case where the plaintiff says that he is now willing to carry out the contract and wants relief on that basis. *Steadman* v. *Drinkle*, (1916) 1 A.C. 275, Dist. MUSSEIN *v.* VAN DIEMEN'S LAND COMPANY. (1938) 1 Ch. 253.

COPYRIGHT — *Infringement — Conversion — If cumulative or alternative damages—Limitation of time for commencement of action for conversion—Limitation Act*, 1623—*Copyright Act*, 1911, *S.* 10—*Act of conversion—Whether order to bind or sale.*

The plaintiffs, publishers of a book, sued the defendants for damages for infringement of copyright and for conversion, in that the defendants incorporated into his book part of the plaintiffs' book. The question arose as to the period of limitation, nature of the damages, etc. It was held that the damages were cumulative and not alternative. On the question of limitation,

Held, by the Court of Appeal (MacKinnon, J., dissenting) that in respect of the claim in conversion the period is six years running from the date of conversion under the Limitation Act, 1623, and not three years under S. 10 of the Copyright Act, 1911, as this is not a claim for infringement but an additional claim based on conversion.

Held, by the Court of Appeal that the act of conversion as at the date of which the value of infringing copies ought to be ascertained is not the order to the binders to bind the sheets which contained the infringing matter but the delivery by the defendant of the bound copies to the purchasers. The delivery is the first clear evidence of an intention on the part of the defendant to deal with the infringing copies in a way adverse to the plaintiff. SUTHERLAND PUBLISHING COMPANY, LIMITED *v.* CAXTON PUBLISHING COMPANY, LIMITED. (1938) 1 Ch. 174.

COSTS—*County Court Rules*, 1936—*Scale of costs—Jurisdiction of Judge to increase the scale of costs—O. XLVII of the County Court Rules.*

O. XLVII of the County Court Rules, 1936, provides as follows:—R. 1. "Subject to the provisions of any Act or Rule, the costs of proceedings in a County Court shall be in the discretion of the Court". R. 2. "The Scales of Costs in Appendix B shall have effect for the purpose of regulating the costs of proceedings in a County Court subject to and in accordance with the Rules of this Order and the directions contained in the Scales of Costs". Rule 5 provides for certain scales. R. 13 provides for power in the Judge to award costs on such scale as he thinks fit where he certifies that the question in dispute was of importance to a class or body of persons or involved a difficult question of law or that the decision of the Court affects issues between the parties beyond those directly in the proceedings. There were certain

EMPLOYER AND EMPLOYEE.

other rules providing for fees beyond the maximum

in the cases where power is given to him to certify for higher costs as under R. 13. MURRAY *v.* REDPATH, BROWN AND COMPANY.

EMPLOYER AND EMPLO

of employment—Express terms in ... ... inventions, etc., by employee—Contract unenforceable as being in restraint of trade—Invention by employee in the course of employment—Cessation of employment—If employee can use the invention for his own benefit after leaving the employment—Implied term of such contracts—Employee a trustee for employers.

Under a written agreement the plaintiff company agreed to employ the defendant as an assistant chemist for three years. In 1932, in the course ment he discovered a method of produci This discovery he made in the course of during the company's hours and using the company's materials. The company took no steps to patent the discovery or do anything in the matter while the defendant was in their employ. In 1934 the defendant left the employment and set up on his own account as a manufacturer of laboratory glass and as he discovered that acrylic acid could be used for that manufacture also he applied for a patent to protect the discovery plaintiff company thereupon sue the patent was held by the them, etc. It was contended for the defendant that as the contract of employment contained express provisions relating to the duties of the defendant as regards discoveries and inventions by him, the implied term i

employers and not of the employee, and that, having made a discovery or invention in course of such work, the employee becomes a trustee for the employer of that invention or discovery and he is therefore as a trustee bound to give the benefit of any such discovery or invention to his employer. TRIPLEX SAFETY GLASS COMPANY *v.* SCORAH. (1938) 1 Ch 911

INSURANCE (NATIONAL

treating a patient—Claim from ... ted under the National Health In

LANDLORD AND TENANT.

not one registered under the Dentists' Acts of 1878 *to* 1923*—Claim against society not maintainable.*

Dr. B. was a duly qualified and registered medical practitioner under the Medical Acts who has practised for many, many years. For the last 39 years of his life, he had been confining himself to the practice of dentistry and under the law now in England one is entitled to though he is not a dentist regis- register kept under the Dentists' s. Under the National Health Insurance Acts of 1924 to 1928, certain benefits are secured for insured persons but those benefits are to be administered through approved societies and a medical man who treats a patient who is a member of those approved societies is entitled to obtain his remuneration not from the patient but from the society to which he belongs. Dr B. supplied dental treatment to one E and applied to the defendant society of which E was a member for the But the society round that Dr. B.

Held, that a 'dentist' under the Dentists' Acts of 1878 to 1923 means a person who is duly registered in the Dentists' register kept under the Dentists' Acts of 1878 to 1923 or any Act amending those Acts and does not take in a person who is entitled to use the name dentist and to practise dentistry. To claim the charges from the society and not from the patient treated, the dentist must be such a dentist under the Dentists' Acts and the

OF TRADE UNIONS APPROVED SOCIETY (1938) 1 Ch 164.

LANDLORD AND TENANT—*Rent Restriction Acts —Rent and Mortgage Interest Restrictions Act*, 1923,

session inasmuch as the defendants' possession was only as trespasser. Sub S. (1) of S. 2 of the Rent and Mortgage Interest Restrictions Act of 1923 provides that "Where the landlord of a dwelling house to which the principal Act applies is in possession of the whole of the dwelling house at the passing of this Act, or comes into

meaning "actual possession" and that a "landlord shall not be deemed to have come into possession by reason only of a change of tenancy made with his consent".

Held, by the Court of Appeal, that the words "actual possession" meant the actual taking of possession by the landlord by his entering on the land by himself or by his agent. It is a misconception to treat a landlord who is excluded from possession by a trespasser as being himself in possession. He is not. His proper procedure if he wants to eject the trespasser is to proceed against him for recovery of possession. After the agreement of tenancy the relationship became one of landlord and tenant. So there was no point of time after Mrs. F's death when the landlord was in possession and the premises had not therefore been decontrolled. Observations of Scrutton, L. J., in *Goudge* v. *Broughton*, (1929) 1 K. B. 103, discussed and distinguished. HOLDEN *v.* HOWARD. (1938) 1 K.B. 442.

POWER OF APPOINTMENT—*Settlement—Power to appoint in favour of one—Prior attempt with trustees of settlement to secure a benefit for appointer—Failure of—Later exercise of power in favour of the object of the power—Motive to defeat the trustees—If exercise of power fraud on the power.*

A woman had a power of appointment which she could exercise in favour of any husband that may survive her for his life or for any less period and upon such conditions and with such restrictions as she shall think fit. In 1933 when she was over 80 years of age she wanted to make a provision for certain relations with whom she was living and she therefore negotiated with her relations and trustees of the settlement that if she should release her power of appointment, they should give her half of the capital to enable her to dispose of it as she pleased. Since they did not agree, she married one N. Q. in 1934 and by a deed of later date she exercised the power of appointment in favour of that husband. She died in 1936. It was contended that the appointment was bad as a fraud on the power of appointment.

Held, the question of a fraud on a power of appointment where there is one object and one object only of the power, differs widely from the question of a fraud on a power by which the fund can be given to one or more of several objects. Where there is one object only of the power it is impossible to establish a fraud unless there is evidence of some arrangement between the appointor and the appointee, not necessarily a legal bargain, but some arrangement under which the appointee is to give effect to the purpose of the appointor to benefit some one other than himself. *In re* NICHOLSON'S SETTLEMENT : MOLONY *v.* NICHOLSON. (1938) 1 Ch. 308.

PUBLIC HEALTH ACT, 1875—*Rivers Pollution Prevention Act*, 1876—*Natural stream—Later sewage water discharged into it—If status changed to a sewer.*

The plaintiffs are the owners of certain lands situated in the borough of Wenlock and they carried on brick and tile works at Blest Hill, Madeley. There was a water-course running through their property. The water-course began as a natural stream and flowed through Madeley, passing by a culvert through part of the plaintiffs' property. The culvert had been made by plaintiffs' predecessors-in-title and then this was a natural stream not vested in or repairable by the local authority. For several years past about 20 houses in Madeley town discharged sewage into the water-course and later there were 44 more houses discharging sewage likewise. The defendant is the corporation of Wenlock liable to repair all sewers vested in them and to prevent sewers becoming a nuisance. The plaintiffs sued the

defendants for a declaration that the water-course was a sewer and that the defendants were liable to repair it.

Held, that it is not in law possible to say that a flowing water-course could change its status as a natural stream and become a sewer within the meaning of the Public Health Act, 1875, by the discharge into it of sewage water after the coming into operation of the Rivers Pollution Prevention Act, 1876. Such discharge is illegal as offending the Rivers Pollution Act and cannot have the effect of changing the status of the channel. GEORGE LEGGE AND SON, LIMITED *v.* WENLOCK CORPORATION. (1938) A. C. 204.

WILL—*Construction—Bequest to A for life—Superadded power to deal with property as if it were her own—If the power exercisable by will or only* inter vivos.

By his will a testator provided as to the residue of his estate after certain bequests as follows:—"All the remainder of my property. . . . . . I give and bequeath unto and equally between my said two sisters (C. L. and A. L.) for their respective lives with full power to deal therewith as if it were their own and on the death of either of them or in the event of either or both of them predeceasing me then I give and bequeath her or their share or shares to my said nephew W. B. A. absolutely". The testator died. His sister A. L. predeceased him and the other sister C. L. died after having made a will and the question was raised if C. L. had an absolue power because if she has a general power of appointment over the property given to her by her brother's will, the will will operate as an exercise of that power.

Held, that the power was not merely an administrative power but a beneficial power which gives the donee power to deal with the property in which the testator has given her a life-interest as if it were her own. There was given in this will a power to the donee of disposing of the property both during her life and after her life by a testamentary power of appointment. *In re* LAWRY : ANDREW *v.* COAD. (1938) 1 Ch. 318.

———*Construction—Legacies—Provision that certain legacies shall abate if estate insufficient for paying all—Estate found insufficient—Delay in paying legacies—Interest on legacies—If also to be taken from the abated legacies and paid to the benefiting legatees.*

By his will a testator bequeathed a large number of pecuniary legacies. Among them were two legacies to W. N. W. and C. D. W. two of his nephews. The will contained a clause that in the event of the estate not being sufficient to pay all the funeral and testamentary expenses, etc., and legacies in full, then "in such case the pecuniary legacies hereinbefore given to my nephews, W. N. W. and C. D. W. (they being otherwise provided for) shall abate equally. . . . . ." The legacies were not paid within one year after the death of the testator. The estate also proved insufficient for payment of all legacies. Interest became payable on the other legacies under the law as the legacies were not paid within one year. The question arose whether interest should be added to the respective legacies entitled to the benefit of the direction as to abatement so as to be payable in priority to the pecuniary legacies subject to the burden of that direction.

Held, that where the estate is sufficient to pay the whole of the legacies in full, and there is a residue, it may be unjust that the residuary legatees, who are entitled to nothing until all the legacies have been paid, should benefit by the delay in paying them which they would do if the interest which the money has been earning in the meantime was paid to them and therefore the legatees will be entitled to interest on their legacies. But interests payable to a legatee is not a legacy given by the testator. It is a sum given in the course of

WILL.

be taken out of the nephew's legacies. *In re* WYLES: FOSTER *v.* WYLES. (1938) 1 Ch. 313.

——*Construction—Will of* 1930—*Bequest of "all my possessions to be . . . . divided equally amongst all my relations"—Testatrix a spinster—Ascertainment of beneficiaries—If whole estate disposed of—Administration of Estates Act*, 1925.

A testatrix *B*, a spinster, died in 1930 having executed

had no nearer relations than her sister's children, her sisters also having predeceased her. There were also

disposition.

WILL.

Held, that it was not a case of intestacy, but a general universal gift of all that the testatrix could bequeath or devise by will.

Held, further, that before the 1925 Act the expression "all my relations" would not take in any more extensive class than would the words "my relations" and they would have been persons, other than a husband or wife, who would have been entitled to the personal estate of the deceased by virtue of the Statute of Distributions, had there been an intestacy. If the Court were to read a gift to "relations" as covering everybody between whom and the testatrix there was a nexus of blood, the result would be to embark upon an inquiry which would be infinite. The result of the direction in the will that the relations should take equally is that the persons entitled under the statute having been ascertained, they would not have taken in the shares indicated by the statute, but would have taken equally. The 1925 Act

(1938) 1 Ch. 205.

VOLUMINAL TABLE OF CURRENT CASES ALREADY DIGESTED IN PREVIOUS MONTHLY PARTS OF 1938 (*I.E.*, JANUARY TO AUGUST) AND ALSO IN 1937 ANNUAL PART.

L.R. INDIAN APPEALS.

65 *I.A*			Col. of Digest.
132	1938,	March.	96
137	„	April.	102,103
150	„	„	73
158	„	May.	46,47,57,111
182	„	June.	17,18
198	„	July.	16,56
213	„	„	57
219	„	„	28,60
236	„	„	43,45
252	„	Aug.	11,46
263	„	June.	30,59,92
286	„	July.	45,72

ALLAHABAD LAW JOURNAL.

(1938) A.L.J.			
617	1938,	Aug.	82
638	„	„	80
644	„	„	24,41,42
670	„	„	35,47
715	„	„	44

ALLAHABAD WEEKLY REPORTER.

(1938) A.W.R. (P.C.)			
163	1938	July.	43
(1938) A.W.R. (H.C.)			
404	1938,	Aug.	44
407	„	„	84
408	„	„	24,38,61,81
415	„	„	80
417	„	„	82
426	„	„	26
431	„	July.	25,41

I.L.R. BOMBAY SERIES.

(1938) Bom.			
259	1938,	March.	33
263	„	„	30
273	„	Aug.	58
280	„	March.	115
292	„	May.	69
301	„	March.	122
327	„	May.	33
331	„	„	49
357	„	„	49

BOMBAY LAW REPORTER.

40 Bom. L.R.			
697	1938,	March.	115
700	„	„	15
704	„	„	78,102
713	„	„	12,52,67,71,123
724	„	„	69,128,136
731	„	„	65
735	„	„	13,105
742	„	„	64
746	„	„	48,52,89,123
752	„	„	96

BOMBAY LAW REPORTER—(*Contd.*)

40 Bom. L.R.			Col. of Digest.
755	1938,	March.	107
758	„	„	85
760	„	„	25,26,93
767	„	April.	109,122,123
780	„	„	73
787	„	May.	46,47,57,111
799	„	June.	30,59,92
811	„	„	17,18

I.L.R. CALCUTTA SERIES.

(1938) 2 Ca			
1	1938,	Febr.	9,12,77
14	„	April.	36
22	„	March.	65
30	„	June.	28
41	„	Aug.	5
52	„	March.	148
60	„	„	125
64	„	April.	51
72	„	March.	48,52,89,123
81	„	April.	29,84
85	„	„	16
103	„	„	49,50

CALCUTTA LAW JOURNAL.

67 C.L.J.			
338	1938,	June.	28
350	„	July.	28,60
363	„	„	6,13
380	„	Aug.	2
421	„	July.	49
429	„	June.	25
442	„	July.	43
456	„	„	45,72
473	„	„	20
484	„	Aug.	5
488	1937.		290,443,445
506	1936.		792
521	1938,	April.	63,80,119
527	„	„	123
540	„	Aug.	11,46

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42 C.W.N.			
985	1938,	March.	48,52,89,123
989	„	April.	102,108
992	„	March.	16
1013	„	Aug.	11,46
1018	„	„	59
1021	„	July.	41
1040	„	„	34

I.L.R. LAHORE SERIES.

(1938) Lah.			
313	1938,	July.	57
318	„	March.	75
332	„	„	126
336	„	April.	115

I.L.R. LAHORE SERIES—(*Contd.*)

(1938) Lah.			Col. of Digest.
341	1938,	April.	113
345	,,	,,	61
347	,,	May.	49
352	,,	June.	56
374	,,	Febr.	28
377	,,	,,	32
379	,,	,,	109

PUNJAB LAW REPORTER.

40 P.L.R.			
692	1938,	July.	18,55
693	,,	,,	39
721	,,	,,	55
722	,,	,,	55
728	,,	,,	36
730	,,	,,	63
738	,,	,,	41
740	,,	,,	16,56
746	,,	,,	28
748	,,	,,	37
749	,,	,,	73
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755	,,	,,	19,27
758	,,	,,	69
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763	,,	,,	51
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779	,,	,,	68
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578	,,	,,	40
586	,,	,,	87
598	,,	May.	42
609	1937.		1063
621	1938,	March.	77
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633	,,	,,	93
636	,,	,,	147
639	,,	April.	107

MADRAS LAW JOURNAL.

(1938) 2 M.L.J.			
81	1938,	Febr.	51
95	,,	,,	164
108	,,	May.	56
112	,,	June.	86,89
115	,,	July.	43
135	,,	April.	31
137	,,	,,	41
152	,,	Aug.	26
156	,,	,,	18
160	,,	June.	36
161	,,	April.	107
165	,,	March.	128
169	,,	July.	45,72
179	,,	April.	110
186	,,	Aug.	14,25,44
210	,,	July.	28,60
222	,,	Aug.	29,31
225	,,	,,	31
228	,,	,,	11,46
234	,,	July.	41
239	,,	Aug.	59

MADRAS WEEKLY NOTES.

(1938) M.W.N.			Col. of Digest.
682	1938,	Aug.	67
699	,,	April.	61,66,96,138
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714	,,	,,	43,55
736	,,	June.	91
742	,,	Febr.	91
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748	,,	,,	46
751	,,	,,	59
753	,,	July.	45,72
757	,,	,,	16,56
762	,,	Aug.	77
766	,,	July.	41
768	,,	Aug.	62
769	,,	,,	37
774	,,	,,	39
781	,,	Febr.	142
820	,,	Aug.	41
822	,,	June.	38,74

LAW WEEKLY.

48 L.W.			
47	1938,	July.	43,45
57	,,	Aug.	59
62	,,	,,	11,46
66	,,	July.	41
70	,,	Aug.	46
74	,,	,,	58
76	,,	April.	43,124
81	,,	Aug.	67
115	,,	March.	63
119	,,	April.	123,125
123	,,	July.	57
127	,,	Aug.	39
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146	,,	,,	69
149	,,	,,	32
150	,,	,,	32
153	,,	Febr.	50
163	,,	April.	10
170	,,	June.	37,54,80,81
237	,,	Aug.	33,73
244	,,	April.	31
246	,,	Aug.	74
248	,,	,,	30
251	,,	,,	42,43

I.L.R. NAGPUR SERIES.

(1938) Nag.			
370	1938	Febr.	40
377	1937.		177,180
382	1938,	June.	32
395	1937.		305,449
399	1938,	Jan.	38
402	1937.		252
407	,,		180
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R. NARAYANASWAMI IYER, B.A., B.L.,

Advocate.

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"THE YEARLY DIGEST"

OF

INDIAN AND SELECT ENGLISH CASES.

I—INDIAN DECISIONS.

ACCOUNTS SETTLED—*Reopening of—Principles—Settlement between person who has just come of age and person in fiduciary position—Duty of latter—Former dispensing with production of accounts and taking gross sum as balance after taking competent advice—Right to reopen.*

If persons meet and agree not to asc ... balance due on accounts, but agree to t... as the balance, which one is willing ... other is content to receive, it is obvio... duction of vouchers is entirely out of ... the very object of the parties is to avoid the necessity for producing these vouchers. But when one of the parties to the transaction has just attained the bare age of majority, and the other party stands in a fiduciary relationship, the Court will jealously watch such a transaction, and it is the duty of the party standing in fiduciary relationship to make a full disclosure of the state of the account. The latter must affirmatively prove that the weaker party was a free agent and had independent and disinterested advice. Where it is established that the weaker party had competent and independent advice, and that there was neither importunity nor persuasion on the part of the other party, who was prepared to produce all the accounts, but that the party who had just come of age was, though young, very shrewd and dispensed with the production of the books agreeing to take a gross sum, it must be held that he has waived his right to disclosure. He cannot be permitted to repudiate the settlement afterwards and to claim that the settled accounts should be reopened. Further if he does not come to Court with clean hands, he cannot expect any sympathy from the Court. (*Venkatasubba Rao and Abdur Rahman, JJ.*) PETHAPERUMAL CHETTIAR *v.* RAMASWAMI CHETTIAR.

1938 M.W.N. 805=(1938) 2 M.L.J. 505.

ACQUIESCENCE—*Building on the land of another—Acquiescence of owner—Right of builder to remove building—Conditions.*

A party building on the land of another is allowed to ... en a *bona fide* ... g that he has ... title but was ... (*Stone, C.J. and Bose, J.*) ABDUL RAZAK *v.* SETH NANDLAL.

1938 N.L.J. 317.

ADMINISTRATION—*Preliminary decree drawn up—Further steps to be taken.*

Where a preliminary decree for administration has been drawn up, nothing more is required from the Court beyond giving directions to the administrator or the receiver or whoever it is who is in charge of the estate, as to the lines the administration ought to take; and the only other decree which can be passed in the administration is the final decree, which will declare that the estate had been administered and which will allot out of the assets remaining in the hands of the ...

... CHETTIAR *v.* KO MAUNG GYI.

A.I.R. 1938 Rang. 372.

ADVERSE POSSESSION—*Essentials—Continuous possession—What is.*

In order to give title as against the rightful owner, adverse possession must, among other things, be continuous. Overt acts of possession are only evidence from which adverse possession has to be inferred. Merely because the acts are separate, it does not follow the possession was not continuous. There is a difference between cessation of user and cessation of possession and the one does not necessarily lead to the other. Where for more than the statutory period, the adverse possessor not only treated the disputed land as his own but intended to exclude the others including the rightful owner from possession, and whenever an occasion arose it was the adverse possessor who exercised possession and not the rightful owner, the facts give rise to an inference of title by adverse possession in spite of the gaps in the evidence as to acts of possession during the aforesaid period. (*S.K. Ghose and Patterson, JJ.*) BHABANI PRASANNA LAHIRI *v.* MANINDRA CHANDRA ROY.

42 C.W.N. 1209.

——Interruption—Attachment—Twelve years' possession not complete on date of attachment of *property*—Effect—Suit by claimant after expiry of twelve years—Plea by adverse possession—Sustainability. *See* C. P. CODE, O. 21, R. 63. (1938) 2 M.L.J. 430.

——*Landlord and tenant—Death of a tenant at will—Suit against son for possession—Plea of adverse possession—Starting point.*

In the case of a tenancy at will, the possession of the tenant becomes that of a wrongdoer as soon as the tenancy terminates. Where such a tenant died and the landlord sued his son it was held that the tenancy was not heritable and that the son's possession was nothing better than that of a wrongdoer's and he had the right to prescribe for any title open to him. (*Stone, C.J. and Bose, J.*) ABDUL RAZAK *v.* SETH NANDLAL.

1938 N.L.J. 317.

AGRA TENANCY ACT (III OF 1926), S. 4 (d)—*Land if 'sir'—Test.*

AGRA TENANCY ACT (1926), S. 15.

Unless a plot of land is recorded as *khudkasht* in 1333 F. it cannot become '*sir*' under S. 4 (*d*) of the Agra Tenancy Act. (*Darling, S.M. and Marsh, J.M.*) SARBESHWARI DEBI *v.* HARNAM SINGH.

1938 R.D. 661.

——S. 15 (3)—*Surrender by mortgagor of ex-proprietary rights—Awarding of ex-proprietary rights by S.D.O. in spite of surrender—Remedy, if can be had under correction section of Land Revenue Act or by regular suit.*

Where though a mortgagor had surrendered his ex-proprietary rights, nevertheless the S. D. O. rightly or wrongly awards ex-proprietary rights, it cannot be abrogated by summary proceedings under the correction sections of Land Revenue Act. Any party who wishes to question those rights must have recourse to a regular suit. (*Darling, S.M. and Mehta, J.M.*) LAKHPAT SINGH *v.* UMRAO SINGH.

1938 A.W.R. (B.R.) 294.

——S. 24—*Widow leading immoral life—If entails loss of rights.*

Where after the death of an ex-proprietary tenant, his widow was leading a loose life and had a child, on an application by the mother of the deceased tenant to have her name recorded in the *Khatauni* in the place of her son's widow, it was held that in the absence of re-marriage it could not be done and that the law only penalised re-marriage and not living in sin by a widow. (*Darling, S.M. and Mehta, J.M.*) MST. MURTI *v.* MST. JEO.

1938 A.W.R. (B.R.) 298.

——S. 37—*Transfer contrary to—Suit for ejectment—Forum.*

Where area of the fixed rate tenancy is held by a single individual without any co-tenant, a transfer by him of portions of his holding is clearly contrary to S. 37 of the Tenancy Act which only allows a division in two particular cases. Hence the suit for ejectment under S. 82 or for injunction under S. 88 (3) would lie in the Revenue Court. (*Sound and Verma, JJ.*) KASHI KAHAR *v.* ASHARFI SINGH.

1938 A.L.J. 720 = 1938 A.W.R. (H.C.) 522 = 1938 R.D. 714 = A.I.R. 1938 All. 511.

——Ss. 82 and 88—*Illegal subletting—Ejectment—Discretion.*

Where there has been illegal subletting in favour of the members of the family, which is a typical agriculturist family, in a suit for ejectment, a proper exercise of discretion would be to allow the tenant to eject the sub-lessees under S. 88 of the Tenancy Act. (*Darling, S.M. and Mehta, J.M.*) BAHORAN TEWARI *v.* RAM CHANDER TEWARI.

1938 R.D. 674.

——S. 88—Benefit of section—When to be allowed. *See* AGRA TENANCY ACT, SS. 82 AND 88.

1938 R.D. 674.

——S. 123 (c)—*Declaration as to rent payable different from that entered—When justified.*

In the absence of a definite compromise, or course of conduct indicating the existence of a subsequent compromise relating the rent which was entered in the papers, no Court could be called upon to declare under S. 123 (c) of the Tenancy Act any rent to be payable which is other than the rent which is entered in the papers. (*Darling, S.M. and Mehta, J.M.*) SHARAFAT ULLAH *v.* NOOR MOHAMMAD.

1938 R.D. 746.

——S. 193—*Tenant, holding over—Status of—Planting of trees by him—If becomes a grove.*

When once the area was definitely held not to be a grove and when the tenant was ejected but was holding over, he is only a trespasser, and any plantation of trees by that person would not be recognised under the law, and what was held not to be a grove cannot be converted into a grove by the action of a trespasser. (*Mehta, J.M.*) SALIG RAM *v.* THAKUR SRI RAM SINGH.

1938 A.W.R. (B.R.) 267 (1).

AGRA TENANCY ACT (1926), S. 283.

——S. 230—*Relief falling within competence of Revenue Court—Jurisdiction of Civil Court.*

Where a landholder brings a suit that the transferee of a fixed rate tenant has no right to build a house on the ground that it does not constitute improvement, adequate relief can be granted by Revenue Court under Ss. 82 and 120 and hence only Revenue Court has jurisdiction to try the suit. (*Bennet and Verma, JJ.*) KASHI KAHAR *v.* ASHARFI SINGH.

1938 A.L.J. 720 = 1938 A.W.R. (H.C.) 522 = 1938 R.D. 714 = A.I.R. 1938 All. 511.

——S. 242—*Applicability—Court of a Small Cause Court Judge.*

A forum such as a Small Cause Court Judge has no jurisdiction at all under the Agra Tenancy Act as an appellate Court. S. 242 of that Act only refers to the Court of the District Judge and not to a Court such as the Court of the Small Cause Court Judge. (*Bennet and Verma, JJ.*) KASHI KAHAR *v.* ASHARFI SINGH.

1938 A.L.J. 720 = 1938 A.W.R. (H.C.) 522 = 1938 R.D. 714 = A.I.R. 1938 All. 511.

——S. 244—*Mixed question of law and fact—Second appeal—Question of admission to tenancy.*

The question of admission to tenancy might be interpreted as a mixed question of law and fact and as such on that ground a second appeal might be admitted. (*Darling, S. M. and Mehta, J. M.*) NAND LAL *v.* WAJID ALI.

1938 R.D. 672.

——S. 244—*Second appeal—Interference—No doubt as to identity of plot—Difference in area owing to mistake in measurement—Court being misled.*

Where there is no doubt about the identity of the plot in question, but the Commissioner was misled by the difference in the area of the plot which was due to a mistake in the measurement, his order can be set aside in second appeal. (*Darling, S. M. and Mehta, J. M.*) MADHAI SAITHWAR *v.* TULSI KEWAT.

1938 R.D. 735.

——S. 252—*Revision—Grounds—Absence of hard and fast standard as to what is an illegality or irregularity—Finding not based on evidence.*

It is impossible to lay down a hard and fast standard of what constitutes such illegality or irregularity as would justify interference. Where a Collector's finding was not based on the evidence on the record and he had entirely failed to appreciate what constituted a separate property in which a lambardar has no share, and where it is clear that to deprive the lambardar of the right to collect rents of what may be a number of small tenants on behalf of a large number of petty co-sharers would result in great confusion and difficulty to all concerned, the circumstances were held to be sufficient to warrant the Board's interference in revision. (*Darling, S. M. and Somford, J. M.*) SAHDEO *v.* RAM SARAN.

1938 R.D. 742.

——S. 255—*Lambardar—Right to sue for rent—Absence of share in patti—Onus.*

The lambardar cannot sue for rents in a patti in which he has no share, but it is for the defendant concerned to prove that his field represents a property in which the lambardar has no share. (*Darling, S. M. and Somford, J. M.*) SAHDEO *v.* RAM SARAN.

1938 R.D. 742.

——S. 268—*Applicability.*

S. 268 applies only to cases in which, if rightly instituted in a Civil or Revenue Court, an appeal lies to the District Judge according to law and cannot consistently with other provisions of the Act (S. 230 and S. 242), be

APPEAL.

applied to suits wrongly instituted in a Civil Court, in which, if rightly instituted in the Revenue Court, an appeal would have lain on the revenue side. (*Bennet and Verma, JJ.*) KASHI KAHAR *v.* ASHARFI SINGH.
1938 A.L.J. 720 = 1938 A.W.R. (H C.) 522 = 1938 R D. 714 = A I.R. 1938 All 511.

APPEAL—*Parties*—Pro forma *defendant.*

Where persons were joined in a suit as *pro forma* defendants as they did not join as plaintiffs and where no issues were framed with respect to their interest and where none of these persons are interested in the result of the litigation, such persons are not necessary parties to the appeal in that suit. (*S. K. Ghose and Patterson, JJ.*) SABITRIBAI *v.* JUGAL KISHORE.
A.I.R. 1938 Cal. 639.

ARBITRATION—*Reference by party to contract on basis of arbitration clause—Stay of Court—Party charged with fraud—Right to apply to Court for stay of arbitration proceedings.*

The Court has a discretion to stay arbitration proceedings which have been initiated by a party on the strength of an arbitration clause in the contract between the parties. When the questions at issue between the parties involve serious allegations of fraud—one of the parties going to the length of filing a criminal complaint against the other—the party who is charged with fraud has the right to ask the Court that matters which affect

BANKER AND CUSTOMER — *Relationship—Nature of—Deposits on current account—If repayable only on demand.*

Where native bankers accept dep[illegible] account on a very extensive scale from [illegible] and conduct nearly every branch of [illegible] business as it is understood in England, [illegible] is not that of mere lender and borrower but there is an implied agreement that the money is payable on demand. (*Mosely and Dunkley, JJ*) DAW HNIT *v.* ANAMALAI CHETTYAR.
A.I.R. 1938 Rang. 335.

BAR COUNCILS ACT (XXXVIII OF 1926), S. 12

—

[illegible]

———S. 12 (3)—*Complainant—Right to be heard.*

Sub-S. (3) of S. 12 of the Bar Councils Act cannot be intended to exclude the right of the Court to hear any person other than the persons mentioned in that sub-section. It is in the power of the Court, and in any ordinary case it would be its d[illegible] ant, if he so desires. (*Rankin [illegible] Buckland, JJ.*) ABINASH [illegible] KUMAR.

———S. 12 (5)—*Assessment of costs.*

In a case where the complainant was unsuccessful before the tribunal whose findings were confirmed by the Court, the complainant was ordered to pay the costs of the Advocate both in the enquiry before the tribunal and

BENG. LAND REV. SALES ACT (1859), S. 2.

BENAMI—*Nature of transaction—Title of benamidar.*

Where a transaction is once made out to be a mere *benami*, it is evident that the benamidar absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested, and the title to the property is with the latter. (*Rowland and Varma, JJ.*) SHEO GOBIND KOERI *v.* RAM ASRAY SINGH.
19 Pat.L.T. 697.

BENGAL AGRICULTURAL DEBTORS' ACT (VII OF 1936), S. 34—*'Civil Court'—High Court acting as Court of appeal.*

The High Court is a Civil Court within the meaning of S 34 of the Bengal Agricultural Debtors' Act when it acts as a Court of appeal under S. 16 of the Letters Patent. (*S. K. Ghose and Patterson, JJ.*) SATISH CHANDRA *v.* NAOGAON UNION BANK, LTD.
42 C.W.N. 1216.

———S 34—*Notice issued by Board before consideration of application under S. 12—If premature.*

It is not necessary before the issue of the notice by the Board under S. 34 of the Bengal Agricultural Debtors' Act that a date and place for the consideration of the application by the debtor must be fixed under S. 12, or that notice of such date must be given to the parties and the parties heard. (*M. C. Ghose and Biswas, JJ.*) JOGESH CHANDRA *v.* MAHES CHANDRA.
42 C W.N. 1179.

———S. 34—*Stay of insolvency proceedings—Notice after adjudication order.*

[illegible]olvency proceeding, no doubt, relates to a debt. But after an adjudication order has been passed, there is no proceeding pending before the Court with regard to a debt which may form the subject of an application [illegible]tors' Act. [illegible]nsolvency [illegible]ard under [illegible]n. (*S.K. Ghose and Patterson, JJ.*) SATISH CHANDRA *v.* NAOGAON UNION BANK, LTD.
42 C.W.N. 1216.

BENGAL LAND REDEMPTION AND FORECLOSURE REGULATION (XVII OF 1806), S. 8—*Regularity of proceedings—Burden of proof.*

[illegible] in the matter of [illegible] of 1806, and a [illegible]d to show that the [illegible] with S. 8 of that [illegible] AHSAN ELAHI *v.*
40 P.L.R. 798.

BENGAL LAND REVENUE SALES ACT (XI OF 1859), Ss. 2 and 3—*12th January and 28th March fixed in tauzi ledger as latest dates in each year for payment of arrears of land revenue—Sum demanded as payable in respect of January kist not paid before 12th*

[illegible]

of revenue and the next, and is not used in the restricted meaning assigned to it in S. 2 of the Act. Thus, where in pursuance of S. 3, the Board of Revenue has, in tauzi ledger, fixed for an estate paying an annual revenue, 12th January and 28th March in each year as [illegible] f land [illegible] kist" [illegible] d end- [illegible] latest [illegible] s 12th [illegible] ayable [illegible] before

BENG. LAND REV. SALES ACT (1859), S. 6.

12th January, the date fixed for the payment of arrears, the estate becomes liable to sale, and the sale held on 22nd March after the latest date for payment of arrears, is within the jurisdiction of the Collector. (*Sir Shadi Lal.*) DINABANDHU *v.* ASHUTOSH. **176 I.C. 881= 1938 O.L.R. 384= A.I.R. 1938 P.C. 248 (P.C.).**

——**Ss. 6 and 14**—*Payment in respect of separate account after latest day of payment—Effect on sale ordered under S.* 14.

The provisions of the last paragraph of S. 6 of the Act are attracted to sales not only of the entire estate, but also of shares of estate. The payment by the defaulting proprietor of the arrears due in respect of a separate account after the latest day of payment cannot, therefore, in any way interfere with the sale ordered under S. 14 of the Act. (*Nasim Ali and Henderson, JJ.*) NIRMAL NALINI DASI *v.* RANI HARSAMUKHI DASI. **42 C.W.N. 1203.**

——**Ss. 13 and 14**—*Sale of separate account—Proceeds insufficient to liquidate arrears—Other separate accounts also in arrears—Power of Collector to order sale of entire estate before putting them to sale.*

If a separate account in arrears is put up to sale and the sale proceeds do not satisfy the arrears due thereon, S. 14 of the Bengal Land Revenue Sales Act comes into operation at once and the Collector can order the sale of the entire estate under that section without putting to sale the other separate accounts which are also in arrears. It would be useless for the Collector to put them to sale as the sale proceeds, if any, of those accounts could not be utilised to wipe off the arrears or the balance of arrears due on the separate account first exposed to sale. (*Nasim Ali and Henderson, JJ.*) NIRMAL NALINI DASI *v.* HARSAMUKHI DASI. **42 C.W.N. 1203.**

——**Ss. 31 and 13**—*Sale proceeds of one separate account—If can be appropriated towards arrears due from other separate account.*

The proceeds of sale of one separate account held under S. 13 of the Act can be appropriated only towards the arrears due from that account and not towards the arrears due from other separate account or accounts. (*Nasim Ali and Henderson, JJ.*) NIRMAL NALINI DASI *v.* HARSAMUKHI DASI. **42 C.W.N. 1203.**

BENGAL TENANCY ACT (VIII OF 1885), Ss. 6 (a) and 7—*Tenure existing from time of Permanent Settlement—Landlord's right to enhancement of rent—Method of assessment.*

If a tenure has been in existence from the time of the Permanent Settlement and enhancibility is one of its incidents, the landlord is entitled to an enhancement of rent under Cl. (*a*) of S. 6 of the B. T. Act. If there has not been any contract between the parties to regulate the principle on which or the amount by which, the enhencement is to be given, the case would come within either of the two methods of assessment of rent prescribed in S. 7 of of the Act, notwithstanding the fact that the tenure was in existence from the time of the Permanent Settlement. But if there was a contract between the parties regulating the amount of enhancement or the principle of enhancement, that contract must be given effect to and the two methods of assessment indicated in S. 7, which section is expressly made subject to any contract between the landlord and the tenant, would not be the proper methods to apply. (*R. C. Mitter, J.*) SREEMANTA NARAYAN SARKAR *v.* MAHARAJA SRISH CHANDRA NANDI. **68 C.L.J. 120.**

——**S. 26-F (3)**—*Transferee of occupancy holding—If entitled to be paid mortgage debt due to himself.*

A transferee of an occupancy holding who is also a mortgagee of that holding is not entitled under S. 26-F

BIHAR TENANCY ACT (1885), S. 171.

(3) of the B. T. Act to be paid his unpaid mortgage debt. If he wishes to enforce his mortgage, he must do so by a proper suit in the ordinary Courts. (*Henderson, J.*) BENOY KUMAR *v.* SK. EAKUB. **42 C.W.N. 1110.**

BERAR LAND REVENUE CODE (1928), S. 102—*Powers of Deputy Commissioner—Reduction of nazul ground rent.*

S. 102 of the Berar Land Revenue Code only gives the Deputy Commissioner, powers to interfere to correct an error due to a mistake in survey or arithemetical calculation. Reduction of *nazul* ground rent cannot come under the section. (*Roughton, F.C.*) UMAR HAJI, *In re.* **1938 N.L.J. 316.**

BIHAR TENANCY ACT (VIII OF 1885) (as amended in 1934), S. 26-N—Scope and effect of—Decree for rent against tenant before coming into force of amended Act—Execution after amended Act—Right of mortgagee under S. 171—If lost. *See* BIHAR TENANCY ACT, S. 171. **1938 P.W.N. 654.**

——**Ss. 38 and 52**—*Scope—Lands in Sonthal Parganas—Abatement of rent on diluvion—Right of tenants—Claim based on contract instead of on law—Failure to prove contract—If bar to relief.*

It has always been held to be the law that a tenant, whether he be an occupancy *raiyat* or otherwise, is entitled to an abatement of rent if the whole or part of the land held by him is diluviated. Ss. 38 and 52 of the Bihar Tenancy Act make this clear, so far as Bihar is concerned. S. 52 is wider than S. 38 in terms, the latter section being applicable to the case of a tenure-holder Lands in Sonthal Parganas are no exception to this rule. The fact that the tenants fail to establish or prove a contract to that effect on which they rely would not in any way prevent their getting the relief to which they are entitled under the law, though they might base their claim on the contract and not on the general law. (*Wort and Agarwala, JJ.*) FOUZI LAL KURMI *v.* DHANA KUMARI DEVI. **19 Pat.L.T. 658.**

——**S. 171**—*Applicability—Rent decree against tenant—Subsequent coming into force of S. 26-N of amended Act—Effect—Decree—If ceases to be rent decree—Execution—Right of mortgagee to benefit of S.* 171.

Where a suit properly framed as a suit for arrears of rent under the Bihar Tenancy Act is instituted and a decree executable under the Act as a rent decree is passed, the fact that S. 26-N of the amended Act comes into force between the signing of the decree and its execution does not make the decree anything other than a rent decree. The fact that under S. 26-N of the amended Act, the landlord must be deemed to have given his consent to transfers made prior to 1923, and to the distribution of rent upon which the transferor and the transferee had agreed, and that thereby the decree in effect at the time of execution affects two holdings, is no ground for holding that the decree is not a rent decree. The new S. 26-N, no doubt confers new rights on purchasers, but the decree remains a rent decree and for purposes of execution the parties are governed by the Bihar Tenancy Act. S. 171 of the Bihar Tenancy Act can therefore be applied to the decree in execution, and a usufructuary mortgagee of the holding can avail himself of the provisions of S. 171. (*James, J.*) SITAL SINGH *v.* RAMJI PRASAD. **1938 P.W.N. 654.**

——**S. 171 (e)**—*Rent decree—Execution—Usufructuary mortgagee paying off balance of decree amount and getting possession of holding—Right of judgment debtor to recover possession of holding from mortgagee.*

Where a usufructuary mortgagee of a holding which was advertised for sale in execution of a rent decree has

BIHAR TENANCY ACT (1885), S. 193.

stepped in and obtained possession of the holding under S. 171 of the Bihar Tenancy Act on his paying off the balance of rent due under the rent decree, a judgment-debtor who desires to recover possession from the mortgagee must pay off the amount which the mortgagee has paid. On such payment, he would be entitled to recover possession of so much of the holding as has no been alienated by himself or his purchasers. (*James, J.*) SITAL SINGH *v.* RAMJI PRA

——S. 193 and Sch. III, .
bility—Money reserved under settlement in respect of right to cut grass—Suit for—Limitation.

The rights to which S. 193 of the Bihar Tenancy Act relates are rights which do not create the relationship of landlord and tenant. A right in respect of pasturage, whether it be an actual grazing or cutting of grass, falls within S. 193, for whatever purpose it may be used. The period of limitation for a suit to of money reserved under a settlement grass is that prescribed by Sub Cl. of the Act. (*Wort, A C.J. and* KAMESHWAR SINGH BAHADUR *v.* I

BOMBAY CO-OPERATIVE S (VII OF 1925), S. 59 (1) (b)—Co —If "Court"—Proceedings under- execution. *See* LIMITATION ACT, A

BOMBAY PUBLIC CONVEYANCES ACT (VII OF 1920), S. 24—*Applicability—Ingredients of offence under.*

To convict an accused under S. 24, it is not sufficient merely to show that the accused is a licensee of a public conveyance and that he permitted it to be driven by a driver who is not licensed; it must be shown that when

pose of private conveyance. (*Davis, J. C. and Lobo, J.*) BHOJRAJ PHEROOMAL *v.* ABDUL WAHEED.
A.I.R. 1938 Sind 190.

forms—Distinction—Intention—Proof — Duty of a judge.

The dividing line between keitt apatitha adoption must be the ques inherit: and it is clear that that inten effect to in such a way as to secure notoriety or attention. It cannot be of keittima adoption should be consu established upon oral evidence a Judge has to do is to see whether fr

BUDDHIST LAW (Burmese).

ary or circumstantial evidence, from all the different elements at his disposal, he can infer that intention and that notoriety which the law demands as being consistent with keittima adoption and keittima adoption alone. (*Roberts, C.J. and Braund, J.*) MA PU TU *v* MAUNG BA SIN. A.I.R. 1938 Rang. 369.

do so the proof of adoption should be deemed incomplete yet in the case of young children it is a normal characteristic of adoption that the up-bringing of the children adopted should be undertaken by the adoptive parents and where this is not done, one must look carefully at the surrounding circumstances to see whether, when the normal characteristics have been departed from, there is still sufficient

the family of their natural parents and join the family of their adoptive parents, and, consequently, in a case of a keittima adoption it is essential that the adoptive parents should, from the date of the adoption, make themselves responsible for the up-bringing of the children. (*Roberts, C. J. and Dunkley, J.*) U BA THAUNG *v.* DAW OO, A.I.R. 1938 Rang. 381.

of one parent children taking m in respect of having children taking his share the lettetpwa or

Under the Burmese Buddhist law a child who takes his share in the estate of his parents after the death of one parent and upon the re-marriage of the surviving

re-marriage after the death of their father. After D's death the representatives of M brought a suit for half of

BURDEN OF PROOF.

taken away the share in the atetpa property upon the remarriage of *D.* Hence *M's* representatives were entitled to the entire half share in the lettetpwa or hnapazon property of *U* and *D.* (*Mackney, Mya Bu and Spargo, JJ.*) MAUNG PO ZAW *v.* MAUNG AN.
A.I.R. 1938 Rang. 376.

BURDEN OF PROOF—Suit on promissory note—Denial of execution and consideration by defendant—Plaintiff proving execution—Effect—Further proof of consideration by plaintiff—Necessity. *See* NEGOTIABLE INSTRUMENTS ACT, S. 118. **1938 P.W.N. 634.**

CALCUTTA POLICE ACT (IV OF 1886), Ss. 44 and 3—*Keeping common gaming house—Liability of unauthorised book-maker—Proof of profit apart from profits of betting—If necessary.*

It is forbidden by law to keep a book and to receive bets on horse-racing outside the enclosure of the race course. If a person takes a room outside the race course and receives bets from any one who comes to him and in fact makes himself an unauthorised book-maker, he would come under the mischief of keeping a common gaming house as defined in S. 3 of the Calcutta Police Act. In such a case, it would not be necessary to show that he, as an unauthorised book maker, was making any profit beyond what he made by his book-making. (*M.C. Ghose, J.*) KALI CHARAN *v.* S. K. BRAHMACHARI. **42 C.W.N. 1232.**

CENTRAL PROVINCES DEBT CONCILIATION ACT (II OF 1933), S. 8 (1) and (2)—*Ambiguity in notice under S. 8 (1)—Statement filed within date fixed by notice but beyond two months prescribed—Effect—S. 8 (2) if comes into operation.*

Where a notice issued under S. 8 (1) of the Debt Conciliation Act required the creditor to file his statement within two months from the date of the service of notice and at the same mentioned the date within which he was to do it, which was clearly beyond the two months mentioned in the earlier portion and where a tement was filed within the date mentioned it was held that the statement was filed within time and that the action of the Board must be taken to be in effect a condonation of the delay coming under the proviso to S. 8 (1) and hence there was no scope for S. 8 (2) to come into operation and treat the debt as discharged. (*Clarke, J.*) SANGAI ANAND KUMAR *v.* HAR NARAYAN. **1938 N.L.J. 296.**

———**S. 15 (3)**—Effect on surety—Remedy against principal debtor. *See* CONTRACT ACT, SS. 134 AND 139. **A.I.R. 1938 Nag. 413.**

CENTRAL PROVINCES LAND REVENUE ACT (II OF 1917), S. 157—*Failure of co-sharer lambardar to pay Sadar lambardar—Payment by him to Government—Recovery under S. 157—Remedy of patti lambardar.*

Where a patti lambardar who held her share free from assessment, failed to collect and pay the land revenue to the Sadar lambardar, and the sadar lambardar paid it and on application to the Tahsildar under S. 157, recovered the amount from the patti lambardar, her remedy is not by a suit against the Sadar lambardar for it would not be maintainable; but to sue the other co-sharers for their share of the land revenue or to apply to the Thasildar to recover it for her or to sue the sadar lambardar for her share of village profits. (*Pollock, J.*) THAKURSINGH *v.* MST. PARWATIBAI. **1938 N.L.J. 292.**

———**Ss. 187 and 188**—*Scope of—Respective duties of lambardar and sadar lambardar.*

S. 187 of the C. P. Land Revenue Act, lays a primary responsibility on the sadar lambardar to collect

C. P. CODE (1908), S. 2.

the land revenue from the lambardars and pay it to government, though his ultimate responsibility may be no more and no less than that of other co-sharers who are all jointly and severally liable for the entire land revenue of the village. Under S. 188 (1) it is the duty of every lambardar to collect and pay to the sadar lambardar so much of the land revenue as may be payable through him. (*Pollock, J.*) THAKURSINGH *v.* MST. PARWATIBAI. **1938 N.L.J. 292.**

———**S. 218 (4)**—*Deputy Commissioner's power to refer to Civil Court for making award—Limits.*

S. 218 (4) of the C. P. Land Revenue Act requires that the compensation shall be calculated by the Deputy Commissioner (or if necessary by the Civil Court) as nearly as may be in accordance with the provisions of the Land Acquisition Act. It does not require that the provisions of that Act shall be strictly followed. A reference by him to a Civil Court of the question of the amount to be awarded is within his powers. (*Roughton, H.M.*) HANUMANTRAO *v.* CHOUBEY MADAN MOHAN. **1938 N.L.J. 326.**

———**S. 218 (5)**—*Order to furnish security prior to entering on land—If legal.*

S. 218 (5) of the C. P. Land Revenue Act requires the Deputy Commissioner's sanction to be given before land can be entered upon prior to payment of compensation and as such it is open to him to attach any reasonable condition as to security, to the sanction given. (*Roughton, H.M.*) HANUMANTRAO *v.* CHOUBEY MADAN MOHAN. **1938 N.L.J. 326.**

CENTRAL PROVINCES MUNICIPALITIES ACT (II OF 1922), S. 48—*Applicability—Enhancement within powers but procedure irregular—Suit to recover tax collected.*

It is true that if a Municipal Committee exercises powers which it did not possess, it should not be regarded as acting in pursuance of the statute governing its powers, and its acts should not be regarded as being those done under the statute. But there is a difference between a case when a corporate body exercises a power which is wholly absent and a case where it has power but it exercises it illegally or with material irregularity. In the former case the Municipal Committee's act from beginning to end is illegal; whereas in the latter case the act is quite legal in the beginning but becomes illegal in the end. Where the Municipal Committee has power to enhance the tax on animals brought to slaughter-house and follows the procedure laid down in S. 68, C. P. Municipalities Act, but in doing so it lapses into an irregularity, namely omission to consider the objections filed by the butchers, the Municipal Committee is certainly exercising, although irregularly, the power conferred on it by S. 68 and to that extent the Municipality is acting under the statute. Hence, the suits to recover amounts collected in excess of lawful rate are governed by S. 48 and if not filed within six months are barred by time. (*Niyogi, J.*) AMRAOTI TOWN MUNICIPAL COMMITTEE *v.* BHIKAN SHEKH. **A.I.R. 1938 Nag. 455.**

CIVIL PROCEDURE CODE (V OF 1908), S. 2 (2)—*Preliminary decree—What amounts to—Partition decree.*

Where a compromise provided for a division of the property according to the respective share of the parties as per their degree of relationship and in effect not only declared the rights of the several parties in the property, but also required further proceedings to be taken before the plaintiffs could get the relief claimed, it was held that it amounted to preliminary decree of partition. (*Zia-ul-Hasan and Yorke, JJ.*) CHINTAMANI TEWARI *v.* BHAGIRATHI. **1938 O.A. 688.**

C. P. CODE (1908), S. 11.

——S. 11—*Causes of action different—Decision when may become* res judicata.

Section 11 does not require that the causes of action in both the suits should be the same for the application of the rule of *res judicata*. The causes of action may be different or the subject matter may be different, but if the issue involved in both the cases is the same and if it was directly and substantially in issue in the former case between the same parties or between parties under whom they or any of them claim, litigating under the same title, the decision of such an issue in the former case will operate as *res judicata* provided the other conditions laid down in S. 11 are satisfied. (*Stone, C.J. and Puranik, J.*) SITABAI *v.* HARI. A.I.R. 1938 Nag. 401.

——S. 11—*Directly and substantially in issue—Point not raised in pleadings—Parties joining issues—Decision, if* res judicata.

Where though a point is not properly raised by the plaint but both parties have without protest chosen to join issue upon that point, the decision on that point would operate as *res judicata* between the parties. (*Stone, C.J. and Puranik, J.*) SITABAI *v.* HARI. A.I.R. 1938 Nag. 401.

ground of limitation at next date of hearing—Maintainability.

rule was issued for attaching the property fixing another date. On that date the judgment-debtor appeared and made an objection that the execution was barred by limitation. He was then within time to appeal against the order passed on the date fixed for his appearance and also to file a petition for review.

Held, that the Court was within its jurisdiction to entertain the objection on the gound of limitation and that the rule of constructive *res judicata* did not apply to the facts of the case. (*Costello and M.* BAIDYANATH SIL *v.* BEJOY CHANDRA [illegible]

——S. 11—*Litigating under same* [illegible] *against widow and attachment—Suit by donee who was also reversioner—Decision as to legal necessity—Subsequent suit as reversioner to set aside sale—If* res judicata—*Divisible cause of action—Extent of bar.*

[illegible]

the debts were without legal necessity was held to be barred by *res judicata*. It was further held that if it was possible to treat the entire cause of action upon which the later suit was founded as divisible and if in the earlier suit one of the component parts cause of action was relied on, then the previous [illegible] would stand as a bar to the extent of the matter [illegible]

C. P. CODE (1908), S. 47.

in the earlier suit. (*Stone C.J. and Puranik, J.*) SITABAI *v.* HARI. A.I.R. 1938 Nag. 401.

——S. 11—*Might and ought—Available defence not raised*—Res judicata.

Where a person fails to plead a matter in defence in a previous suit, he is barred by *res judicata* from raising the same matter as subject matter in a subsequent suit. (*Bennet, Ag.C.J. and Verma, J.*) KANHAIYA LAL *v.* BANKE BEHARI. A.I.R. 1938 All. 542.

——S. 11, Expl. 4—*Previous suit by plaintiff's predecessors claiming partition of whole shamilat—Subsequent suit by plaintiff claiming that certain well and land in shamilat was not liable to be partitioned—If barred by* res judicata.

A suit was instituted by the plaintiff's predecessors in which they claimed that entire shamilat was liable to be partitioned. A subsequent suit was brought by the plaintiff to the effect that certain well and land in the shamilat should be excluded from partition.

Held, that this plea ought to have been raised and made a ground of attack in the previous suit by the plaintiff's predecessors. As it was not so raised, the subsequent suit was barred under Expl. 4 to S. 11. (*Addison and Abdul Rashid, JJ.*) MEHAR LANGAH A.I.R. 1938 Lah. 671.

[illegible]ality—'Other proceeding' if [illegible] Encumbered Estates Act—[illegible] if comes under Sub-S. (1) (iii).

[illegible] transfer contained in Sub-S. (1) (*iii*) of S. 24 is sufficient to cover the retransfer of the decided case, back to the Special Judge from whose Court it was originally transferred. (*Yorke, J.*) GOVIND PRASAD *v.* MUSTAFA BEGAM. 1938 A.W.R. (O.C.) 77 = 1938 O.L.R. 382 = 1938 O.A. 621 = 1938 O.W.N. 775.

——S. 44—Notification under—Decree of Native

[illegible]

A.I.R. 1938 Rang. 362.

——S. 47—*Bar of suit—Judgment debtor executing trust deed for benefit of creditors appointing plaintiff as trustee—Plaintiff added as party but not substitut-* [illegible]

[illegible] No notice [illegible] aware of [illegible] parties were [illegible] and were purchased by the defendants who obtained delivery of possession through Court. The plaintiff instituted a suit [illegible] his title was not in any way [illegible] by the [illegible] which the defendants purchased [illegible] possession. [illegible] not a [illegible] suit in [illegible] decree was

C. P. CODE (1908), S. 47.

obtained did not relate to any property and the trust was created before attachment, that the question of the plaintiff being the representative of the judgment-debtor was neither raised nor determined in the execution proceedings and that, therefore, the suit was not barred under S. 47, C. P. Code. (*Nasim Ali and Henderson, JJ.*) HIMANSU KUMAR *v.* HASEM ALI KHAN. **42 C.W.N. 1131.**

———S. 47 and O. 32, R. 1—*Executing Court—Powers of—Validity of decree—Power to question—Case of no jurisdiction—Dismissal of suit on behalf of alleged minor with costs—Plaintiff really a major—Procedure to be followed—Decree for costs—If executable.*

Ordinarily a Court executing a decree cannot go behind the decree and has no power to entertain any objection as to the validity of the decree or as to legality of the character of the decree, but that is only true in a case when the Court passing the decree had got jurisdiction to pass it; but where the Court passing the decree was inherently incompetent to pass the decree and had absolutely no jurisdiction to pass it, its decree is a nullity and no question of validity of the decree arises in such a case. Where a suit is brought by guardian on behalf of an alleged minor, the Court which was dealing with such a case if it found that the plaintiff had attained majority more than three years prior to the suit, has no jurisdiction to proceed with the suit as it was not properly brought and should have either dismissed it, or allowed the plaintiff to amend the plaint and file it as major. But without doing so, if the Court dismisses the suit with costs, the decree, for costs against the plaintiff, cannot be executed as the Court has no power to pass a decree against the plaintiff who strictly was no party to the proceedings before it. Costs ought to have been awarded against the guardian. (*Zia-ul-Hasan and Yorke, JJ.*) SURAJ BAKHSH SINGH *v.* PHALDAN SINGH. **1938 O.A. 612= 1938 O.L.R. 369=1938 O.W.N. 779.**

———Ss. 47 and 68—*Executing Court—Transfer to Collecter for execution—Objection to sale on ground of fraud—To which Court to be made.*

S. 68, C. P. Code, does not state that the Collector shall become the Court executing the decree. The Court executing the decree remains the Court which sends the decree for execution to the Collector and the powers conferred by the C. P. Code on the Court executing the decree remain with that Court and do not pass to the Collector. Hence the question whether a sale in execution of a decree was brought about by fraud, being a question relating to execution, discharge or satisfaction of a decree within the meaning S. 47, C. P. Code, can be entertained by an executing Court even though the decree had been transferred to the Collector under S. 68, C. P. Code, and the sale had been confirmed. (*Thomas, C. J. and Zia-ul-Hasan, J.*) RADHA RAWAN PRASAD *v.* RAJENDRA PRASAD. **1938 O.A. 598=1938 O.L.R. 371= 1938 O.W.N. 758=A.I.R. 1938 Oudh 188.**

———S. 47—Scope—Question whether decree is in contravention of Santhal Paraganas Settlement Regulation and as such invalid—If can be raised in execution. *See* SANTHAL PARGANAS SETTLEMENT REGULATION, S. 6 (*b*). **1938 P.W.N. 617.**

———S. 50 and O. 22, Rr. 11 and 12—*Relative scope of—S. 50, if applies to appeals from execution proceedings—O. 22, R. 11, if applies—And if controlled by R. 12.*

It is because of the special provision in S. 50 C. P. Code, that R. 12 of O.22 excludes the execution proceedings from the operation of Rules 3, 4 and 8 of that Order. R. 12 of O. 22 must therefore be construed as referring only to the proceedings in the executing Court and not to those in the appellate Court which hears appeals from execution proceedings. S. 50, C. P. Code does not apply to appeals arising from execution proceedings but only to those in the original Court. It is not correct to say that R. 11 of O. 22 is controlled by R. 12 of the same order. There is no reason why R. 11 of O. 22 should not apply to an appeal under S. 47, C. P. Code, as the C.P.Code does not make a distinction between appeals arising from execution proceedings and those preferred against decrees. (*Stone, C.J. and Niyogi, J.*) MADHORAO *v.* BALIRAM. **1938 N.L.J. 312.**

———S. 65—*Property purchased by auction-purchaser Date of vesting—Proceedings by judgment-debtor in connection with confirmation of sale—Effect of.*

Where a person purchases certain property in a Court auction held in execution of a decree and the sale is subsequently confirmed in his favour, the property vests in him from the date of confirmation of sale, whatever proceedings may be taken in connexion with the confirmation of the sale by the judgment-debtor whose property is sold. The vesting of the property in auction-purchaser is not postponed till the final decision of the proceedings started by the judgment-debtor. (*Mir Ahmad, J.*) RAM DITTA MAL *v.* CHARAT SINGH. **A.I.R. 1938 Pesh. 49.**

———S. 68—Transfsr to Collector for execution—Effect—Objection to sale—To which Court to be made. *See* C. P. CODE, SS. 47 AND 68—EXECUTING COURT. **1938 O.W.N. 758.**

———S. 73—*Applicability—Decree of Small Cause Court—Execution—Court of Small Causes attaching salary of judgment-debtor and realizing money—Other decree-holders subsequently applying to High Court for execution—Attachment of salary—Garnishee sending monthly instalment to High Court—Former decree-holder applying to High Court for rateable distribution —Right of.*

Certain decree-holders applied for execution of decree in a Court of Small Causes, their decrees being of that Court. The Small Cause Court attached the salary of the judgment-debtor and money was actually being realized by the Court. Subsequently other decree-holders holding decrees against the same judgment-debtor, having applied to the High Court for execution by attachment of the salary of the judgment-debtor, the garnishees began to send the monthly instalments to the High Court and discontinued sending instalments to the Small Cause Court. Thereupon the decree-holders executing their decrees in the Court of Small Causes filed their application for execution in the High Court. It was contended that they were not entitled to rateable distribution with regard to money received prior to their applications being received in the High Court.

Held, that the decree-holders were entitled to rateable distribution along with other decree-holders in all the money received in the High Court by attachment of the salary of the judgment-debtor. (*Lobo, J.*) HINDU CO-OPERATIVE BANK *v.* MAHADEV KALIANJI. **A.I.R. 1938 Sind 175.**

———S. 80—*Notice—Contents—Alternative claim not mentioned—If can be claimed in suit.*

An alternative and a lesser claim which is not mentioned in the notice under S. 80 cannot derogate from the plaintiff's right to have the suit tried on the issue which is claimed in the notice. (*Grille, J.*) SECRETARY OF STATE *v.* NAGORAO TANKO. **A.I.R. 1938 Nag. 415.**

C. P. CODE (1908), S. 80.

——S. 80—*Object of notice—Conte... tion—Rule as to.*

The object of giving two month... Government, which is prescribed in S... Government sufficient warning of a case... to be brought against it, so that Gover... so wishes, compromise the case, or aff... it considers that the restitution is due, being had to a Court of law in which Government might be mulcted in costs. It is necessary to ... little commonsense into notices under S. 80.

When the object of the notice is plain and is achieved, and there has not been any violation of the spirit and intention of S. 80, the notice should be treated as valid notice. (*Grille, J.*) SECRETARY OF STATE *v.* NAGORAO TANKO. A.I.R. 1938 Nag. 415.

——Ss. 92 and 47—*Appeal—Orders for carrying out scheme.*

Where orders are passed merely for carrying out a scheme, they are orders in execution, and appeals lie from such orders under S. 47. (*Mosely and Dunkley, JJ.*) U PO SEIN *v.* U PU. A.I.R. 1938 Rang. 363.

——S. 99—*Applicability—Absence of both parties—Allowing of appeal on statement of person not duly accredited—If can be condoned.*

The law does not contemplate the acceptance of an appeal in the absence of the appellant unless the respondent is present and pleads judgment against himself. Where both the parties were absent, but the Court acting on the statement of a relative of the appellant who was not however his duly accredited representative and on the facts as disclosed in the evidence on record allowed an appeal, it was held that such an order should be reversed as the passing of that order is not such an irregularity as could be condoned under S. 99, C. P. Code. (*Darling, S.M. and Mehta, J.M.*) YAQUB KHAN *v.* JAGMOHAN SINGH. 1938 R.D. 745.

——S. 100—*New plea—Question of law—If can be raised.*

An order that the appeal abates not only with regard to the respondent who has died but with regard to all the respondents, comes within the definition of a decree and as such is appealable. (*S. K. Ghose and Patterson, JJ.*) SABITRIBAI *v.* JUGAL KISHORE. A.I.R. 1938 C...

——S. 102—*Applicability—Suit for money ... injunction—Second appeal.*

S. 102, C. P. Code, bars a second appeal in small sums of money, if the claim is merely to recover money. But if in addition, the suits are also, and perhaps mainly, for an injunction, a second appeal would lie and ... *Stodart, JJ.*) ... OF DEVAKOTT...

——Ss. 104 and 105 (1)—*Return of plaint for want of jurisdiction—Remand by appellate Court—Decree—Dismissal of appeal—Second appeal—Competency—Question of jurisdiction—If can be raised.*

C. P. CODE (1908), S. 115.

...'s Court the defendant ... no jurisdiction and he ... hat the Revenue Court ... e Munsif accepted this ... t to be returned to the ... proper Court. A first ... pellate Court held that ... and remanded the suit for disposal on the merits. The Munsif then decreed ... that the Civil Court had jurisdiction,

Held, that no appeal lay from the order of the lower appellate Court the first time when the jurisdiction question came before it, but that as the case had been concluded, a second appeal lay from the decree of the lower appellate Court and under S. 105 (1), C.P. Code, the question of jurisdiction could be raised in second appeal. (*Bennet and Verma, JJ.*) KASHI KAHAR *v.* ASHARFI SINGH. 1938 A.L.J. 720 = 1938 A.W.R. (H.C.) 522 = 1938 R.D. 714 = A.I.R. 1938 All. 511.

——S. 104 (2) and O. 43, R. 1—*Return of plaint—Reversal in appeal—Second appeal — Competency—Revision.*

Where an order returning a plaint for presentation to proper Court, is reversed in appeal, no further appeal lies against that order in view of S. 104 (2), C.P. Code, read with O. 43, R. 1. But as the matter is one which relates solely to the question of jurisdiction, it can be taken up in revision. (*Zia-ul-Hasan and Yorke, JJ.*) GULZARI SINGH *v.* RAM ADHIN. 1938 R.D. 723 = 1938 O.L.R. 376 = 1938 O.A. 618 = 1938 A.W.R. (C.C.) 75 = 1938 O.W.N. 801.

——S. 105 (1)—Question of jurisdiction—If can be raised. *See* C. P. CODE, Ss. 104 AND 105 (1). 1938 A.L.J. 720 = A.I.R. 1938 All. 511.

——S. 107 and O. 23, R. 1—*Applicability—Appeal—Right to withdraw—Memo. of objection by respondent—If bar to withdrawal—Power of appellate Court to ... of appeal—O. 41, R. 22 (4).*

... press provision in the Code of Civil ... withdrawal of an appeal. O. 23, ... nor is the case ... P. Code, which ... e powers of an ... es to an appeal. ... o withdraw his ... has not acquired ... there is a cross-objection by the respondent is no bar to the withdrawal in view of the provisions of O. 41, R. 22 (4). But if the respondent has obtained any right under the appeal it is not open to the appellant to withdraw his appeal without permission. The Court when granting leave ... cases, transpose ... pellant and the ... not bound to ... appellant withdraws. But it cannot be said that the appellate Court has no jurisdiction to allow the appeal to be withdrawn. (*Beaumont, C. J. ... odew, J.*) DHONDO *v.* ... 40 Bom.L.R. 895.

——... Setting aside of award ... —If a case decided. *See* C. P. CODE, S. 115—CASE DECIDED. 1938 A.L.J. 813 (F.B.).

——S. 115—*'Case decided'—Setting aside of award and supersession of arbitration—Revision—Competency.*

C. P. CODE (1908), S. 115.

A Court cannot be considered to have decided a case within the meaning of S. 115, C. P. Code, where it has set aside the award and superseded the arbitration pending a suit, which is consequently to be tried by the Court. (*Bennet, Ag.C.J., Ismail and Verma, JJ.*) GOVIND DAS *v.* INDRAWATI. **1938 A.L.J. 813= A.I.R. 1938 All. 557 (F.B.).**

——**S. 115** — *Discretionary orders — Revision— Intervention.*

Where the question relates to the exercise of discretion which is vested by law in the lower Court, except in very exceptional cases, it is not proper for a Court of revision to interfere with the way in which the lower Court has exercised its discretion. (*Varadachariar, J.*) VENKAYYA *v.* VANKATA RAO. **1938 M.W.N. 925.**

——**S. 115**—*Other remedy open—Non-interference—Limits of rule.*

High Court will not interfere in revision where there is another remedy open to the party. But the other remedy which is open to the applicant in revision must be a certain and conclusive remedy allowed by law. (*Roberts, C.J. and Dunkley, J.*) MAUNG AHMIN *v.* MAUNG SAUNG. **A.I.R. 1938 Rang. 360.**

——**S. 144**—*Application for—Order to file in record-room—Effect — Restitution application—Nature of—Course of proceedings—Applicability of Limitation Act.*

Where on receipt of an order from the High Court staying all proceedings with reference to an application for restitution, the lower Court merely directed that it should be filed for the present in the record room, it is merely an administrative order and not a judicial one. It is in no sense a final disposal of the case. An application under S. 144, C. P. Code, is a miscellaneous case and once initiated that miscellaneous case does not give rise to any application of the Limitation Act during the course of its disposal. As long as that remains pending, there is no question of the application of the Limitation Act to its proceeding. Attention of the Court that orders may be passed on the pending application, is all that is necessary and for that there can be no limitation. (*Bennet and Verma, JJ.*) RAMAKANT MALVIYA *v.* SATYA NARAIN. **1938 A.W.R. (H.C.) 542= A.I.R. 1938 All. 552.**

——**S. 149**—*Applicability—Decree on payment of court-fee—Court-fee deposited after three years—Execution of decree—Starting point—Limitation Act, Art.* 182.

Where in a suit for dissolution of partnership, a defendant is given a final decree for a certain sum on his paying the requisite court-fee, the proceedings in that Court do not become final until that Court either accepts the court-fee or holds that the claim is dismissed for non-payment of the court-fee. Until this court-fee is paid there is no decree capable of execution, and when there is no decree capable of execution limitation cannot begin to run under Art. 182 of the Limitation Act. As S. 149, C.P. Code, gives the Court absolute discretion, at any stage, to allow the person by whom court-fee is payable to pay it, its acceptance of court fee though after three years from the date of the order directing the payment of the necesssary court fee, is quite valid and time for execution of the decree begins to run only after the date when the court-fee was paid. (*Bennet, A. C. J. and Verma, J.*) BABU RAM *v.* GOPAL SAHAI. **1938 A W.R. (H.C.) 538= A.I.R. 1938 All. 539.**

——**S. 151**—*Powers under—Orders in contravention of S. 7 (1) (a) of U. P. Encumbered Estates Act—If can be set aside.*

C. P. CODE (1908), O. 2, R. 2.

Where a delivery of possession has been made in contravention of S. 7 (1) (*a*) of the U. P. Encumbered Estates Act, though an application for restitution may not come under S. 144, yet it can be set aside under S. 151, C. P. Code. (*Zia-ul-Hasan and Yorke, JJ.*) SHEO NATH *v.* MADAN MOHAN LAL. **1938 O.A. 684.**

——**O. 1, R. 3**—*Joinder of several defendants—Conditions—Suit for possession against several defendants —Different causes of action—Breaches of tenancy agreements—Trespasses—Misjoinder of causes of action— O. 2, R. 6—If applies.*

O. 1, R. 3, C. P. Code, is the rule that makes provision for what must be the exceptional case of combining in one suit separate causes of action against several defendants. But it provides that, before that ought to be done, the right to relief must arise in respect of or out of the same 'act or transaction or series of acts or transactions'. In order to qualify under this rule, the case must be one in which the issue—be it an issue of fact or an issue of law or both—against each of the defendants is substantially the same. Where a plaintiff sued as an owner for possession of property, different defendants or sets of defendants who were in possession on the ground of either breaches of tenancy agreements, or trespasses, it was held that the suit in reality was an attempt to combine in one suit different suits against different defendants in respect of different pieces of property and upon different causes of action. Separate lettings to each tenant and separate 'squatting' by each squatter did not constitute the same act or the same series of acts or transactions. It was further held that the case is not one covered by O. 2, R. 6 for that rule does not apply to cases of misjoinder of causes of action but to cases where several causes of action have been properly joined in one suit and the causes of action so joined cannot conveniently be tried together. (*Braund, J.*) DAW HLA GYI *v.* MAUNG PO THAUNG. **1938 Rang.L.R. 397.**

——**O. 1, R. 10**—*Scope—Striking out name of necessary party—Propriety—Proper procedure.*

When O. 1, R. 10, C.P. Code, provides that the Court may strike out the name of a party who has been improperly joined as plaintiff or defendant, these words have reference to the suit as framed. It was certainly never intended that the claim of a necessary party should be first tried and that his name should then be struck off the record on the ground that his claim ought to be dismissed before any decree has been passed. Such a procedure can only lead to multiplicity of proceedings. Where, therefore, several persons claiming to be owners of the equity of redemption sue for redemption of the mortgage, the Court cannot strike out the names of some of them under O. 1, R. 10, C. P. Code, on the ground that they had not been properly joined as parties to the suit. The correct procedure would be to keep the names of all the plaintiffs on the record until a preliminary decree is passed. If the Court is then of opinion that any of the claims have failed, these claims can then be dismissed as part of the preliminary decree. (*Beckett, J.*) MANOHAR LAL *v.* ROSHAN LAL. **40 P.L.R. 805.**

——**O. 2, R. 2**—Applicability—Contract of sale by instalments—Defaults—Separate suits in respect of each default—If barred. *See* SALE OF GOODS ACT, S. 38 (2). **A.I.R. 1938 Rang. 364.**

——**O. 2, R. 2 (3)**—*Leave under—When to be applied for—Grant of leave at late stage of suit—Legality of.*

Under O. 2, R. 2, C. P. Code, the omission to ask for a particular relief is not a defect that goes to the maintainability of the very suit in which leave should

C. P. CODE (1908), O. 2, R. 6.

have been asked; it only entails a disability as regards subsequent proceedings. There is no reason for insisting that the application for leave to omit must precede, or at least be contemporaneous with the first suit. It cannot be said that the C[illegible] power to grant leave unless the applicati[illegible] before the institution of the suit or alo[illegible] presentation of the plaint. The Court, [illegible] upon to deal with such an application has ordinarily to consider whether the grant of leave to reserve certain remedies would in the circumstances be appropriate in the sense that it will not give an unfair advantage to the plaintiff or impose an unfair burden on the defendant. A question of this kind can as well be dealt with [illegible]

1938 M.W.N. 925.

——O. 2, R. 6—Applicability—Misjoinder of causes of action. *See* C. P. CODE, O. 1, R. 3—JOINDER OF SEVERAL DEFENDANTS. 1938 Rang. L R. 397.

——O. 6, R. 4—*Pleadings—Deed impeached as 'fraudulent' and 'bogus'—Necessity to keep the two distinct.*

To call a deed both [illegible] clear piece of pleading [illegible] in both cases, a deed n[illegible] bogus and hence it [illegible] (*Gruer and Niyogi,* [illegible]

——O. 6, R. 17- [illegible] *tion of fresh details—Permissibility.*

It is not by a mere change in the wording of the plaint or the introduction of fresh details that the nature of a suit is altered. The alteration which affects the case is one where the original suit is wholly displaced by the proposed amendment or where a totally different or [illegible]

should be allowed to be amended by substituting the name of *C*, the sole proprietor and manager of the firm in place of firm *S*.

Held, that in view of the fact that the name of *C* was already on the record and that the only defect in the plaint was that the opposite party had been wrongly described, the amendment ought to be allowed. (*Addison, Ag. C.J. and Din Mohammad, J.*) KISHEN SINGH *v.* SALIG RAM. A.I.R. 1938 Lah. 718.

——O. 6, R. 17—*Discretion of Court—Leave to amend—When to be granted—Considerations for Court.*

O. 6, R. 17, C. P. Code, leaves it to the discretion of the Court to grant an amendment. Leave to amend would generally be granted to enable the Court to determine the real question in issue between the parties, provided that the amendment will occasion no injury to

C. P. CODE (1908), O. 20, R. 1.

the opposite party except such as can be compensated for by costs or other terms to be imposed by the Court. If the defendant is in no way prejudiced and is not [illegible] ise, inclu[illegible] of action [illegible] ld should [illegible] AMMA *v.* [illegible] 1938 M.W.N. 875.

——O. 9, Rr. 3 and 8—*Dismissal—When justified—Date fixed for filing list of witnesses—Failure to appear on that date—Effect—'Hearing'—Meaning.*

The utmost result of the failure of a party to give a list of witnesses within the time fixed would be that the Court might decline to hear the evidence of any witnesses whom he might subsequently call; failure to file a list of witnesses by the date fixed could under no circumstances result in the dismissal of a suit. O. 9, Rr. 3 and 8 refer to the dismissal of a suit on the failure of parties to appear when the suit is called on for hearing, and clearly a date fixed solely as the last day on which a list of witnesses may be filed is not a date fixed for hearing. The word 'hearing' in these rules although does not mean solely the recording of evidence, it means what it says, that is, "when the suit is called for hearing before the Court" [illegible] the disposal of a [illegible] vers of an officer [illegible] the Court at all. [illegible] UNG AHMIN *v.* [illegible] L.R. 1938 Rang. 360.

[illegible] *process-fees—Proce-* [illegible] *—Result.*

Process-fees can be paid to the officer of the Court who is designated under the orders of the Court to receive them, and can be paid at any time, subject to the time-limit fixed by the Court, and it is plainly unnecessary for the party paying such fees to appear in Court to pay them, and in fact, it would be highly in- [illegible]

[illegible] *v.* MAUNG SAUNG. A.I.R. 1938 Rang. 360.

[illegible] *ecording of evidence of witness—* [illegible]

[illegible] the Judge should refer to the [illegible] ient. It is mandatory that he [illegible] memorandum of the evidence [illegible] and shall sign it. (*Mir Ahmad, J.*) DASSA RAM *v.* ZAFFARYAB ALI. A.I.R. 1938 Pesh. 46.

——O. 20, R. 1—*Judgment delivered without notice to parties—Counsel for party informed subsequently—Limitation for appeal—Starting point.*

Where a Court delivers a judgment without having previously fixed a date for pronouncing the judgment, and the defendant being absent on that date, the judgment is informed to his counsel on some later day, this later day must be regarded as the date for pronouncing judgment and period of limitation for appeal must be deemed to run from that date and not from the date on which the judgment is actually pronounced. A.I.R. 1925 All. 293, Rel. on. (*Abdul Rashid, J.*) MOHAMMAD ZAMAN *v.* HANS RAJ SHAH.

A.I.R. 1938 Lah. 707.

——O. 20, R. 4 (1)—*Judgment of a Court of small causes—Contents—Duty of Judge.*

Under O. 20, R 4 (1), C. P. Code, the judgment of a Court of small causes must contain the point for determination and the decision thereon. Though a Judge of the small causes Court need not write lengthy judgments and can reduce his remarks to a minimum, yet this minimum must be intelligible so as to enable the High Court in revision to satisfy itself that the decision is according to law. The Judge is expected to apply his mind to the decision of a Small Cause Court case as carefully as he would apply his mind to the decision of a regular suit. (*Thomas, C.J.*) PUTTOO LAL *v.* EWAZ ALI. 1938 O.A. 611=1938 O.L.R. 366=1938 O.W.N. 805.

——O. 21, R. 2—*Adjustment—Executory contract.*

An executory contract may form the subject of an adjustment. But where a compromise does not completely extinguish the rights of the plaintiff under the preliminary decree, but provides for their revival in cases of default, such a compromise is not an adjustment. (*Baguley and Mosely, JJ.*) V. N. A. FIRM *v.* BANK OF CHETTINAD, LTD. A.I.R. 1938 Rang. 353.

——O. 21, R. 10—*Execution application presented after office hours—Validity.*

An application for execution presented to a clerk duly authorised to receive it, is valid though it is presented beyond the office hours, provided the clerk has accepted it. (*Puranik, J.*) KISHAN LAL RAM NIWAS *v.* NARAEN KISAN. I.L.R. 1938 Nag. 451.

——O. 21, R. 12—Scope and applicability. *See* C. P. CODE, S. 50 AND O. 22, RR. 11 AND 12. 1938 N.L.J. 312.

——O. 21, R. 32—*Scope—Prohibitory injunction—Disobedience by defendant—Remedy of plaintiff—Fresh suit—Necessity.*

Where a decree granting a prohibitory injunction is disobeyed by the defendant, the plaintiff is not bound to bring a fresh suit to convert the prohibitory injunction into a mandatory injunction so as to enable him to apply under O. 21, R. 32 (5), C. P. Code. The relief to which the plaintiff is entitled is laid down by R. 32 itself, that is, detention of the defendant in the civil prison, or attachment of his property or both. The plaintiff can apply for any of those reliefs or for both, and the fact that he claims relief under O. 21, R. 32 (5) would not preclude him from claiming the proper relief by applying to the proper Couct. (*Wort, A.C.J. and Manohar Lall, J.*) TOON LAL *v.* SONOO LAL. 1938 P.W.N. 625.

——O. 21, R. 32 (5)—*Applicability—Prohibitory injunction—Relief under R. 32 (5)—Availability.*

The injunction contemplated by O. 21, R. 32 (5) is a mandatory injunction and not a prohibitory injunction, and the relief to which a party is entitled under Cl. (5) of R. 32 can be claimed only in the case of a mandatory injunction and is not available in the case of a prohibitory injunction. (*Wort, A.C.J. and Manohar Lall, J.*) TOON LAL *v.* SONOO LAL. 1938 P.W.N. 625.

——O. 21, R. 57—*'Default'—Decree-holder's inability to get property attached—If amounts to.*

On an application by a decree-holder, a warrant of attachment of certain movable property belonging to the judgment-debtor was issued. When the bailiff went to the spot accompanied by the decree-holder's representative, he was informed that the property was already sold. On a report being submitted by him to that effect, the execution Court made an order that the case be consigned to the record room inasmuch as the decree-holder's representative had failed to get the property attached.

Held, that the inability on the part of the decree-holder to get the property attached did not amount to a

default contemplated by O. 21, R. 57 and the consignment of the execution case to the record room did not amount to a dismissal of the application so as to attract the penal provisions of O. 21, R. 57, and this being so a fresh application by the decree-holder for execution was not barred. A.I.R. 1938 Lah. 123, reversed. (*Addison and Din Mohammad, JJ.*) PEOPLES BANK OF NORTHERN INDIA, LAHORE *v.* DURGA DASS. A.I.R. 1938 Lah. 728.

——O. 21, R. 63—*Occupancy rights of judgment-debtor attached in execution of decree—Declaratory suit by landlord—Maintainability.*

Where the occupancy rights held by a judgment-debtor are attached in execution of a decree against him, the landlord of the land in which the occupancy rights are held, is entitled to bring a suit under O. 21, R. 63 for a declaration that the occupancy rights cannot be attached and sold in execution of the decree. (*Addison and Din Mohammad, JJ.*) KARAM CHAND *v.* AMAR KAUR. A.I.R. 1938 Lah. 677.

——O. 21, R. 63—*Suit under—Rights of parties—Determination—Crucial date—Date of suit or date of claim order or attachment—Adverse possession not complete on date of claim order but complete on date of suit on claim order—If can be taken into account.*

In a suit to set aside a claim order, the rights of the parties on the date of the attachment or on the date of the order on the claim petition are the rights which have to be taken into consideration. Where an unsuccessful claimant has not been in possession of the property in dispute which he claims to have purchased, for 12 years on the date of the attachment or on the date of the order dismissing his claim, and has not perfected his title by prescription on either of those dates, he cannot by waiting for some months and then bringing his suit, be permitted to say that on the date of the suit he has completed twelve years and thereby got a title by prescription. It is not possible for the plaintiff to clothe himself with additional rights by waiting for some months and then compel the rightful owner (the judgment-debtor) to lose his right to the property. (*Burn and Stodart, JJ.*) VENKATA RANGACHARYULU *v.* TURANGA RAO. 48 L.W. 375=1938 M.W.N. 918=(1938) 2 M.L.J. 430.

——O. 21, Rr. 63 and 66—*Summary order on an objection to sale proclamation—Effect—If conclusive under R.* 63.

The mere question of whether there was a prior charge would not be an objection to the attachment. It is only when an inquiry is held and an order is passed under one of the R. 60 or 61 of O. 21, that there is an order which is conclusive under R. 63; and without an inquiry there can be no such conclusive order. Hence a summary order passed on an objection to the sale proclamation does not have any of the effects of an order under R. 63. (*Bennet, Ag.C.J. and Verma, J.*) KANHAIYA LAL *v.* BANKE BEHARI. A.I.R. 1938 All. 542

——O. 21 (Mad. H.C.), Rr. 85 and 86—*Failure to deposit stamp for sale certificate—Forfeiture of whole deposit—If justified.*

Where default is committed in respect of the cost of the general stamp to be affixed to the sale affixed, only the initial deposit of 25% can in any case be forfeited. The whole amount cannot be forfeited. (*Stodart, J.*) PONNAMBALA MUDALI, *In re.* 48 L.W. 416=1938 M.W.N. 864=(1938) 2 M.L.J. 529

——O. 21, R. 89—*Conditional deposit—Validity—Alternative applications under Rr.* 89 *and* 90—*Maintainability.*

Neither the judgment-debtor nor a person interested in the property sold can attach any condition to his deposit under O. 21, R. 89 and the Court cannot accept the deposit subject to any condition or protest. A judgment-debtor made applications under Rr. 90 and 89. The prayer under R. 89 was in the first place "in the alternative." It was to be taken into consideration only if the first prayer in the application which was the main prayer was not granted, namely, if the sale was not set aside under R. 90. Further, even this alternative prayer was hedged round with conditions. The deposit made was to be retained only if the sale was set aside. If the sale was confirmed it was to be refunded. The main prayer under R. 90 was dropped by the judgment-debtor subsequently.

Held, that the application was conditional and hence not maintainable and the date on which the application [illegible]

A.I.R. 1938 Sind 177.

———O. 21, R. 89—*Construction—Deposit not accepted by decree-holder—If amount received by decree-holder.*

R. 89 has to be strictly construed and even a mistake [illegible] have deposited in Court behind the back and without the consent of the judgment-creditor and which the judgment-creditor has refused to accept. The only deduction allowed by the Rule is the amount which since the date of the proclamation of sale has been actually received by the decree-holder. (*Lobo, J.*) HARIRAM DIPCHAND *v.* RAGHUNATH JETHABHAI.

A.I.R. 1938 Sind 177.

———O. 21, R. 89—*Right to apply—"Interest"—Sale by judgment-debtor after Court sale—Application to set aside sale by judgment-debtor and purchaser—Competency.*

A judgment-debtor who, after the Court sale, transfers his interest in the property sold in execution of a decree, [illegible] from applying under the Rule. (*Lobo, J.*) HARIRAM DIPCHAND *v.* RAGHUNATH JETHABHAI.

A.I.R. 1938 Sind 177.

———O. 21, R. 90—*Parties—Auction-purchaser—Appeal against order setting aside sale—Necessity to implead.*

[illegible] as a party and his absence is [illegible] (*Stone, C. J. and Bose, J.*) [illegible] RAO.

———O. 21, R. 90, Provis[illegible] *against legal representative of judgment-debtor—Notice under O. 21, R. 66 served on agent of widow of judgment debtor—Agent not appearing owing to illness—Objection by widow after sale—Maintainability.*

K, who had a decree against one *A*, took out execution after his death, against his legal representatives. The property was attached and the agent of *R*, one of the widows of the deceased judgment debtor, was served with notice under O. 21, R. 66 on 15th June, 1936, for appearing in Court on 22nd June, 1936. He endorsed the notice to the effect that he was lying ill in hospital after an

operation and was therefore unable to attend Court on the date fixed. The sale took place on 6th August, 1936, and *R* put in objection to the sale of the property alleging that it was part of the property given to her in lieu of dower and that the sale had been conducted fraudulently.

Held, *R's* interests were affected by the sale and she was entitled to prefer an objection under O. 21, R. 90. That the proviso to O. 21, R. 90 however applied to the case and the sale could not be set aside as the objection made by *R* could have been made before the sale was conducted and the fact that an agent was lying ill was not sufficient ground for the objection not having been made before the sale. That as the objector did not appear nor was represented when the conditions of the sale were published, it could not be said that there had been any material irregularity in publishing and conducting the sale. (*Almond, J.C.*) KAHAN CHAND *v.* MT. ROSHAN JAN.

A.I.R. 1938 Pesh. 52.

———O. 21, R. 92—*Confirmation of sale—If automatic—Application—Necessity.*

A sale cannot be said to be automatically confirmed merely because no application had been made under R. 89, 90 or 91 of O. 21, C.P. Code, or such application had been made and disallowed. Something had to be done by the Court, namely, to make an order confirming the sale and unless it is done the sale cannot be said to [illegible] [Z]ia ul-Hasan and Yorke, JJ.*) SHEO [illegible] MOHAN LAL.

1938 O.A. 684.

———O. 21, R. 92 (1) and (2)—*Confirmation of sale—Power of Court to refuse—Sale under final decree, pending appeal from the preliminary decree—Variation of preliminary decree—Sale in favour of third party, if can be set aside.*

Where a final mortgage decree was passed pending an appeal from a preliminary decree and a sale is held, the fact that in the appeal the preliminary decree was varied cannot be a ground for setting aside a sale to a third party. Further under O. 21, R. 92 (1) the Court is bound to confirm a sale unless there is a successful or effective application under R. 89, 90 or 91 of O. 21. It is quite clear that the proviso to R. 92 (2) does not relate to R. 92 (1). (*Stone, C. J. and Bose, J.*) BIRDI CHAND *v.* GANPATRAO.

1938 N.L.J. 303.

[illegible]*peal—Legal representative* [illegible] *brought on record.*

Where the legal representative of a *pro forma* respondent who is dead is not brought on record, the appeal does not abate *in toto*. (*S. K. Ghose and Patterson, JJ.*) SABITRIBAI *v.* JUGAL KISHORE.

A.I.R. 1938 Cal. 639.

———O. 22, R. 10—*Applicability—Final decree passed* [illegible]

[illegible] R. 10, C. P. Code, can only [illegible] or order has been passed or [illegible] to happen. (*Derbyshire, C. J. and Costello, J.*) JITENDRA NATH *v.* HARINDRA NATH.

42 C.W.N. 1183.

———O. 22, R. 10—*Person putting forward adverse claim—If can come in.*

The language of O. 22, R. 10, C. P. Code, is wholly inapplicable to a case where some one is seeking to come into the proceedings in order to put forward a claim adverse to that of the original parties in the proceedings. (*Derbyshire, C. J. and Costello, J.*) JITENDRA NATH *v.* HARINDRA NATH.

42 C.W.N. 1183.

———O. 22, R. 11—Scope and applicability—If applies to appeals under S. 47, C. P. Code. *See* C. P. CODE, S. 50 AND O. 22, RR. 11 AND 12. 1938 N.L.J. 312.

———O. 23, R. 1—Applicability—Appeal—Withdrawal—Right of appellant—Power of Court to grant leave to withdraw. *See* C. P. CODE, S. 107 AND O. 23, R. 1. 40 Bom.L.R. 895.

———O. 23, R. 1—*Withdrawal of suit—Order for payment of costs as condition precedent—No time fixed for such payment—Costs paid subsequent to filing of fresh suit—Maintainability of suit.*

Where at the time of the application for withdrawal of the former suit with permission to file a fresh suit under O. 23, C. P. Code, the Court directed the payment of costs as a condition precedent but did not fix any date for such payment, the non-payment of costs does not render a fresh suit bad *ab initio* and the payment of costs subsequent to the institution of the suit would cure the irregularity. (*Sen, J.*) SAGARESWAR CHATTARAJ *v.* BABULAL CHATTOPADHYAYA. 68 C.L.J. 75.

———O. 32, R. 1—Suit on behalf of alleged minor—Plaintiff found to be major—Procedure to be followed. *See* C. P. CODE, S. 47 AND O. 32, R. 1. 1938 O.A. 612=1938 O.W.N. 779.

———O. 33, R. 2—*Property which is subject-matter of suit—If should be included in schedule.*

The property which is the subject-matter of the suit is not exempted from the operation of R. 2. (*Almond, J. C.*) VAISHNODAS *v.* REHMAT KHAN. A.I.R. 1938 Pesh. 50.

———O. 33, R. 5—*Applicant possessed of immovable property not including it in schedule—If fatal to application.*

Where it is apparent on the face of the application to sue *in forma pauperis* that the applicant is possessed of immovable property which he has not included in a schedule and on which he has placed no value, the application must be dismissed. (*Almond, J.C.*) VAISHNODAS *v.* REHMAT KHAN. A.I.R. 1938 Pesh. 50.

———O. 33, R. 7—*Objection under R. 5—Power of Court to deal with.*

Court has under O. 33, R. 7 power to dismiss the application either because on the evidence produced it is not satisfied that the petitioner is a pauper or because the petition falls within some of the prohibitions specified in R. 5. Hence there is no objection to the Court in dealing with the technical objections mentioned in R. 5 before hearing the evidence as to whether the petitioner is actually a pauper or not. (*Almond, J.C.*) VAISHNODAS *v.* REHMAT KHAN. A.I.R. 1938 Pesh. 50.

———O. 38, R. 12—*"Agriculturist"—Who is—If means same as in S. 60.*

The word "agriculturist" in O. 38, R. 12, C. P. Code, must be interpreted in the same sense as in Ss. 60 and 61, C. P. Code, and not differently. An "agriculturist" is a tiller of the soil who is unable to maintain himself otherwise. (*Pandrang Row, J.*) VENKATASUBBAMMA *v.* NARAYANA REDDI. 48 L.W. 380 = (1938) 2 M.L.J. 487.

———O. 40, R. 1—*Receiver—Position of—If legal representative of party—Estate including decree to be executed—Execution—Procedure for execution of decree by receiver.*

Receivers appointed by the Court are officers of the Court, and are not the legal representatives or assigns of the parties to the suit; nor is it the practice of the Court to bring receivers on the record in a suit and subject them to liability as to costs. Where an estate of which a receiver has been appointed includes a decree to be executed, the proper procedure is for the receiver to apply in the suit in which he was appointed (unless it already has the power) for liberty either to file a fresh darkhast in his own name for execution or to continue the existing darkhast (when one has been filed and is pending) in the name of the darkhastdar on giving him a proper indemnity as to costs. (*Beaumont, C.J. and Wasoodew, J.*) HANMANT *v.* JAINAPUR. 40 Bom.L.R. 932.

———O. 40, R. 2—*Rangoon High Court, Rr. 204 and 205—Receiver's fees—Powers of Court.*

Official Receiver, in making his lists, should consider under what head the fees are to be charged and charged at the rate specified in the sub-section. The Court may then, in the circumstances of any particular case, review such remuneration, and, whilst not exceeding the maximum laid down, may direct such remuneration at any less rate as may be thought fit. (*Roberts, C.J. and Dunkley, J.*) DAW OO *v.* U BA THAUNG. A.I.R. 1938 Rang. 357.

———O. 41, R. 22 (4)—Scope—Appeal—Cross-objection by respondent—If bar to withdrawal of appeal. *See* C. P. CODE, S. 107 AND O. 23, R. 1. 40 Bom.L.R. 895.

———O. 43, R. 1 (e)—*Application to add party—Order on—Appeal.*

O. 22, R. 10, C. P. Code, does not apply to an application to add a certain person as party. Consequently an order on such an application is not appealable, though the application purports to be made under that rule. (*Derbyshire, C.J. and Costello, J.*) JITENDRA NATH *v.* HARINDRA NATH. 42 C.W.N. 1183.

———O. 44, R. 1 and O. 33, R. 1—*'Person'—If includes limited company.*

The word 'person' in O. 33, R. 1 and so the word 'person' in O. 44, R. 1, C. P. Code, does not include a limited company incorporated under the Indian Companies Act. Consequently, an application by a limited company for leave to appeal *in forma pauperis* under the provisions of O. 44, R. 1, is not competent.

Per *Costello, J.*—It is doubtful whether it is even right to say that the word 'person' includes a liquidator of a limited company in liquidation. (*Costello and Biswas, JJ.*) BHARAT ABHYUDHOY COTTON MILLS, LTD. *v.* KAMESHWAR SINGH. 42 C.W.N. 1164.

———O. 47, R. 1—"Error apparent on the face of the record"—Meaning of—Award compulsorily registrable not registered—Decree passed on award without attention of Court being drawn—Review—Power of Court. *See* REGISTRATION ACT, SS. 17 (1) (*b*) AND 49. 40 Bom.L.R. 952.

———Sch. II, Para. 1—*Reference—One of defendants not joining in—Validity.*

A dispute was referred to arbitration; but one of the defendants did not join in the reference. An award was passed making the person joining the reference liable for the amount in dispute. He contended that the reference was *ab initio* void as the other person had not joined the reference.

Held, that the reference was not invalid by the other defendant not joining the reference and that the award was binding on the person party to the reference and could not be interfered with in revision. (*Almond, J.C.*) MIAN RAHMATULLAH *v.* SAYED ALAM SHAH. A.I.R. 1938 Pesh. 47.

COMPANY—*Articles of Association — Alteration—Powers of company—Special contract with company in terms of or embodying article—Power of company to evade by altering article.*

There is a very clear distinction between the relation of a shareholder to a company in regard to his shares and his rights against the company in regard to other

OMPANY.

ontracts. Although the regulations contained in a ompany's Articles of Association are revocable by pecial resolution, a special contract may be made with he company in the terms of or embodying one or more of the Articles, and a company cannot break its contracts by altering its Articles. When dealing with contracts referring to revocable Articles, and especially

(Reilly, C.J. and Abdul Ghani, J.) BASAPPA v. ASIATIC GOVERNMENT SECURITY LIFE ASSURANCE CO., LTD. 43 Mys.H.C.R. 396.

——*Extraordinary general meeting of shareholders —Notice of—Contents of.*

Notice of an extraordinary general meeting of the shareholders of a company must sary to enable the shareholders interest whether or not he ought The pecuniary interest of a dir special resolution to be propo material fact for this purpose. Ghani, J.) BASAPPA v. A SECURITY LIFE ASSURANCE CO., LTD. 43 Mys.H.C.R. 396.

COMPANIES ACT (VII OF 1913), S. 55—*Sanction* *ital—*

ing to a reduction of the shar the following principles are (1) That a company has the much more so if the power i of Association. (2) Subjec

extent, the mode and incidence of the reduction. (4) The company may reduce the share capital of all its shareholders *pro rata* or may reduce the shares of any individual shareholder or any class of shareholders wholly or in part. (5) That the interests of the minority have unfairness has been shown to it the Court should keep in view the decision has been arrived at b fully cognizant of their necessities and are the best custodians of their interests and should therefore be slow to interfere. (*Mir Ahmad, J.*) KHATTAR ELECTRICAL ENGINEERING AND GENERAL SUPPLY CO., *In re.* A.I.R. 1938 Pesh. 41

30th December, 1936, for deciding the question of reducing the capital and assets of th meeting held on 30th December, 193 nine shareholders of the company ninth shareholder had died befo issued and his legal representative succession certificate to entitle them proceedings. An objection having been raised as to circulation of the balance sheet, the meeting was

COMPANIES ACT (1913), S. 202.

adjourned to 21st February, 1937. Another notice was issued on 6th February, 1937, to convene the adjourned meeting on 21st February, 1937. In this notice the meeting was designated as an extraordinary general meeting of the shareholders of the company. The same eight shareholders were present at the meeting. One of the shareholders left the meeting under protest and the

Court for sanction to be awarded to the proposals. It was contended that full 21 days' notice as required by S. 81 (as amended) not having been given the meeting of 21st February was not validly held and the resolutions were *ultra vires.*

Held, that the company was well within its rights in

1936, because the latter meeting had been validly adjourned to the former date under Art. 67 of the Articles of Association of the company. The fact that S. 81 was amended in the meantime had no effect on the

1937, was unnecessary and the decision of the meeting of 21st February, 1937, became final on that very day. (*Mir Ahmad, J.*) KHATTAR ELECTRICAL ENGINEERING AND GENERAL SUPPLY CO., *In re.* A.I.R. 1938 Pesh. 41.

——S. 109 (1) (e)—*Floating charge—Test.*

taken by the charges to carry on the business of the company in the ordinary way? Where a clause in an agreement was 'that the amount of security money will be the second charge on the machinery and other goods of the company', on a construction with reference to vn it was held that it amounted to a and that if not registered is void. DIAN COMPANIES LAW AND INDRA LTD. v. OFFICIAL LIQUIDATORS, ORKS, LTD. .W.R. (H.C.) 553=1938 A.L.J. 820.

——Ss. 202 and 235—*Petition under S. 235 presented* *ons—High Court* *of High Court—*

d covers appeals e winding up of a decides a dispute between the parties or deprives the appellant of a substantial and important right and is not a mere formal

COMPANIES ACT (1913), S. 230.

and interlocutory order. The last part of S. 202 which lays down that 'appeal will be heard in the same manner,' etc., merely regulates the procedure to be followed in the presentation and hearing of such appeals. Where a petitition under S. 235 is presented to the High Court against certain persons and the High Court passes an order holding the application to be maintainable, its order is not of a merely formal or ministerial character, but finally decides points between the parties relating to substantial and important rights. Such an order is appealable under S. 202 and a party aggrieved by the order is entitled to appeal to a Division Bench of the High Court under Cl. 10 of the Letters Patent. (*Young, C.J. and Tekchand, J.*) MULK RAJ *v.* OFFICIAL LIQUIDATOR, PEOPLES BANK.

A.I.R. 1938 Lah. 658.

——**S. 230**—*Creditor's right to preferential treatment in respect of money deposited as security—Trust, if created.*

Where as part of the agreement of the appointment of certain persons as selling agents they deposited with a company certain amounts, which was to carry interest and which was to be re-paid on the termination of the period for which those persons acted as selling agents, and such persons applied for the return as per their agreement and not succeeding in getting it applied for the winding up of the company with which they had contracted and contended that they are entitled to preferential payment, it was held that the agreement between parties did not create a trust or any other fiduciary relationship and as such the selling agents were not entitled to any preferential payment. (*Harries, J.*) INDIAN COMPANIES LAW AND INDRA SUGAR WORKS, LTD. *v.* OFFICIAL LIQUIDATORS, INDRA SUGAR WORKS, LTD. **1938 A.W.R. (H.C.) 553= 1938 A.L.J. 820.**

——**S. 235**—*Application under—Provisions of Civil Procedure Code—If applicable.*

Per *Monroe, J.*—An application under S. 235, Companies Act, is in the nature of a plaint and the proceedings under S. 235 are judicial proceedings; but the provisions of the Code of Civil Procedure are inapplicable to a petition under S. 235, because express provisions for its contents and the formalities connected with it are provided for by the Companies Act and the rules made thereunder. (*Young, C. J. and Tekchand J.*) MULK RAJ *v.* OFFICIAL LIQUIDATOR, PEOPLES BANK. **A.I.R. 1938 Lah. 658.**

——**S. 235**—*Petition under—Contents.*

It is not necessary in a petition presented to the High Court under S. 235 to fully and adequately set out the particulars on which the claim is based. Neither S. 235 nor the rules framed thereunder require that the sum claimed by the liquidator from a director or officer of the company should be specifically stated in the petition. So also the rules framed under S. 235 do not require that an affidavit supporting the facts mentioned in the petition should be filed along with the petition or that if it is not filed, it cannot be received at a later stage. Where therefore a petition under S. 235 does not state the sum sought to be recovered from the persons against whom the petition is presented and is not supported by affidavit, the absence of these do not render the proceedings defective. (*Young, C.J. and Tekchand, J.*) MULK RAJ *v.* OFFICIAL LIQUIDATOR, PEOPLES BANK. **A.I.R. 1938 Lah. 658.**

——**S. 235**—*Petition under—Names of certain persons added subsequently but documents relating to them filed later on—Date of application against these persons.*

CONTEMPT OF COURT.

Per *Monroe, J.*—Where in a petition under S. 235 to the High Court, the names of certain persons are added subsequently but documents relating to them which taken together fulfil the requirements of the rule framed under S. 235 are not filed at that time but later, the date of the application against the added defendants is the date on which the documents are filed. (*Young, C.J. and Tekchand, J.*) MULK RAJ *v.* OFFICIAL LIQUIDATOR, PEOPLES BANK. **A.I.R. 1938 Lah. 658.**

——**S. 235**—*Proceedings under—Matters alleged against some entirely different from those alleged against others—Joint trial of claims against all—Permissibility.*

Where in the proceedings under S. 235, Companies Act, instituted in the High Court against certain persons, the matters alleged against some of such persons are entirely different from those which are subject-matter of the investigation against others, the claims against all cannot be tried jointly on principles underlying O. 2, R. 6, C.P.Code, there being no real common unity between them. (*Young, C.J. and Tekchand, J.*) MULK RAJ *v.* OFFICIAL LIQUIDATOR, PEOPLES BANK. **A.I.R. 1938 Lah. 658.**

COMPROMISE—*Construction—Failure to pay 'three consecutive instalments'—What amounts to.*

Where a compromise among other things provided that 'if the judgment-debtordoes not pay three consecutive instalments, the decree-holder shall have power to take out execution in respect of remaining entire amount due' and the judgment-debtor relied upon the fact that after the date of the compromise he had never come within the terms that he had not paid three consecutive instalments, because in respect of every series of three instalments he had paid the third instalment of the three, that is, if instalments were due in January, February and March, he had actually paid the March instalment and that for the next quarter he had paid the June instalment and so on, it was held that when the instalment was paid in March, it was in fact and in law a payment of the January instalment, and that it followed from that, that when April came and no payment was made, there were three consecutive instalments unpaid and that hence the entire amount became payable. (*Lord Wright.*) OUDH COMMERCIAL BANK, LTD., FYZABAD *v.* BISHAMBHAR NATH BAJPAI. **176 I.C. 890=1938 O.W.N. 816= 48 L.W. 368=1938 A.W.R. (P.C.) 178= 1938 M.W.N. 934=A.I.R. 1938 P.C. 250 (P.C.).**

CONTEMPT—*Newspaper headlines—Pending case—Publication of complaint with comments.*

Where a newspaper published with scare headlines portions of a complaint against the respondent in which gross allegations were made against him four months after the complaint had been filed, while proceedings were actually pending in the trial Court and also in the High Court for quashing the complaint, and further the paper published above the complaint its own comments.

Held, that nothing could be more in the nature of contempt than action of that character. (*Young, C.J. and Monroe, J.*) VIDYA SAGAR KAPUR, *In the matter of.* **40 P.L.R. 791.**

CONTEMPT OF COURT—*Proceedings pending before Court—Statements against published—Grave offence—Punishable even if apology were tendered.*

(1) Where the contempt of Court is of a very grave nature, the party in contempt may be punished in spite of apology tendered. (2) There is nothing more incumbent upon Courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard.

CONTRACT.

In re *Read*
R. 683 foll.
J.) BAPAY

(1938) 2 M.L.J. 520.

CONTRACT—Bailment—Essentials of.
CITY MUNICIPALITIES ACT, S. 41 (7).
16 M.L.J. 306.

——*Construction—Contract of mother and minor daughter with company—Minor to do certain services—Mother to compensate if minor defaulted—Respective*

the minor daughter should do certain service for the company and if the daughter failed to follow the terms of the contract the mother and the daughter would compensate the company for the loss sustained by it. The mother was herself receiving money under the earlier contracts and she was promising to stand in the role of one who should use her influence with her daughter to enable the company's expectations in respect of the daughter to be realized. The company advanced money to be adjusted against her future earnings. The daughter failed to carry out the contract:

Held, (1) that the minor daughter was not liable under the contract but her mother was liable on her covenant to pay the company any loss which it suffered; (2) that the contract was not one of indemnity; (3) that her failure to earn sums paid caused a loss to the company of the moneys advanced and this was the measure of damages. (*Roberts, C.J. and Dunkley, J.*) DAW NYUN *v.* MAUNG NYI PU.
A.I.R. 1938 Rang. 359.

——*Hypothecation—Proof—Deposit of Government Promissory note.*

One *D* at Calcutta held on deposit on *P's* account certain cash certificates and fixed deposit receipts, and a considerable sum in cash. *P* at that period was contem-

the one which *P* was asking for.
the terms on which *D* retained the
sory note were not that *D* should k
and collection of interest but that
security for dues from *P*. (*Panckridge, J.*) RAMNATH *v.* CHANDULAL. **A.I.R. 1938 Cal. 649.**

CONTRACT ACT (1872), S. 23.

that of a person who is only bound by contract of sale.

a sale in his favour acquires full and correct knowledge as to the seller's title, but that cannot be said when the sale is in course of negotiation. Where therefore in a contract of sale the party agreeing to sell does not dis-
erty, even if
agreeing to
e knowledge
of the mortgage. In the absence of such knowledge, he must be presumed to have bargained for purchase of the property free from the encumbrance. Hence in case of breach of such a contract the party agreeing to sell has hardly any ground to claim damages from the defendant as if the latter had committed a breach of contract. (*Niyogi, J.*) MT. SUNDERA BAI *v.* PANDHARINATH.
A.I.R. 1938 Nag. 441.

——*Sale—Time, if essence of contract—Price to be paid in one month—Acceptance of instalments beyond the month.*

Where in a contract for sale, the entire purchase price was to be paid within one month after the receipt of earnest money, and the vendor during that month accepted various instalments towards the purchase money, the vendor should be regarded to have waived his right for entire payment within one month and could not plead time as essence of contract. (*Roberts, C.J. and Dunkley, J.*) U THA NYO *v.* M. M. R. M. CHETTIYAR FIRM.
A.I.R. 1938 Rang. 367.

——*Third party—Right to enforce—Undertaking by under tenure-holder to tenure-holder to pay Zamindar rent due from latter—Zamindar's right to sue thereon.*

A third party cannot sue on a contract made by others, unless the contract is intended to secure a benefit to him
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Nasim Ali
v. KIRAN
N.N. 1212.
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nsufficient-
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NATH *v.*
Cal. 654.

and the accused at that time that the accused would subsequently reimburse him be

forfeited. The security bond was subsequently forfeited as the accused failed to appear on the fixed date. Three years afterwards the accused voluntarily and out of gratitude executed a mortgage in favour of the surety, the consideration of the mortgage being the amount forfeited. The accused subsequently brought a suit for the recovery of the land on the ground that consideration for the mortgage was against public policy:

Held, that S. 23 did not apply to the case and it was therefore not open to the accused to get back the land without paying the surety the amount for which the mortgage had been effected.

Held further, that even if an agreement to reimburse had been made between the parties at the time when the security bond was executed, the plaintiff's suit would still fail on the ground that both parties being *in pari delicto*, the Court would help neither party and would let the estate remain where it falls, because a person who has transferred his property to another for an illegal or immoral purpose cannot get the transfer annulled on the ground that the consideration was illegal or immoral. A.I.R. 1921 Oudh 132 Rel. on. (*Tek Chand, J.*) BUR SINGH *v.* KHERU. **A.I.R. 1938 Lah. 732.**

——S. 39—*Acquiescence—What may not amount to—Preliminary decree in mortgage suit — Subsequent compromise—Default in carrying out terms.*

In a mortgage suit a preliminary decree fixing the amount due to the plaintiff was passed. Subsequently by a compromise it was agreed that the plaintiff should accept the mortgaged property at valuation less than the amount fixed in the preliminary decree and in addition to this, the judgment-debtor was to pay certain sum on or before a fixed date. A surety was furnished for the due payment of this additional sum. It was agreed that on conveyance of the property and the payment of the additional sum, the plaintiff should not be entitled to a personal decree but in default of the payment he was free to enforce the decree in the usual manner. On default in the payment the plaintiff asked for a personal decree against the judgment-debtor for the amount due on the preliminary decree and at the same time he prayed for execution against the surety. He was unsuccessful in serving notice upon the surety.

Held, that from the mere fact that the plaintiff mistakenly pursued both remedies at the same time, he was not estopped by acquiescence from proceeding with the preliminary decree against the judgment-debtor. (*Baguley and Mosely, JJ.*) V. N. A. FIRM *v.* BANK OF CHETTINAD, LTD. **A.I.R. 1938 Rang. 353.**

——S. 65—*Applicability—Contract void from inception.*

Where a contract is void from its inception, it would fall within the terms of S. 65 as a contract which has become void; and money advanced on it would be recoverable. (*Addison and Din Mohammad, JJ.*) DALIP SINGH *v.* JAGAT SINGH. **A.I.R. 1938 Lah. 721.**

——S. 65—*Applicability—Transfer amounting to transfer of occupancy rights—Transfer avoided—Transferee co-sharer, if can sue under S. 65.*

Where an occupancy tenant executes a deed of surrender in respect of a field amounting to a transfer of occupancy rights, in favour of a fractional co-sharer in the village and the lambardar gets the transfer set aside under S. 13, C. P. Tenancy Act, and enters into possession of the field the transferee co-sharer, whatever remedies he may have against the transferring tenant, is not entitled to recover under S. 65, Contract Act, from the lambardar the amount of the consideration paid by him. Having knowingly entered into a voidable contract with the object admittedly of cultivating the land himself, he has no remedy whatever under S. 65, Contract Act, against the lambardar, who has enforced the statutory right which he had the option to exercise. The landlord was not a beneficiary under the voidable contract, was not mentioned in it and was not a party to it. The fact that he did derive benefit by his action in avoiding the contract is immaterial. He received no benefit under the terms of the contract himself on which the plaintiff co-sharer is entitled to claim compensation from him. (*Grille, J.*) GANDSINGH *v.* GOWARDHAN. **A.I.R. 1938 Nag. 451.**

——S. 65—*Money belonging to plaintiff wrongly obtained by defendant under contract with another person—Latter not held out by plaintiff as agent—Plaintiff's right to recover amount.*

Where money belonging to the plaintiff was wrongly obtained by the defendant from another person under a contract with him and such person was not an agent of the plaintiff and was not held out by the plaintiff as such, the plaintiff is entitled to recover the amount from the defendant. S. 65 of the Contract Act may not apply directly to such a case but the same principle would apply. (*Jack, J.*) KARALA VALLEY TEA CO., LTD. *v.* LACHMI NARAYAN AGARWALA. **68 C.L.J. 94.**

——S. 68—*Essentials to be proved.*

Under S. 68 it must be shown not only that the moneys were to be expended on goods suitable to the condition in life of the infant but also that they were suitable to her actual requirements at the time of sale and delivery. As any one who supplied necessaries to an infant is in the position of a legal creditor, so anyone who advances money to an infant for the purpose of procuring necessaries is entitled to stand in the position of a legal creditor. (*Roberts, C.J. and Dunkley, J.*) DAW NYUN *v.* MAUNG NYI PU. **A.I.R. 1938 Rang. 359.**

——S. 69—*Applicability—Mortgagee paying off decree for arrears of land revenue to avert sale.*

There is no reason why a person legally bound to pay should be held to be not a person who is interested in the payment. As between a defaulting landholder and his mortgagee, the former is personally bound to pay and this initial liability does not cease because to protect his security, the mortgagee pays off the arrears. Moreover S. 125 (Proviso) Central Provinces Land Revenue Act, does not override S. 65 (*b*), T. P. Act, which lays on the mortgagor, so long as the mortgagee is not in possession of the mortgaged property, the duty of paying all public charges accruing due inrespect of the property. As between the mortgagee and the mortgagor, the latter is primarily bound to pay the arrear and when the mortgagee pays offthe arrear he is discharging the mortgagor's obligation with a view to protect his own interest. The case therefore clearly falls under S. 69, Contract Act. (*Niyogi, J.*) MT. MULABAI *v.* BALAKDAS. **A.I.R. 1938 Nag. 459.**

——S. 74—*Penalty—Decree for lesser sum to be paid in instalments—Provision for higher sum on default—Relief in execution.*

The amount which was found due under a decree was Rs. 5,600. This included a sum of Rs. 850 compound and penal interest provided for in the original document as penalty. The decree provided that if the amount less the penalty was paid in certain instalments the debtor would be allowed a rebate of this amount of penalty imposed in the original document between the parties. In default of the payment of instalments the defendant would be liable to pay the whole sum of Rs. 5,600.

Held, that there was clearly a penal clause.

Held, further, that the executing Court as a Court of equity had the power to relieve against the penalty, even

CONTRACT ACT (1872), S. 134.

If the decree was one on award. (*Haveliwala and Lobo, JJ.*) AHMEDBUX v. BALCHAND.
A.I.R. 1938 Sind 185.

The position of the surety is twofol[illegible] hand he is liable to pay the debt, on [illegible] when he pays the debt, he stands in t[illegible] creditor and he is entitled to enforce against the principal debtor all the remedies which were available to the creditor. If the liability of the surety is so co-extensive with that of the principal debtor, his right is not less co extensive with that of the creditor after he satisfied his debt. To enable the surety to enforce his right against the principal debtor, there are two essential conditions (i) that the debt itself must subsist, (ii) that his remedy against the principal must remain unimpaired. Consequently the creditor will be entitled to compel the surety to perform his promise only if the debt subsists and the surety's remedy is unimpaired. Where the princip[illegible] to the Debt Conciliation Board [illegible] debts, and before the Board the [illegible] his statement of debts the debt gua[illegible] declaring that he would recover it from the surety, the debt due by the principal debtor does not exist so as to entitle the creditor to [illegible] Granting for the no[illegible] overlooked that under [illegible] Act, the surety's reme[illegible] and the creditor by lifting the burden of the debt from off the shoulders of the [illegible] the surety seeks virtua[illegible] entailed by the Debt Co[illegible] an aggravated form and [illegible] (*Niyogi, J.*) BABU RAO v. BABU MANAKLAL.
176 I C. 686 = A.I.R. 1938 Nag. 413.

——**S. 230**—*Agent having interest in contract—Right to sue in his own name.*

Where an agent enters into a contract as such, if he has an interest in the contract, he may sue in his own name, the agent being in such a case virtually a principal to the extent of his interest in the contract. (*Tek Chand, J.*) HARDAYAL MAL v. KISHAN GOPAL.
A.I.R. 1938 Lah. 673.

CO-OPERATIVE SOCIETIES ACT (II OF 1912), S. 43 (1)—*Rules framed under, R. 5—Award against member personally for debt against society—If can be passed.*

The bye-laws of a statutory corporation cannot travel beyond the powers vested in it by the Act. A Co-operative Society being a statut[illegible] is a legal person and its debts are di[illegible] liability of its members which membe[illegible] reached by creditors of the corporation [illegible] proceedings. Hence it is legally not [illegible] Registrar to make an award against th[illegible] sonally for a debt of the Society. (*Vivian Bose and Puranik, JJ.*) NARAYAN SAKHARAM v. CO-OPERATIVE CENTRAL BANK, MALKAPUR.

CR. P. CODE (1898).

or the Government of India Act, it is payable in virtue of the power conferred by that Act within the meaning of the section, even although the High Court purported [illegible] under a power derived from some [illegible] 204 of the Insolvency Rules (Calcutta) [illegible] 2 of the Presidency Towns Insolvency [illegible] covered by S. 3 of the Court Fees Act. (*Panckridge, J.*) OFFICIAL ASSIGNEE OF CALCUTTA. *In the matter of.*
42 C.W.N. 1146.

——**Ss. 7 (iv) and (8) (c)**—*Declaratory suit praying consequential relief—Valuation by plaintiff—Revision—Power of Court.*

S. 7 (iv) of the Court-Fees Act is subject to the provisions of S. 8 (c) of the Court-fees (Bengal Amendment) Act, 1935. If, therefore, in a suit to obtain a declaratory decree in which consequential relief is prayed, the plaintiff puts an entirely unreasonable valuation on the consequential relief, this valuation may be revised by the [illegible] S. 8 [illegible] y, J.) [illegible] NESSA [illegible] I. 144.

——**S. 7 (iv) (c)**—*Suit falling under—Plaintiff failing to fix value of suit for purposes of court fee but* [illegible] *t for jurisdictional purposes*, *if should be taken as value* [illegible] *urt fee.*

[illegible] t-fees on a suit falling under any of the clauses of S 7 (iv) depends on the amount [illegible] andum of appeal, as the [illegible] the suit for purposes of [illegible] depend upon a figure to [illegible]. If the plaintiff fails to fix such a figure expressly for court-fee purposes on the erroneous supposition that the suit is not covered by S. 7 (iv) (c) and separately values his suit for jurisdictional purposes at a certain figure, he should be taken as having valued the relief sought by him at this amount He should not be taken as having failed to value his relief within the meaning of the section and so should not be required to fix the value of the relief for the first time. The plaintiff cannot have the benefit of a higher valuation for selecting a superior forum for the hearing of his case and pay a court-fee on a lower valuation. (*Beckett, J.*) BELI RAM v. DASONDHA SINGH.
A.I.R. 1938 Lah. 647.

——**Sch. II, Art. 22 (Punjab)**—*Suit by reversioner challenging alienation of ancestral land by widow—Appeal—Court fee payable.*

[illegible] for a declaration [illegible] a widow follow- [illegible] his reversionary [illegible] ustom which re- [illegible] ancestral property

Held, that, having regard to the allegations in the plaint, the Court-fee leviable on an appeal by the reversioner was Rs. 20 under Art. 22 of Sch. II to the [illegible] amended by the Punjab Court-fees [illegible] (*Coldstream, J.*) RAM SINGH v. [illegible]
I.L.R. 1938 Lah. 450.

[illegible] **OCEDURE CODE (V OF 1898)**—[illegible] —*If can alter Cr. P. Code.*

[illegible] ulations are a volume of orders by a [illegible] vision in the Cr. P. [illegible] ower to issue orders [illegible] r. P. Code. The Cr. [illegible] ed by any orders of a

CR. P. CODE (1898), S. 12.

local government in a departmental code. (*Bennet, J.*) MOHAMMAD YAKUB *v.* EMPEROR.

1938 A.W.R. (H.C.) 471=1938 A.L.J. 782= A.I.R. 1938 All. 534.

——**Ss. 12 and 107**—*Sub-divisional magistrate—Limits of jurisdiction—Proceedings under S. 107 against person in another sub-division if can be taken.*

The essence of the sub-divisional system is that a sub-divisional magistrate should be responsible for his own sub-division and nothing else. A sub-divisional magistrate has no jurisdiction to take cognizance of matters outside the local area within which, he has been appointed by the District Magistrate to act. So, where proceedings are taken before a sub-divisional magistrate, under S. 107 against a person living outside the jurisdiction of that sub-divisional magistrate, the proceedings are without jurisdiction and have to be quashed. (*Gruer, J.*) SYED ALI *v.* EMPEROR. **176 I.C. 784= A.I.R. 1938 Nag. 448.**

——**S. 100**—*Complaint under S. 497, I. P. Code—Issue of warrant for arrest of wife—Propriety.*

A husband had lodged a complaint under S. 497, I. P. Code, against four persons who were carrying on an intrigue with his wife. The wife was living with her mother and there was no suggestion that she was being detained by her mother against her will. On receipt of that complaint, the Magistrate issued a warrant under S. 100, Cr. P. Code, against the wife and when she had been arrested under the warrant, he proceeded to make an order consigning her to a certain Asram.

Held, that in the absence of any allegation in the complaint that the woman was confined under circumstances in which that confinement would amount to an offence, there was no jurisdiction to issue a warrant under S. 100 and the subsequent order was also without jurisdiction. (*Bartley and Henderson, JJ.*) THAKAMANI DEBI *v.* NEPAL CHANDRA.

A.I.R. 1938 Cal. 704.

——**S. 103**—*Search witnesses previously convicted of criminal offences—Search—If amount to violation of law.*

A quantity of illicit liquor and materials for illicit distillation were recovered from the house of the accused after search by excise officers. The search witnesses were however found to have been previously convicted of criminal offences and one of them had a civil suit against the accused.

Held, that the manner of search amounted to violation of law. (*Bartley and Khundkar, JJ.*) HARADHAN MAITY *v.* EMPEROR. **A.I.R. 1938 Cal. 701.**

——**S. 107**—Proceedings under—Forum. *See* CR. P. CODE, SS. 12 AND 107. **176 I.C. 784= A.I.R. 1938 Nag. 448.**

——**S. 109**—*Scope and applicability—Concealment, if possible when local residence is known—Section, if contemplates continuity in concealment.*

S. 109, Cr. P. Code is one restrictive of liberty and must be applied only when strictly applicable. The mere taking of precautions to conceal is penalised by the section irrespective of the success or otherwise of the precautions. There can be a concealment even if residence within the local limits is well known and no hard and fast rule could be laid down as regards the continuity of the concealment for it is a question of fact in each case. (*Gruer, J.*) GANPATI *v.* EMPEROR.

176 I.C. 820=A.I.R. 1938 Nag. 465.

——**S. 139-A (2)**—*Existence of public right—Denial proved—Duty of Magistrate—Magistrate, if can direct a party to file a civil suit.*

According to S. 139-A (2), Cr. P. Code, if a magistrate on enquiry finds that there is any reliable evidence in

CR. P. CODE (1898), S. 145.

support of the non-applicant's denial of the existence of a public right, he should stay the proceedings until the existence or otherwise of the right has been decided by competent civil Court. The magistrate is however not empowered to order either side to file the necessary civil suit. (*Gruer, J.*) BIHARI, *In re.* **176 I.C. 755.**

——**S. 144**—*Applicability—Dispute relating to land—Proper procedure—Proceedings under S. 144—If justified.*

Where the dispute obviously relates to immoveable property, the proper procedure for a magistrate to adopt is to draw up a proceeding under S. 145, Cr. P. Code, provided, of course the magistrate is satisfied that there is a likelihood of breach of peace. Proceedings under S. 144, Cr. P. Code, are not justified in such a case. (*Chatterji, J.*) BIMALA KANTA BAGCHI *v.* SANAT KUMAR GHOSH. **19 P.L.T. 620.**

——**S. 144**—*Scope—Mandatory order—Power of magistrate to pass—Order directing party to remove fence from land—If authorized.*

Where a party has already taken possession of a disputed plot of land and put up boundary pillars and fence round it, a criminal Court cannot start proceedings under S. 144, Cr. P. Code, with a view to dispossess him from the disputed land. No doubt S. 144, Cr. P. Code, gives a magistrate the power to pass an order to prevent an immediate breach of peace, but the section does not authorise him to pass a mandatory order to remove the fence. All that a magistrate can do under the section is to direct any person to abstain from a certain act or to take certain order without certain property in his possession or under his management. The section, in other words empowers the magistrate to pass a restrictive order, and the removal of the fence is not act which the magistrate of the section to direct a party to do. (*Chatterji, J.*) BIMALA KANTA BAGCHI *v.* SANAT KUMAR GHOSH. **19 P.L.T. 620.**

——**Ss. 144 (1) and (4)**—*Order of Sub-Magistrate under—Joint Magistrate not only rescinding that order but making new orders—Jurisdiction of.*

While it is open to a superior Magistrate to alter or rescind the order of an inferior Magistrate, he cannot make a new order under S. 144 (4), Cr. P. Code, though no doubt he could have made it under Sub-S. (1) of S. 144, Cr. P. Code. Where the Sub-Magistrate of a place called *V* made a certain order under S. 144 (1), Cr. P. Code, but both the parties applied under S. 144 (4), Cr. P. Code, to the joint Magistrate of *K* who had jurisdiction over the Sub-Magistrate of *V*, and he not only rescinded the order of the Sub-Magistrate but made a positive order prohibiting some of the parties from in any way interfering with the execution by the trustee of a temple of an undertaking given by him and also prohibiting some of them from entering a temple without a written consent from the trustee,

Held, that the above orders of the joint Magistrate were without jurisdiction and hence declared to be null and void. 42 M.L.J. 352=1937 M. 487, Foll. (*Pandrang Row, J.*) RAMASWAMI AIYANGAR *v.* RAMASWAMI PATRACHAR. **(1938) 2 M.L.J. 509.**

——**S. 145 (2)** — *"Immovable property" — Paddy crops cut and stored in khalihan—Dispute as to possession of—Proceedings under S. 145—Jurisdiction to draw up.*

Paddy crops cut and stored in a khalihan do not come within the term "immovable property" within the meaning of S. 145 (2), and a dispute as to possession of such crops does not give a Magistrate jurisdiction to draw up proceedings under S. 145, Cr. P. Code. (*Chatterji, J.*) RAJINDRA LAL *v.* BRICH KURMI.

1938 P.W.N. 643.

CR. P. CODE (1898), S. 145.

——S. 145 (6)—*Effect of order under—Who are* ... *application*

... to the prior proceedings under S. 145 and as such they were bound by the order and a fresh application by them is not maintainable. (*Zia-ul-Hasan, J.*) MUNESHWAR BAKSH ...

... investigation or not is a question of fact. Where a Sub-Inspector of Police, on hearing of a shooting incident, goes to the house where the shooting has taken place, without knowing whether it was due to accident or design, and on finding a corpse at the house takes down a statement from a person present there, it cannot be said that the statement is recorded by him in the course of the investigation, so as to make it inadmissible in evidence. It is only after recording that statement that the Sub-Inspector can have any real information about the commission of a cognizable offence. (*Burn and King, JJ.*) MYLASWAMI CHETTY *v.* EMPEROR.

1938 M.W.N. 905.

——S. 162—*Contradiction—Conditions necessary.*

Under S. 162, Cr. P. Code, the statement of a witness in evidence can only be contradicted by his alleged statement to the police on two conditions, ... application for contradiction is made ... the other is that the statement of th... proved by a certified copy of the diary. (*Bennet, J.*) W. K. WESLEY *v.* EMPEROR.

1938 A.W.R. (H.C.) 505.

——S. 162—*Statement of witnesses recorded in police diary—Burden of rebuttal.*

There is an initial presumption of accuracy in the case of official records but in the case of statements of witnesses recorded in the police diaries, the burden of rebutting them is not very heavy. Where the witness is a respectable educated man and quite disinterested and the difference between what he did say and what he is recorded as saying, is very slight and could easily have been due to a misunder... recording the statement, ... statement attributed to h... be accepted as corre... KISHEN *v.* EMPEROR. A.I.R. 1938 Lah. 714.

——S. 195—*Applicability—Offences requiring sanction and offences not requiring sanction committed in same transaction—Absence of sanction—Prosecution for offences not requiring sanction—Sustainability.*

Where in the course of one transaction a number of offences are committed, some requiring sanction for prosecution, and others not requiring such sanction, it is not necessary that the prosecution of those offences which do not require sanction should depend upon the obtaining of sanction for prosecution of the offences requiring sanction. The law onl... ... committed, the Magistrate or the police are helpless in proceeding to prosecute the offender for the latter offences unless the

CR. P. CODE (1898), S. 202.

Court sanctions the prosecution of the former. Four Civil Court peons with warrants for attachment of mov... ... trained the Civil Court peons for some time. The accused were convicted under S. 143, I. P. Code. It was contended that there having been resistance to the writ of the Court, the accused could not be prosecuted ... e of unlawful assembly or rioting ... of the Court which issued the writs ... unlawful assembly was a separate ... a separate charge was permissible under S. 143, I. P. Code, it was immaterial that there was no sanction as required by S. 195, Cr. P. Code. (*Mahomed Noor and Rowland, JJ.*) SHEO AHIR *v.* EMPEROR. 19 Pat.L.T. 665.

——S. 196—Applicability—Petition to Sub-Inspector of Police by residents of locality—Allegation of offences against another and prayer for protection against claim—Prosecution—Sanction—Necessity. *See* PENAL CODE, S. 499, EIGHTH EXCEPTION.

1938 M.W.N. 871 (2)=(1938) 2 M.L.J. 397.

——S. 197—*Object underlying—Prosecution of a Municipal Commissioner—Sanction—Necessity.*

The policy of the Legislature underlying the enactment of S. 197, Cr. P. Code is to afford a reasonable protection to the public servants in the discharge of their official function and this policy could not be defeated by ... the public servant ... be said to be dis... ccused is admittedly a public servant, is a Municipal Commissioner and that he could not be removed from his office without the sanction of the Local Government, then he is completely protected by S. 197 and sanction is necessary for his prosecution. (*Manohar Lal, J.*) KALI PRASAD SINGH *v.* SIRIKRISHUN CHATURVEDI.

176 I.C. 725=4 B.R. 755.

——S. 202—*Scope—If applies to transfers under S. 528.*

The 1st part of S. 202 applies only to cases in which the Magistrate has taken cognizance himself and does not include a case which is transferred. The transfer ... ambit of 2nd part of ... 528, because where the ... Court to probe into the ... ulge in surmises such that the case of a transfer under S. 528 was overlooked when the section was amended. (*Gruer, J.*) QAMARALI *v.* MST. TULSI. A.I.R. 1938 Nag. 433.

——Ss. 202, 203 and 204—*Scope—Cognizance of case by Magistrate—Procedure on.*

The granting of a summary A, B or C is a mere administrative matter, while the dismissal of the complaint requires a judicial order under S. 203, Cr. P. Code. Ordinarily, when a Magistrate takes cognizance of an offence on a complaint, he should examine the complainant on oath and reduce the substance of his ... shes to postpone ... ance with S. 202, ... he wishes to dis... 203, Cr. P. Code. But that section contemplates that he should exercise his own independent judgment, and if he does not wish to postpone the issue of process, then he acts under

CR. P. CODE (1898), S. 342.

a peculiar feature in that, the pardon unc
is tendered as a Judicial act and under t
cautions, rules and consequences which
out. One consequence, perhaps the mos
that when a Magistrate has tendered t
trial must not be by another Magistrate
is vested under S. 30 of the Code to try such an offence, but by the High Court or Sessions Court. Where certain accused were charged with offences which came within the offences mentioned in S. 337, Cr. P. Code, and a conditional pardon was tendered to and accepted by one of the accused and where subsequently the prosecution applied under S. 494, Cr. P. Code, and got the withdrawal of the case as against that accused and he gave evidence as against the rest in the trial before a special Magistrate, to whom the case had been transferred and who was empowered under S. 30 to try the offences, it was held that what was done came substantially within S. 337 and hence the trial by the special Magistrate was without jurisdiction. (*Lord Wright.*) FAQUIR SINGH *v.* EMPEROR.

——**Ss. 342 and 540**—*Failure to examine accused subsequent to examination of Court witnesses—Trial, if vitiated.*

Where in a case tried summarily, certain Court witnesses were examined under S. 540, Cr.P. Code, after the close of the defence evidence but the accused was not thereafter examined under S. 342, Cr. P. Code, it was held that the Magistrate should have strictly followed the provisions of S. 342, Cr. P. Code, which applies both to summons and warrant cases but as the accused had once been examined in detail, the failure to examine him once again after the examination of Court witnesses was a mere irregularity and was not fatal to the trial as the accused had not been in any way prejudiced. (*Thomas, C.J.*) KANDHI *v.* MUNICIPAL BOARD, RAE BARELI. **1938 O.A. 591= 1938 O.L.R. 365=1938 O.W.N. 743.**

——**S. 342**—*Scope—Questions to accused to get admissions to fill up gaps in prosecution evidence—Legality.*

The examination of the accused under S. 342, Cr.P. Code, for the purpose of getting admissions to fill up the gaps in the prosecution evidence is contrary to law, and the prosecution cannot be permitted to rely on admissions obtained from the accused in such circumstances. The defect in the prosecution case cannot be sought
S. 342
RAO *v.*

(1938) 2 M.L.J. 397.

——**Ss. 350 (1) and (3)**—*Transfer of magistrate who heard the case—New magistrate not doing any thing—Retransfer of the former magistrate—Right to demand* de novo *trial—Object of S.* 350.

Where a magistrate after examining the prosecution witnesses and recording the statement of the
and framing a charge, is transferred and the
transferred to another magistrate for trial, but bef
proceedings are taken in his Court, the former magistrate is reposted to the original place and the case is retransferred to his file, the accused have no right under the circumstances to demand a *de novo* trial under S. 350 (3), for the reposted magistrate cannot be considered 'another magistrate' within the meaning of S. 350 (1), Cr. P. Code. The fundamental idea of S. 350, Cr. P. Code is that the magistrate who passes judgment in a case

——**S. 350 (1) (a)**—*Contravention of—When vitiate trial.*

A contravention of the provisions of S. 350 (1) (*a*) will vitiate the trial only when there is a refusal on the magistrate's part to resummon and rehear the witness, or when the evidence of witnesses examined against the provisions of Cl. (*a*) is relied upon by the Court. (*Zia-ul-Hasan, J.*) SHEO RAM *v.* EMPEROR. **1938 O.A. 661=1938 O.W.N. 881.**

——**S. 350 (1) (a)**—De novo *trial—Prosecution not relying and not wishing to produce witness, examined before—Accused, if can insist on their production.*

S. 350 (1) (*a*) does not require that even a witness on whom the prosecution does not rely and whom it does not wish to produce at the *denovo* trial though examined
rlier trial should also be produced at the *de novo*
is may be a matter for comment and inference,
. 350 (1) (*a*) does not authorise an accused to compel the prosecution to produce a witness whom they do not wish to produce. (*Zia-ul-Hasan, J.*) SHEO RAM *v.* EMPEROR. **1938 O. A. 661= 1938 O.W.N. 881.**

——**Ss. 350 (1) (a) and 227**—De novo *trial—Effect—New charge, if can be framed.*

When a *de novo* trial is granted, it has the effect of wiping out the prior proceedings. Hence a magistrate can frame a new charge or add a new one to the existing charge, when he grants a *de novo* trial. Even otherwise, if a new magistrate does frame a new charge the accused can have no grievance for under S. 227 (1), Cr. P. Code, a Court can, at any time before Judgment is pronounced, alter or add to any charge. (*Zia-ul-Hasan, J.*) GAJJU *v.* EMPEROR. **1938 O.A. 658.**

——**S. 350 (1), Prov. (a)**—*Scope and applicability of—Decision of second magistrate to resummon witnesses—Accused if can insist that there shall be no* de novo *trial.*

The proviso (*a*) to S. 350 (1), Cr. P. Code has no application to a case where the new magistrate decides to resummon witnesses and to recommence the inquiry or trial. The proviso only gives the accused a right at the commencement of the proceedings before the new magistrate to demand that the witnesses or any of them be resummoned and reheard, and it does not give him any other right. When the magistrate has decided to exercise the option of resummoning witnesses, the accused has no right to insist that there shall not be a *de novo* trial or inquiry. (*Thomas, C.J. and Yorke, J.*) GUR DAYAL *v.* SHEO DULAREY. **1938 O.A. 652=1938 O.W.N. 841.**

——**S. 403**—*Trial and conviction under S. 45 of Calcutta Police Act—Subsequent trial on same facts under S. 44 of that Act—If barred.*

person along
Calcutta Police
the same facts
under S. 44 of that Act The case really comes under the second clause of S. 403, Cr. P. Code. (*M.C. Ghose, J.*) KALI CHARAN *v.* S. K. BRAHMACHARI. **42 C.W.N. 1232.**

——S. 421—*Duty of Court—Summary dismissal of appeal for default—Legality.*

A Court cannot dismiss an appeal summarily simply because the accused fails to prosecute his appeal. The law requires that the dismissal of the appeal shall depend upon the exercise by the Judge of his independent and impartial judgment after he has read a copy of the judgment and not upon the failure of the accused to prosecute his appeal. (*Davis, J. C. and Lobo, J.*) EMPEROR *v.* BALUMAL HOTCHAND.

A.I.R. 1938 Sind 171.

——Ss. 435 and 439—*Refusal to issue process against accused—Failure to give reasons—Revision—Jurisdiction of High Court to interfere—Cr. P. Code, S. 203.*

Where an order under S. 203, Cr. P. Code is passed, declining to issue process to an accused, and the magistrate has not acted as he should under S. 202, Cr. P. Code, the High Court has jurisdiction to entertain a revision application against the order and to interfere, if necessary, in the interests of justice. Where it appears from the records that there are no sufficient grounds for issuing notice to an accused person, the High Court is not justified in interfering in revision merely because the magistrate who had cognisance of the matter failed to give reasons for not issuing the process; but if it appears from the records that the magistrate had not good grounds for not issuing process, the High Court is justified in interfering. The fact there is no evidence on record against the accused is not in itself a sufficient reason for refusing to interfere in revision especially when the complainant says he has evidence. (*Horwill, J.*) VENKATASUBBA PILLAI, *In re.*

(1938) 2 M.L.J. 372.

——S. 439—*Powers of High Court—Alteration of finding.*

The High Court as a Court of revision has the power of a Court of appeal, and it is provided in S. 423 (1) (*b*) (ii) that a Court of appeal has power 'to alter the finding maintaining the sentence.' It is therefore open to the High Court, when a case comes up before it in revision, to alter a finding under S. 500, I. P. Code to one under S. 500 read S. 120-B, I. P. Code. (*Bennet, J.*) TARAPADO SHASTRI *v.* EMPEROR.

1938 A.W.R. (H.C.) 467=1938 A.L.J. 769.

——S. 476—Irregularity in complaint made by one Court to another—If curable under S. 537 (*a*). *See* CR. P. CODE, SS. 537 (*a*) AND 476.

1938 N.L.J. 285.

——S. 476—*Preliminary enquiry—Prosecution for fabrication of written evidence—Party, if can be directed to produce documents in his possession.*

Where an application under S. 476, Cr. P. Code is made to the Court for prosecuting a party for fabricating written evidence, the Court can direct a preliminary enquiry and order the party to produce documents in his possession for the purpose of considering whether or not the prosecution should be launched. (*Ameer Ali, J.*) GOPALDAS *v.* JNANENDRA.

A.I.R. 1938 Cal. 677.

——S. 476—*Prosecution for having made false entry —Evidence necessary.*

Where an application under S. 476 read with S. 195 is made against a person for having fabricated evidence by making a false entry, before action can be taken against such person, there must be some satisfactory evidence that the entry was fabricated for the purpose of being used in the proceedings; but actual user of documents in the proceedings is not necessary. (*Ameer Ali J.*) GOPALDAS *v.* JNANENDRA.

A.I.R. 1938 Cal. 677.

——S. 476—*Prosecution under S.* 193, *I. P. Code—Considerations.*

Where an application under S. 476 read with S. 195 is made to the High Court for taking action against a person for having made contradictory statements in a case, the High Court should, after making every allowance for forgetfulness and confusion, take action in a proper case. There must, however, be a reasonable or something more than a reasonable probability of conviction and the High Court should not ordinarily take action unless it has to deal with a really bad case. (*Ameer Ali, J.*) GOPALDAS *v.* JNANENDRA.

A.I.R. 1938 Cal. 677.

——Ss. 476, 476 B and 435—*Refusal to file complaint—Appeal—Direction to file complaint—Complaint and conviction—Validity of complaint, if could be questioned in revision against conviction.*

Where in an appeal under S. 476-B from an order refusing to lay a complaint, the appellate Court directed the lower Court to lay the complaint and the complaint was made and the accused was convicted, he cannot in revision against his conviction be permitted to question validity of the complaint, inasmuch as he had failed to avail himself of the remedy open to him then and there to question its validity. (*Grille, Ag. C.J.*) VITHOO *v.* EMPEROR. 1938 N.L.J. 285.

——Ss. 476 and 476-B—*Refusal to make complaint —Appeal—Remand—Power of same Judge to make complaint.*

Where a Subordinate Judge had previously refused to make a complaint, it does not follow that he is debarred from laying one *suo motu* if on a further consideration, he finds, whether such conclusion is reached on a further study of facts or on an elucidation by a higher tribunal in its order of remand, that there is really a case for making a complaint. (*Grille, Ag.C.J.*) VITHOO *v.* EMPEROR. 1938 N.L.J. 285.

——S. 476-B—*Appeal under—Power of Court to remand case to lower Court with direction to lay complaint.*

An appellate Court hearing an appeal under S. 476-B Cr. P. Code has the power to remand the case from which the appeal was made and direct it to lay the complaint. (*Grille, Ag.C.J.*) VITHOO *v.* EMPEROR.

1938 N.L J. 285.

——S. 494—Scope and applicability—Distinction between Ss. 337 and 494. *See* CR. P. CODE, SS. 337 AND 494. 1938 A.W.R. (P.C.) 170= A.I.R. 1938 P.C. 266 (P.C.).

——S. 499—*Scope—If overrides inherent powers of High Court—Direction to produce accused in High Court or in any other Court as may be directed—Validity—Failure to produce as directed—Forfeiture.*

The provisions of S. 499 are not exhaustive and do not override the inherent powers of the High Court in the matter of bail. There are no restrictions on the High Court in the matter of imposing conditions on which it grants bail, and there is no irregularity in the High Court directing that the sureties shall be responsible for the production of an accused person on bail in the High Court and for his subsequent production in the Court of the District Magistrate of the District where he was tried to hear the reserved judgment in his appeal. A bond which directs the appearance of the accused not only in the High Court but in such Court in which the High Court might direct him to appear is therefore valid ; and there is a forfeiture of the bond, if the sureties, although aware of the terms set out in the bond on which they undertake to furnish security for the due appearance of the accused, fail to produce the accused before the Court according to the directions

CR. P. CODE (1898), S. 526.

of the High Court. (*Grille, J.*) ADKOO UMRAO KALAR *v.* EMPEROR. **A.I.R. 1938 Nag. 420.**

——**Ss. 526 and 528**—*Ground for transfer—Communal dispute.*

Ordinarily, the mere fact that a case is between Hindus or Mahomedans does not *ipso facto* debar either a Hindu or Mahomedan Judge or Magistrate from hearing it. Where however the case has reached a stage in which the unfortunate question of communalism has become very prominent, by reason of the petitions for transfer by one of the parties, it is desirable in the interests of everybody concerned to transfer the case. (*Blacker, J.*) AMBA PARSHAD *v.* IMAM ALI. **A.I.R. 1938 Lah. 706.**

——**S. 526 (1)**—*Procedure—Conviction under Ss. 380 and 454, I. P. Code—Proper sentence—Duty of Magistrate—Release on probation—If justified—Sentence of imprisonment—Necessity for.*

In the case of a conviction for theft and house-breaking, if the Magistrate gives merely a nominal sentence of imprisonment till the rising of the Court, then, although he is complying with the letter of the law, he is in fact treating the accused more leniently than it had applied S. 562 (1). An accused convicted under S. 379 or 380, I. P. Code, may in a proper case be released on probation of good conduct. If he is convicted under Ss. 454 and 457, I. P. Code, a sentence of imprisonment is [illegible] ...ion ... t it ... im- ... to execute a bond under S. 562 (1), Cr. P. Code, for the offence of theft under S 380, I.P. Code, and to sentence him to imprisonment until [illegible] the offence of house-breal [illegible] (*Broomfield and Norman* [illegible]) ...BA SAKHOBA. [illegible]

——**S. 528**—*Costs—Po*[illegible] *plication under.*

In applications under S. 528, Cr. P. Code, a Magistrate has no power to award costs. (*Lakshmana Rao, J.*) DISTRICT MAGISTRA[illegible] CHANDRA TIRUMAL REDD[illegible]

——**S. 528**—Transfer under [illegible] if can be ordered in such a case. *See* CR. P. CODE, S. 202—SCOPE. **A.I.R. 1938 Nag. 433.**

——**S. 537**—*Erroneous statement of charge—If curable.*

There is a distinction between a misjoinder of charge and an erroneous statement of a charge otherwise lawful. Such error in charge can be cured under S. 537. (*Davis, J.C. and Lobo, J.*) EMPEROR *v.* BALUMAL HOTCHAND. **A.I.R. 1938 Sind 171.**

——**S. 537**—*Scope—Misjoinder of charges—If cured.*

It makes no difference whether the acts [illegible] forty-one, fourteen or four, [illegible] statutory number and are not [illegible] of S. 234, Cr. P. Code, or [illegible] relating to the joinder of charges, the misjoinder of charges is a vital defect in the trial which cannot be [illegible]

[illegible] irregularity in a complaint made by one Court to another

CRIMINAL TRIAL.

is curable under Sub-S. (*a*), since a complaint made by a Court is, for the purposes of S. 537, Cr. P. Code, in no way different from a complaint made by a private individual. (*Grille, Ag. C.J.*) VITHOO *v.* EMPEROR. **1938 N.L.J. 285.**

——**S. 540**—Failure to examine accused subsequent to examination of Court witnesses—Trial if vitiated. *See* CR. P. CODE, SS. 342 AND 540. **1938 O.W.N. 743.**

——**S. 544**—*Rules under, made by Punjab Government, Vol. 3, Chap. 9, R. 1—Warrant case—Expenses of Defence witnesses—If to be paid by Government.*

The only fair interpretation of R. 1, Chap 9, Vol. 3 framed by the Punjab Government which makes no distinction between prosecution witnesses and defence witnesses is that Government by exercising its power of restriction, which it is authorized to exercise by S. 544, Cr. P. Code, has limited the cases in which Magistrates may pay the expenses of witnesses to those mentioned in the rule. If the rule framed by the High Court lays down the contrary, that is to say, that ordinarily the expenses of defence witnesses are to be paid by Government in every warrant case, it is *ultra vires*. (*Tek Chand and Ram Lall, JJ.*) NANAK CHAND *v.* SURAJ PARKASH. **A.I.R. 1938 Lah. 693.**

——**S. 562 (1)**—*Applicability—Conditions—Accused over 21 years—Offence punishable with more than seven year's imprisonment—Release on probation—Legality.*

A Magistrate has no power to act under S. 562 (1), Cr. P. Code, in the case of an offence punishable with more than seven years' imprisonment and where the accused is more than 21 years old. (*Broomfield and Norman, JJ.*) EMPEROR *v.* YESHABA SAKHOBA. **40 Bom L.R. 927.**

[illegible]**AL TRIAL**—*Committal to session—Offence* [illegible] *tting—If to be committed—Duty of magis-* [illegible]

[illegible] it cannot be laid down that cases of nose-cutting under S. 326, I. P. Code, should, as a matter of course, be committed to the Court of session for trial, the Magistrate should always consider whether he [illegible] (*Broo*)*mfield and Norman, JJ.*) **40 Bom L.R. 832.**

[illegible] *of interested witnesses corroborated by other evidence—Conviction—Sustainability.*

There may be some witnesses for the prosecution who are interested witnesses, but if their evidence is supported by other evidence, it cannot be said that conviction is based on no legal evidence and that therefore it is unsustainable (*Varma, J.*) BANKEY SINGH *v.* DASRATH PANDEY. **1938 P.W.N. 681.**

——*Delay in prosecution—Effect—Suspicion.*

Where a prosecution is launched against a public servant after a delay of nearly four years, it rouses a [illegible] ...end. ...SIRI- ...755.

[illegible] ...*tesses.*

The prosecution is not bound to call any particular witnesses when there is reasonable ground for the Pub[illegible]

But it is open to the jurors to draw inference [illegible] rable to the prosecution from the non-examina[tion] of the witnesses. (*Guha and Lethbridge, JJ.*) BRINCHIPADA *v.* EMPEROR. **A.I.R. 1938 Cal. 625.**

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——*Duty of prosecution—Examination of witnesses—Non-examination of witness named in complaint—If fatal.*

It cannot be held that because a witness named in the petition of complaint has not been examined in the case, therefore an inference adverse to the prosecution should be drawn. It is for the Court to consider whether or not the non-examination of the witness calls for an adverse inference against the prosecution. If the prosecution is content with the witnesses examined by it, it is not bound to examine all the witnesses that it could possibly on any point. (*Varma, J.*) BANKEY SINGH v. DASRATH PANDEY. **1938 P.W.N. 681.**

——*Evidence—Advocate cited by Police as witness for prosecution—If disqualified from appearing as counsel for accused—Professional etiquette.*

The mere fact that a lawyer is cited as a witness by the prosecution would not disqualify him from appearing as counsel for the accused in the case. No doubt it is not in accordance with professional etiquette for a lawyer who has given evidence as a witness for the prosecution to accept or to continue to hold a brief from the accused. But the mere citing of an Advocate as a witness by the Police does not operate as a disqualification. (*Pandrang Row, J.*) KANDAN PADAYACHI, *In re.* **48 L. W. 276=(1938) 2 M.L.J. 446.**

——*Evidence—Charge of murder—Case depending on statement of accused—Evidence of prosecution as to part of statement disbelieved—Conviction on rest of the statement—If justified.*

Where in a trial for murder, the case against the accused depends entirely on the statement made by the accused and the discoveries made in pursuance of that statement, if the Court disbelieves the prosecution case in respect of a part of the statement, it is not safe to base a conviction for murder on the rest of the statement. (*Horwill, J.*) VENKATASWAMI v. EMPEROR. **48 L. W. 332=1938 M.W.N. 866.**

——*Evidence—Value of—First information report—Delay in making report—Effect of.*

Delay in making a report to the police is only a suspicious circumstance which puts the Court on its guard and cannot by itself be held to be a reason for rejecting evidence which is otherwise fully entitled to credit. (*Blacker, J.*) RADHA KISHEN v. EMPEROR. **A.I.R. 1938 Lah. 714.**

——*Evidence—Value of—Statement of formal witness for prosecution assisting defence.*

Statement of a formal witness for the prosecution, which goes to assist the defence, does not have that weight which it would have had if he had been a witness for the prosecution as to the material facts of the case. (*Blacker, J.*) RADHA KISHEN v. EMPEROR. **A.I.R. 1938 Lah. 714.**

——*Misjoinder—Cases clubbed together improperly—Trial—If vitiated—Prejudice to accused.*

Where there are several cases against several accused persons, they must generally be kept distinct, evidence let in in each case separately and conclusions drawn on the evidence let in in each particular case. But before the conviction can be set aside it must be shown that the accused suffered prejudiced by the cases being clubbed together. Although in most cases of improper clubbing together of cases the accused would be held to have suffered prejudice by being called upon to meet several cases at the same time, in a simple case in which the accused could be tried together in one trial and in which the defence has not been rendered more difficult by the procedure adopted in the trial, the trial cannot be held to be vitiated. (*Horwill, J.*) SYED MUSTAFA SAHIB v. EMPEROR. **48 L. W. 350=1938 M.W.N. 865=(1938) 2 M.L.J. 382.**

——*Sentence—Defiance of process of law—Proper punishment.*

Defence of the process of law must be looked upon as a serious offence as it hampers the administration of justice. If allowed to be committed with impunity the prestige of the court would be lost. Such offences should be punished with adequate sentences and not at all leniently. (*Mahomed Noor and Rowland, JJ.*) SHEO AHIR v. EMPEROR. **19 P.L.T. 665.**

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CUSTOM—*Proof—Judicial decisions—Value of.*

Judicial decisions on questions of custom are not of much assistance as they proceed on their own facts and are based on the amount of evidence led in each case. (*Din Mohammad, J.*) ABDUL GHAFOOR v. FAJIR ALI. **40 P.L.R. 796.**

——*Proof of—Length of time necessary.*

Proof of the existence of custom over a period of about 60 years is sufficient to hold that it is binding. The technical rules of English law governing the establishment of custom cannot be followed rigidly in proving the existence of a custom in India. In India a custom may fall into desuetude and be superseded by another custom according to the ethical and legal notions of the community in which it is in force, provided of course existence of substituted custom can be proved by a series of well-known, concordant, and on the whole continuous instances, extending over a reasonable length of time. (*Tekchand, J.*) ABDUL MAQSAT v. MOHAMMAD AMIN. **A.I.R. 1938 Lah. 680.**

——**(N. W. F. P.)**—*Alluvion—Right of riparian owner.*

Where a riparian owner claims land formed by alluvion lying adjacent to his own land, custom is the law to be applied in such cases in the N. W.F. Province under Bengal Alluvion and Diluvion Regn. 11 of 1825, which is made applicable to the Province by S. 4 of the Law and Justice Regn. 7 of 1901, and where the wajib-ul-arz relating to the village provides that land which is formed by alluvion belongs to the adjacent riparian owner, such person becomes owner of the land as soon as it emerges from the river. (*Almond, J. C.*) PASAND v. FAIZ TALAB. **A.I.R. 1938 Pesh. 48.**

——**(Punjab)**—*Abadi—Ferozepura—Right of reversion in malba of houses of non-proprietors.*

On the non-proprietors leaving, the right of reversion of the malba of the houses of the non-proprietors in Abadi Ferozepura held vested in the founder of that abadi alone and not in all the proprietors of the village. (*Tekchand, J.*) ABDUL MAQSAT v MOHAMMAD AMIN. **A.I.R. 1938 Lah. 680.**

——**(Punjab)**—*Alienation—Ancestal land—Good management.*

It cannot obviously be considered to be an act of good management to sell property worth Rupees 20,500 when there is necessity for a loan of about Rs. 6000 only. (*Bhide and Beckett, JJ.*) IQBAL SINGH v. MAHINDAR SINGH. **A.I.R. 1938 Lah. 648.**

——**(Punjab)**—*Alienation—Ancestral land—Just debt—Meaning—Amounts borrowed by big zamindar for purchase of costly clothes and ornaments—If just debts.*

Just debt means a debt which is actually due and which is not immoral, illegal or opposed to public policy. It also means a debt not contracted as an act of reckless extravagance or of wanton waste or with the intention of destroying the interest of the reversioners. It need not be one incurred for a necessary purpose; but if a non-necessary debt is unreasonably large compared to the means and station in life of the proprietor, it cannot come under the definition of a just debt. Similarly if a

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number of comparatively small loans for non-necessary purposes are contracted within an unreasonably short period, they collectively may amount to extravagance, judged by the tests previously mentioned, and may be excluded from the category of just debts. What is unreasonable or extravagant must depend upon the circumstances of each particular case and must be decided by the Court on fair and rational grounds. Amounts borrowed by a big zamindar with a large income and living in a style suited to his social status, for costly clothes and ornaments cannot be considered to be a very unreasonable expenditure so as to exclude the debts from the category of "just" debts. (*Bhide and Beckett, JJ.*) IQBAL SINGH *v.* MAHINDAR SINGH.

A.I.R. 1938 Lah. 648.

——**(Punjab)**—*Alienation—Ancestral land—Necessity— Purchase of ornaments.*

The purchase of ornaments to replace those which had been stolen cannot be considered to be valid necessity for the sale of "ancestral" land. (*Bhide and Beckett, JJ.*) IQBAL SINGH *v.* MAHINDAR SINGH.

A.I.R. 1938 Lah. 648.

——**(Punjab)**—*Alienation— Ancestral land —Necessity—If must exist at the time of alienation*

Even a male proprietor is not entitled to encumber ancestral property for his future requirements; the necessity to support an alienation of ancestral property must exist at the time of the alienation. (*Bhide and Beckett, JJ.*) IQBAL SINGH *v.* MAHINDAR SINGH.

A.I.R. 1938 Lah. 648.

——**(Punjab)**—*Alienation— Ancestral property—Fact that part of property sold was house property situated within city limits—If sufficient to take it out of customary restriction on sale.*

Where the vendor is admittedly governed by custom with regard to alienation of ancestral property, the mere fact that part of the property sold was house-property situated within the city limits would not be suffici[illegible] take it out of the customary restrictions on "ancestral" properties. (*Bhide and Beckett* [illegible]) IQBAL SINGH *v.* MAHINDAR SINGH.

A.I.R. 1938 Lah. 648.

——**(Punjab)**—*Alienation—Ancestral property — Necessity—Proof by alienee.*

The law requiring an alienee to prove necessity for alienation of ancestral property is well-known, and if an alienee fails to take the obvious precaution of ascertain- [illegible]

aware of the true nature of the debts discharged by the alienation and acts in bad faith. 65 P. R. 1000, Rel. on. (*Bhide and Beckett, JJ.*) IQBAL SINGH *v.* MAHINDAR SINGH.

A.I.R. 1938 Lah. 648.

——**(Punjab)**—*Alienation—Antecedent debt—Debts incurred after agreement of sale and latter included in consideration for that sale.*

An "antecedent debt" means a debt [illegible] only antecedent in time, but also antecedent [illegible] it must be truly independent of the [illegible] impeached. In other words, the two transactions must be dissociated in time as well as fact. Debts which were incurred after agreement relating to the sale was entered into and which were later on included in the consideration for that sale cannot be properly held to be "antecedent debts". (*Bhide and Beckett, JJ.*) IQBAL SINGH *v.* MAHINDAR SINGH. **A.I.R. 1938 Lah. 648.**

DAMAGES.

——**(Punjab)**—*Alienation—Setting aside—Declaratory suit by son—Collusion—Meaning of.*

"Collusion" in judicial proceedings has been defined as "a secret agreement between two persons that the one should institute a suit against the other, in order to obtain the decision of a judicial tribunal for a sinister purpose." In a declaratory suit challenging the sale by father of ancestral property, the vendor is merely a *pro forma* defendant and no question of collusion with the defendant against whom relief is claimed really arises as it does, *e.g.*, in suits for divorce, etc. Again when such a suit is instituted on behalf of a minor, there cannot obviously be any collusion on the part of the plaintiff in the above sense, as a minor is legally incapable of entering into any agreement. Even when the plaintiff is a major, the above definition would not apply, as the object of the declaratory decree is to protect the interest of the plaintiff and the other reversioners, and not those of the vendor; and this purpose cannot be considered to be "sinister." (*Bhide and Beckett, JJ.*) IQBAL SINGH *v.* MAHINDAR SINGH.

A.I.R. 1938 Lah. 648.

——**(Punjab)**—*Alienation—Setting aside—Declaratory suit by son—Collusion—Proof—Son living with father.*

Where a son brings a declaratory suit challenging the alienation of ancestral land by father, the mere fact that the plaintiff being the son of the vendor was living with him is not sufficient to justify the suit being dismissed as collusive. (*Bhide and Beckett, JJ.*) IQBAL SINGH *v.* MAHINDAR SINGH.

A.I.R. 1938 Lah. 648.

——**(Punjab)** — *Widow—Decree against—If binds reversioners.*

A decree obtained by an alienee against a widow in respect of an alienation made by her husband during his lifetime is binding on the reversioners, as it is a [illegible] represents the estate [illegible] *J.*) KHAN *v.* MAHO-

40 P.L.R. 804.

[illegible] *the connection between act complained of and damage or injury—Necessity for—Remote damages—If can be recovered—Rule.*

Both as regards actions in contract and actions in tort, the damage which can be recovered by a plaintiff complaining of a breach of contract or a tort is the damage which necessarily flows from the breach of the [illegible]

tort and the damage or injury complained of Plaintiffs commenced to manufacture brick on a plot of land which they took on lease from certain Mahomedans. The defendants alleging that the plaintiff were desecrating a grave-yard approached the police and informed the police that the action of the plaintiffs would lead to a [illegible]

while, a heavy fall of rain destroyed a large quantity of the bricks of the plaintiffs which were being manufactured and also damaged the fuel used in burning the bricks. Plaintiff claimed damages from the defendants.

Held, that neither could the defendants have contemplated damage by rain as the result of their action, nor could the damage by rain be said to have flowed

necessarily from the action of the defendants, that the damage was too remote and therefore the action for damages could not be sustained. (*Wort, A.C.J. and Manohar Lall, J.*) MAKSOOD ALAM *v.* BANDHU SAHU. **1938 P.W.N. 621 = 19 Pat.L.T. 670.**

DECCAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), S. 2—*Status waived at the time of decree—Claim to relief in execution—Sustainability.*

An agriculturist judgment-debtor who at the time of passing the decree agrees to waive his status, can be allowed to go back upon the agreement and claim all the benefits of an agriculturist at the time of execution. (*Mehta and Lobo, JJ.*) PREMCHAND *v.* MANOMAL. **A.I.R. 1938 Sind 169.**

DECREE — Construction — Direction to party to deposit amount in Court within fifteen days from date of decree—Interpretation of—Date of decree—If to be excluded — Intention of Judge — If material. *See* GENERAL CLAUSES ACT, S. 9. **40 Bom.L.R. 892.**

——*Setting aside—Fraud—Non-service of summons on defendant—If amounts to.*

Non-service of summons on the defendant does not necessarily connote fraud and the decree obtained by the plaintiff cannot, therefore, be set aside for fraud on that ground. (*Sen, J.*) SAGARESWAR CHATTARAJ *v.* BABULAL CHATTOPADHYAYA. **68 C.L.J. 75.**

DEED—*Construction—Gift to named person mentioned as filling particular character or relationship—Description not true—Gift, if takes effect or fails—Mention of donee as adopted son if mere description of* persona designata *or reason and motive of gift—Intention of donor.*

Where a person executes a deed of gift giving properties to another person under the belief that the donee fills a certain character, and the language of the document shows that the intention of the donor is that the donee should take the gift only in that character, if the donor turns out to be mistaken, the gift must fail because the presupposed condition does not exist. In such cases the mention or description of the donee as filling a certain character or relationship is a reason and motive of the gift and indeed a condition of it. But where the donor is under no misapprehension as to the facts and no fraud or deception is practised upon him and he uses language which can apply to no one but the donee, the donee must be taken to be a *persona designata* and the gift must take effect irrespective of whether his description in the deed is true or not. The mention of the donee as filling a certain character must in such cases be taken to be merely descriptive of the person to take under the gift deed. (*Abdul Ghani and Nageswara Iyer, JJ.*) LAKSHAMMA *v.* ERE GOWDA. **43 Mys.H.C.R. 352.**

——*Construction—Oral evidence to determine intention—Admissibility.*

Oral evidence to determine the intention of the parties is certainly not admissible if the document is unambiguous; but if there is doubt then it is permissible. (*Vivian Bose and Puranik, JJ.*) NARAYAN SAKHARAM *v.* CO-OPERATIVE CENTRAL BANK, MALKAPUR. **A.I.R. 1938 Nag. 434.**

——*Construction—Power-of-attorney — Introductory particulars.*

The rule laying down that powers-of-attorney should be strictly construed relates only to the substantive part of the document where a particular authority is conferred upon the attorney, and not to mere introductory particulars in the document. Documents in this country are not drafted with that meticulous care which is necessary and parties should not be penalized for such

formal defects as are not material. (*Addison and Din Mohammad, JJ.*) MEGH RAJ *v.* RAGHBAR DAS. **A.I.R. 1938 Lah. 712.**

——*Construction—Reference to authorities construing other deeds—Desirability—Intention of parties—Duty of Court.*

It is not very profitable to attempt to construe a document by reference to authorities construing other documents; the words of each document must be taken, and the Court must ascertain, as best as it can, what the intention of the parties was in accordance with the terms as expressed by them, and the document must be taken as a whole. (*Wort, C.J. and Manohar Lall, J.*) RAJKUMAR BHARTHI *v.* SURAJDEO SAHI. **1938 P.W.N. 659.**

DISTRICT BOARD—*Lease by—Validity—Lease contravening R. 94 of Rules published by Local Government.*

A lease for 15 years granted by the District Board without the previous sanction of the Divisional Commissioner contravenes the provisions of R. 94 of the Rules published under the statutory authority by the Local Government and is, therefore, *ultra vires*. (*R.C. Mitter, J.*) AMOLOK CHAND RAPARIA *v.* KESHAB PATI. **68 C.L.J. 116.**

DIVORCE—*Desertion—Break in—What amounts to—Desertion for long time—Subsequent association between parties—Party living as strangers under same roof—If sufficient to stop desertion.*

When there has been desertion by the husband of his wife for a long time, a subsequent association between the parties, during which the parties, though living under the same roof, live as strangers, cannot amount to a break in the desertion. Desertion is not broken unless the husband offers to the wife a home on terms on which a self-respecting wife can accept. (*Beaumont, C.J.*) FIDO *v.* FIDO. **40 Bom.L.R. 900.**

DIVORCE ACT (IV 1869), S. 14, Proviso—*Applicability—Husband living in adultery treating wife with cruelty and deserting her—Wife marrying Mahomedan husband believing thereby that marriage with former husband would be dissolved—Right to decree.*

Where a woman who has been treated with gross cruelty and has been deserted by a husband guilty of habitual adultery under the most aggravating circumstances and who, after her husband had left the place where he had in fact long deserted her, married a Mahomedan husband according to Islamic law believing that by so doing and by herself becoming a Mahomedan, her marriage with her Christian husband would *ipso facto* be dissolved, it cannot be said, merely because she was wrongly advised as to the law, that exercising discretion in her favour and granting her decree nisi would encourage immorality. Hence, discretion under S. 14 should be exercised in her favour. (*Davis, J.C., Mehta and Lobo, JJ.*) HOPE *v.* HOPE. **A.I.R. 1938 Sind 162.**

——**S. 19**—*Proof of impotency—Wife's invincible repugnance to act of coitus—Burden of proof—Delay—Effect of.*

Incapacity in wife of consummating marriage, consisting of a nervous and psychic disorder and of invincible repugnance in relation to the act of coitus, at all events in so far as the petitioner husband is concerned, which renders her incapable of submitting to sexual intercourse with him, is sufficient to satisfy the requirements of S. 19, as it constitutes a permanent physical disability. The burden of proving his allegation is on the petitioner and he must remove all reasonable doubts. If there be a direct conflict of testimony between the two parties who alone know the truth, the difficulties are

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i.e., a real sense of grievance complained of, unmixed with any other subsidiary motive, and, as a necessary proof of such sincerity, requires all reasonable promptitude to be exhibited by complainer in seeking redress. Delay in itself is not an absolute bar to su in a suit of such nature unless the respondent suffered in any way by reason of it; but it has an important bearing on the evidence by which the charge of impotency is sought to be established and upon the measure of proof required. The one guiding principle is that great delay in the institution of a suit of this description by the husband is an objection to be accounted for. (*McNair, J.*) BULL *v.* BULL.
A.I.R. 1938 Cal. 684.

EASEMENT—*Acquisition—Right of pasturage — Inhabitants of village—How may acquire.*

A right of pasturage by vitue of a lost grant cannot be established by the inhabitants of a village, as they are a variable number of persons. Such a right cannot also be established by prescription under S. 26 of the Limitation Act, inasmuch as to establish such a right it must be shown that it has been peaceably and openly ... interruption ... ard to some of ... case of all the ... only right of easement which can be claimed in a case like this is the right of easement by custom. To establish their right of custom, it must be shown that the custom is immemo...

——*Easement of necessity—Right to—Partition of joint property.*

In order to give an easement of nec... tion has been made of joint property ... the easement must be necessary for ... of one of the former joint owners. ... *and Din Mohammad, J.*)

——*Easement of necessit*...

An easement of necessity ...

T... ble ...
...TARY OF STATE *v.* NAGORAO TANKO.
A.I.R. 1938 Nag. 415.

ESTOPPEL—*Admission of counsel on point of law.*

Per *Mackney, J.*—Admission of a counsel on a point of law dc... quently.
PO ZAW ...

EVIDE...
confession—Confession by accused coming from police custody—Improper inducement—Inference.

EXECUTION.

... onfessional statement ... dmittedly come from ... fore the Court for a ... ning prosecution evi... before his statement ... drawn that his confession was in any way improperly induced. It was more likely to have been due to the fact that he had an ...

... S. 32—*Statement by murdered person about motive for murder—Evidence of—Admissibility.*

Statements made by a murdered person prior to the murder as to the accused's motive are not statements falling under S. 32 of the Evidence Act, and evidence of such statements is not admissible in evidence to prove the motive for the murder. (*Burn and Venkataramana Rao, JJ.*) VEERANKUTTI HAJI *v.* EMPEROR.
1938 M.W.N. 868 = (1938) 2 M.L.J. 618.

——**S. 114, Ill. (a)**—*Scope—Person points out place of concealment of stolen property—Presumption—Conviction for theft or receipt of stolen property—Sustainability.*

The mere fact that a person points out the place in which stolen property is concealed does not give rise to any presumption under S. 114 of the Evidence Act, or justify his conviction for the offence of receiving stolen property, still less for the offence of theft. (*Broomfield and Norman, JJ.*) EMPEROR *v.* YESHABA SAKHOBA.
40 Bom.L.R. 927.

——**S. 116**—*Applicability—Tenancy coming to an end.*

Once the tenancy is at an end there is nothing for S. 116 of the Evidence Act to fasten on to when the ... tutory estoppel comes ... *J.*) ABDUL RAZAK *v.*
1938 N.L.J. 317.

... *enant already in possession.*

Once a tenant admits the title of his landlord and ...

CHARAT SINGH. **A.I.R. 1938 Pesh. 49.**

——**S. 145**—*Inquest report—Statements in—Use of to contradict evidence of inquest officer.*

...

v. EMPEROR. **1938 M.W.N. 868 = (1938) 2 M.L.J. 618.**

EXECUTION—Execution Court—Powers of—Decree in contravention of S. 6 (*b*) of Santal Parganas Settle... can be refused. *See* ... REGULATION, S. 6
1938 P.W.N. 617.

——Penal clause in decree—Relief against. *See* CONTRACT ACT, S. 74.
A.I.R. 1938 Sind 185.

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———*Executing Court—Powers of—When can disregard decree.*

No doubt the executing Court has got to take a decree and execute it as it stands, but the executing Court is not precluded from finding out whether any decree had ever been passed at all; and merely because something has been written in a decree form, it does not necessarily make it a decree. Hence where there is no judgment to support the decree sought to be executed and the decree is something merely written in a decree form, the decree is a complete nullity and the executing Court can disregard it. (*Baguley and Mosely, JJ.*) A.T.N.A.T. CHOCKALINGAM CHETTIAR *v.* KO MAUNG GYI.

A.I.R. 1938 Rang. 372.

———*Minor—Decree against—Attainment of majority in the course of execution—Duty to inform Court—On whom lies—Failure to inform Court—Effect—Inference of fraud.*

If a minor judgment-debtor happens to attain majority during the course of the execution proceedings, then it is for him to inform the Court that he had come of age and if he fails to do this the presumption is that he chose to allow the case to be conducted by his *quandom* guardian. As such a failure on the part of the decree-holder to inform the Court of such a fact cannot be construed to constitute fraud on his part. (*Thomas, C.J. and Zia-ul-Hasan, J.*) RADHA RAWAN PRASAD *v.* RAJENDRA PRASAD. **1938 O.A. 598=1938 O.L.R. 371=1938 O.W.N. 758=A.I.R. 1938 Oudh 188.**

———*Sale—Validity—Sale with wrong legal representative of deceased judgment-debtor on record—If void.*

An execution sale with a wrong person on the record as the legal representative of the deceased judgment-debtor is not without jurisdiction, when there is nothing to show that the decree-holder has not acted *bona fide.* (*King, J.*) AYINAN CHETTIAR *v.* RAMASWAMY AYYAR. **48 L.W. 395=1938 M.W.N. 902=(1938) 2 M.L.J. 482.**

FAMILY ARRANGEMENT — *Essentials—Avoidance of future litigation—Beneficent to all parties.*

Where during the lifetime of a widow disputes arose between her, her husband's brother and his nephews and there was almost a certainty of protracted litigation among members of the family and a compromise is entered into with a view to avoid such future litigation by which each of the three parties to it namely the widows, her husband's brother and his nephews were benefitted it was held that it amounted to a family arrangement. (*Zia ul-Hasan and Yorke, JJ.*) CHHATARPAL SINGH *v.* SANT BAKHSH SINGH.

1938 O.A. 573=1938 O.W.N. 711=A.I.R. 1938 Oudh 190.

FEDERAL COURT RULES, O. 10, Rr. 3 and 5—Applicability—Special reference under O. 33—Procedure. *See* FEDERAL COURT RULES, O. 33.

1938 P.W.N. 609.

———**O. 21, R. 2**—Applicability — Special reference under S. 213, Government of India Act—Procedure as to pleadings, etc. *See* FEDERAL COURT RULES, O. 33.

1938 P.W.N. 609.

———**O. 33**—*Reference under—Procedure as to pleadings, etc.—Concise statements of facts, arguments and authorities—If to be filed—O.* 10, *Rr.* 3 *and* 5—*O.* 21, *R.* 2.

The provisions of O. 21, R. 2 of the Federal Court Rules as to pleadings and their contents cannot obviously be applicable to a special reference under S. 213 of the Government of India Act which is governed by O. 33 of the rules, although the preliminary steps would be somewhat identical. As provided by R. 2 of O. 33, the parties can be required to furnish statements of facts as arguments as well. It would be more appropriate to require the parties to furnish concise statements of the facts of the case and of the argument and authorities upon which they propose to rely at the hearing as provided in Rr. 3 and 5 of O. 10 of the Federal Court Rules. (*Gwyer, C.J., Sulaiman and Jayakar, JJ.*) C. P. AND BERAR SALES OF MOTOR SPIRIT AND LUBRICANTS TAXATION ACT, *In the matter of.*

1938 P.W.N. 609.

———**O. 36, R. 2**—*Scope—Special reference under S. 213, Government of India Act re: validity of Act of one Province—Right of other Provinces to be heard—Terms—Powers of Court to impose.*

In a reference under S. 213 of the Government of India Act as to the validity of an Act of a Provincial Legislature, in which no other Province is directly concerned and to which no other Province is made a party (no notice also being served), it cannot be said that the other Provinces ought to be joined in the reference or that their presence before the Court is necessary under O. 17, R. 3 of the Federal Court Rules. The other Provinces are not therefore strictly governed by O. 36, R. 2 of the Rules. But in order to enable the Advocates General of other Provinces to put their points of view, if their Provinces are indirectly interested in the reference, O. 36, R. 2 of the Rules makes a special provision for them to apply to be heard. If they so desire to be heard they should file statements, arguments and authorities, and would be subject to any order as to costs which the Court can, and may think fit to pass after the reference has been heard. (*Gwyer, C.J., Sulaiman and Jayakar, JJ.*) C. P. AND BERAR SALES OF MOTOR SPIRIT AND LUBRICANTS TAXATION ACT, *In the matter of.*

1938 P.W.N. 609.

FOREST ACT (XVI OF 1927), S. 25—*Pre-supposes recognition of existing rights—Restrictive alternatives—If proper.*

S. 25 pre-supposes the existence of public rights of way before a forest is reserved and also pre-supposes that such public rights of ways are recognized; and the powers given to deal with them are exceptional powers hedged with the proviso that suitable alternatives be provided in the case of the special power to close them being used. The alternatives referred to cannot however be clogged with any restriction such as the imposition of a transit fee for cattle. (*Grille, J.*) SECRETARY OF STATE *v.* NAGORAO TANKO.

A.I.R. 1938 Nag. 415.

GENERAL CLAUSES ACT (X OF 1897), S. 9—*Applicability—Decree or order of Court—Direction to party to deposit amount in Court within fifteen days from date of decree—Interpretation of—Date of decree—If to be excluded—Intention of judge—If material.*

S. 9 of the General Clauses Act, it is true, would not apply in terms to a decree or order of Court, but it is desirable that for the sake of uniformity the same interpretation should be given to an expression occurring in a judicial order as would be given to it in a statute. Where a decree passed by a Court on 23-1-1936, directed that the defendant should "pay in Court Rs. 200 within 15 days from this day", and the defendant deposited the amount on 7-2-1936.

Held, that the expression "fifteen days" would mean fifteen clear days, and that the date of making the order, namely, 23-1-1936 should be excluded, consequently the deposit was in time and sufficient.

Held further, that whatever might be the intention of the Judge who made the order, it was to be made out from the expression used, and what was material was the

GOVT. OF BUR. (ADAP. OF LAWS) Order, 1937, p. 9.

meaning of the expression used and the intention of the Judge. (*Divatia, J.*) RAMCHANDRA *v.* LAXMAN.
40 Bom.L.R. 892.

GOVERNMENT OF BURMA (ADAPTATION OF LAWS) ORDER, 1937, Para 9 and GOVERNMENT OF BURMA ACT, Ss. 148 and 149—*Scope and effect of—Execution of decree of—Native State—Law as to, if affected.*

The power of the Courts in Burma to execute a decree of a Native Prince or State in India, arises from the notification of the Government of India under S. 44, C. P. Code, as it stood prior to its amendment. The effect of para. 9 of the Adaptation of Laws Order and Ss. 148 and 149 of the Government of Burma Act, is only to continue in force the law with reference to such executions as it existed immediately before the commencement of the Government of Burma Act, because such law has not been altered, repeal[illegible] the legislature or other competent [illegible] any decree of a Native State in I[illegible] notification under S. 44, C. P. Code, applies can still be execu[illegible] may [illegible] Nati[illegible] *Brau*[illegible]

[illegible]

to dismiss civil servants at pleasure—Dismissal in violation of rules—Right of redress in Civil Cou[illegible]

It is a fundamental principle, based on public [illegible] that the Crown should have the unfettered discre[illegible] to remove a public servant at pleasure, and even a contract to engage him for a fixed term, if there be no statute law authorising it, would not be available to him, such a contract being void as against public policy. This power to dismiss at will can only be controlled by a statute but cannot be abridged or controlled by rules or regulations of service, even if those rules or regu[illegible] are framed under powers given by a statute. [illegible]quently, the dismissal or discharge of a civil serv[illegible] violation of the Fundamental Rules framed under [illegible] 96 B of the Govern[illegible] would not [illegible] but would [illegible]

——S. 96 B—*Fundamental Rules, Part III, R. 54* [illegible]

[illegible]

c[illegible] against him was finally decided and on his conviction by the Magistrate was dismissed from service but on his acquittal in appeal, the order of dismissal was cancelled and he was discharged from service, a month's pay being given in lieu of notice, the said payment does not amount to re instatement and he cannot, therefore, under R. 54, Part III of the Fundamental Rules, claim full pay for the whole period of suspension. (*Mitter and Sen, JJ.*) SECRETARY OF STATE FOR INDIA *v.* SURENDRA NATH.
42 C.W.N. 1186.

——(1935), **S. 213**—*Reference under—Onus—Case, answer and rejoinder—Procedure.*

Where a special reference under S. 213 of the Government of India Act relates to an Act of a Provincial Legislature and the Advocate-General of India challenges its validity on behalf of the Governor-General of India, the onus is on him in the first instance to state the facts and arguments and authorities showing that the Act or any provisions thereof is or are *ultra vires* of the Provincial Legislature concerned. It would then be for the Advocate-General of that Province to file his case stating any further facts which may be considered necessary and meeting the arguments of the Advocate-General of India and citing the authorities [illegible] he [illegible] be [illegible] of a [illegible] whether there should be any rejoinder by the party challenging the validity of the Act must be considered after the opposite party has filed his case. (*Gwyer, C.J., Sulaiman and Jayakar, JJ.*) C. P. AND BERAR SALES OF MOTOR SPIRIT AND LUBRICANTS TAXATION [illegible] *of.* 1938 P.W.N. 609.

[illegible] *Scope and effect of—Letters Patent* [illegible] *th of Chief Justice during vacation—Effect of—Jurisdiction of Vacation Bench to decide* [illegible]

[illegible] consist of a Chief Justice and a [illegible] other Judges. In the case of a vacancy caused by death some time must necessarily [illegible]

tuted High Court. The vacancy in the Office implies that the office exists which is distinct from the case of an abolition of the office. Where the Chief Justice of the High Court dies during the vacation of the High Court, the Office of Chief Justice does not die with him. It still continues, though it remains vacant till filled up. [illegible]

is not required to do any of the duties of the Chief Justice. The only effect of the vacancy in the office of Chief Justice is that so long as [illegible] [illegible]tinues, [illegible] [illegible]til the [illegible] Judges [illegible] ment of [illegible] and the consequent vacancy in his office [illegible] not affect the [illegible] the least or [illegible] case within [illegible] the Rules of [illegible] *[Cha]tterjee, JJ.)* [illegible]L T. 675= 1938 P.W.N. [illegible]

GUARDIAN AND WARD—Maintenance—Arrears of—Order issuing warrant against ex-guardian—Legality. *See* GUARDIANS AND WARDS ACT, S. 34.
68 C.L.J. 62.

GUARDIANS AND WARDS ACT (VIII OF 1890), S. 34—*Arrears of maintenance due to minor—Order issuing warrant against ex-guardian—Legality.*

An order issuing warrant against an ex-guardian for recovery of arrears of maintenance said to be due to the minor up to the date of his making over possession of the minor's estate to the new guardian is bad, when the ex-guardian has no property of the minor in his hands and has made it over to the new guardian [illegible] submitted accounts. If

found due from him to the minor, appropriate steps could be taken against him for the recovery of the said amount. (*R. C. Mitter, J.*) GOLAM KADER HALDAR *v.* MOHAMMAD ABDUL RASHID. 68 C.L.J. 68.

HIGHWAY—*Use as a public path—Presumption of dedication from long user.*

Where it is found that a path has been used as a public path from time immemorial, its dedication to the public as a public highway can be presumed from the long user which has been established; when there is evidence of long enjoyment in a particular way, it is the habit and duty of the Court so far as it lawfully can, to clothe the fact with right. (*Grille, J.*) SECRETARY OF STATE *v.* NAGORAO TANKO.

A.I.R. 1938 Nag. 415.

HINDU LAW—*Adoption—Widow—Powers of adoption in Mysore—Death of last male owner—Subsequent adoption by widow of pre-deceased co-parcener—Validity—Estate already vested in collateral heir—If divested.*

Under the Hindu Law prevailing in the Mysore State, an adoption by the widow of a deceased coparcener of a son to her deceased husband subsequent to the death of last surviving coparcener of the joint family is valid; but such adoption cannot have the effect of divesting property which has already vested in collateral heir after the death of the last male owner by inheritance after the extinction of the coparcenary. (*Abdul Ghani and Nagesvara Iyer, JJ.*) DASAPPA *v.* SESHAGIRI RAO.

43 Mys. H.C.R. 438=16 Mys.L.J. 301.

———*Adoption—Widow—Powers of under Mitakshara in Mysore State—Disruption of joint family subsequent to death of husband—Subsequent adoption—Validity—Right of adopted son to share in property formerly held by joint family.*

There is no text, no authority and no reason why a properly authorized widow governed by the Mitakshara School of Hindu Law should not adopt a son, even if the adopted son gets no property. That the widow's husband has died as a coparcener in his joint family and his coparceners have become divided after his death or the coparcenary has otherwise come to an end does not affect her right to make a valid adoption in any way. The validity of a widow's adoption is not affected by the question whom it might divest of property. But an adoption so far as it affects property, does not by any fiction relate back to any point of time before its own date, though for the continuance of the family line and the religious and secular consequences of that continuance an adoption must relate back to the death of the adoptive father. If the adoptive father's family is still undivided at the date of the adoption, the adopted son becomes a member of that joint family and at once becomes a coparcener in respect of the family property as it stands at that moment. It is to his father's estate as it stands at the date of the adoption that he succeeds. If the joint family of which the adoptive father was a member has ceased to exist before the adoption takes place by reason of a partition, there is no co-parcenary into which the adopted son can enter, and the adopted son can therefore get no right to share in the property which once belonged to the joint family which has come to an end before his adoption was made. (*Reilly, C. J. and Abdul Ghani, J.*) SANKARAMMA *v.* KRISHNA RAO. 16 Mys.L.J. 376=43 Mys. H.C.R. 415.

———*Alienation—Father — Mortgage by—Validity against sons—Absence of proof of necessity or of antecedent debt—Debt not shown to be immoral—Sons—If bound.*

The law is perfectly clear that an alienation by a Hindu father for an antecedent debt binds the interests of his sons in the property alienated if it is not proved that the debt was immoral. But a mortgage by the father which is not for necessity and not for an antecedent debt does not bind the sons' interests in the property whether or not the debt was contracted for an immoral purpose. It is not necessary in that case to show that the debt was an immoral debt. (*Broomfield and Macklin, JJ.*) ASMAN *v.* GANPAT.

40 Bom.L.R. 946.

———*Debt—Borrowing for joint family business—If binding on joint family.*

Debt borrowed for carrying on a joint family business is binding on the joint family, being for the benefit of the family. (*Stone, C.J. and Vivian Bose, J.*) GANGARAM CHOTURAM *v.* CHAPSI KUWARJEE.

A.I.R. 1938 Nag. 431.

———*Debts—Father—Antecedent debt—Loan to father in pursuance of agreement to execute mortgage in future as and when required by lender—If antecedent debt binding on sons.*

Where money is advanced to a Hindu father on the strength of an agreement to execute a mortgage as and when required by the lender in future, that would constitute an antecedent debt so as to make the mortgage executed in pursuance of the agreement binding on the shares of his sons as well. The agreement must, however, be a genuine agreement and not a device for evading the law.

Varadachariar, J.—There is a real distinction between cases in which the lender and the borrower contemplate the giving of security only as a future possibility and cases in which from the outset the parties contemplate only a mortgage loan. (*Leach, C.J. Madhavan Nair and Varadachariar, JJ.*) VENKATARAMASWAMI *v.* IMPERIAL BANK OF INDIA, RAJAHMUNDRY.

48 L.W. 401=1938 M.W.N. 913=(1938) 2 M.L.J. 461 (F.B.).

———*Joint family—Alienation by member—Right of alienee—Suit for partial partition.*

A purchaser of a small portion of the joint family property from one of the co-owners can sue for partition only of the land purchased by him, and the Court can decree his suit if the parties would not be in any way prejudiced or inconvenienced thereby. (*Syed Nasim Ali, J.*) TARINI CHARAN CHAKERBUTTY *v.* DEBENDRA LAL DAY. 68 C.L.J. 114.

———*Joint family—Business—Business carried on by member—Presumption.*

There is no presumption that a business carried on by a member of a joint family is joint family business. A member of a joint family who engages in trade can make separate acquisitions of property for his benefit, and unless it can be shown that the business grew from a nucleus of joint family property, or that the earnings were blended with joint family funds, they remain his self-acquired property. (*R. C. Mitter and Biswas, JJ*) MST. KULWANTA BEWA *v.* KARAMCHAND SONI.

68 C.L.J. 8.

———*Joint family—Business — Debts—Debts contracted by manager—Extent of liability of other members.*

Where debts are contracted by manager of a joint Hindu family, the other coparceners are liable not personally but only to the extent of their interest in the family property unless, in the case of adult coparceners, the contract sued upon, though purporting to have been entered into by the manager alone is in reality one to which they are actual contracting parties, or one to which they can be treated as being contracting parties by reason of their conduct, or which they have subsequently ratified. The fact that a coparcener used to

HINDU LAW—Joint family.

work at the shop is by itself not such conduct as would cause him to be treated as one of the contracting parties. (*Addison and Abdul Rashid, JJ.*) MAM RAJ *v.* SHER SINGH. **A.I.R. 1938 Lah. 694.**

——*Joint family—Son's right—Questioning of decree against father in execution—Limits.*

Where an award executable as a decree is being enforced against the father of a joint Hindu family who raises no objection whatever, the son who was not a party to the award can challenge it at the execution stage of the proceedings but only to the extent necessary to protect his own interests. He cannot be allowed to fight his father's battles though he may use the same weapons which his father used or might have used. The test is: was the decree obtained against the f[illegible] sonally or in a representative capacity. (*V[illegible] and Puranik, JJ.*) NARAYAN SAKHAR[illegible] OPERATIVE CENTRAL BANK, MALKAPUR. **A.I.R. 1938 Nag. 431.**

——*Joint family—Suit and decree against member—Decree if binding only upon defendant or upon joint family—Question of fact—Proper course—Withholding of costs for failure to do so.*

It is a question of fact to a large extent whether a decree, passed, in a suit against a member of joint Hindu family is binding only upon the defendant sued or upon the family. Whichever conclusion is arrived at, it depends [illegible]

[illegible] putes. The High Court is entitled to withhold costs from litigants who necessitate a number of actions instead of one in order to fairly clear the position as to whether the family is being sued or a member of the family is being sued. Where the members of the joint family were not impleaded in such a suit and consequently were not in a position to contest matters which might have to be contested before the joint family property could be taken in execution, it is right and proper that they should have an opportunity of litigating the question as to whether the debt was one binding on the family. (*Stone, C. J. and Vivian Bose, J.*) GANGARAM CHOTURAM *v.* CHAPSI KUWARJEE. **A.I.R. 1938 Nag. 431.**

——*Maintenance — Daughter-in-law — Rig[illegible] against self acquired property of father-in law [illegible] hands of donee or devisee by will.*

A widowed daughter-in law under the Hindu La[illegible] no legal right to maintenance from her father-in law out of his self acquired property but only what is called a moral right, but if on her father-in law's death that [illegible] his heirs, her moral [illegible] [illegible]oment of his death [illegible] property which they [illegible] a devisee or donee of the self-acquir[illegible] father-in law or against the property not by inheritance, but by will or [illegible] Stodar[illegible]

——

Hindu [illegible] *from f*[illegible] *of maintenance—If limited to bare necessities of life.*

Under the Mitakshara school of Hindu Law an illegitimate son of a deceased joint coparcener (who is a

HINDU LAW—Religious Endowment.

member of the twice-born or regenerate classes), who has died in union and without leaving any separate property is entitled to receive maintenance out of the joint family estate which has passed by survivorship to his putative father's coparceners. It is not necessary that the mother of the illegitimate son should have been a दासी or continuously kept concubine of his father. There is no justification for holding that the maintenance awarded should cover only the bare necessities of life. The expression जीवन् मात्र, in Ch. I, S. 12 verse 3 of the Mitakshara has no reference to the amount of maintenance. It must be taken to mean no more than [illegible]

whether they amount to partition.

Mere lists of property do not form an instrument of partition and so would not require registration, but what the Court has to consider is whether these lists merely contain the recital of past events or in themselves embody the expression of will necessary to effect the change in the legal relation contemplated. (*Vivian Bose and Puranik, JJ.*) NARAYAN SAKHARAM *v.* CO-OPERATIVE CENTRAL BANK, MALKAPUR. **A.I.R. 1938 Nag. 434.**

——*Partition—Oral evidence — Admissibility—But* [illegible]

substitute a written instrument for the oral agreement, then the ultimate contract is deemed to be contained in that instrument alone and no oral evidence of its terms can be given thereafter. (*Vivian Bose and Puranik, JJ.*) NARAYAN SAKHARAM *v.* CO-OPERATIVE CENTRAL BANK, MALKAPUR. **A.I.R. 1938 Nag. 434.**

——*Religious Endowment—Accretion— Endowment to existing debutter—If could only be accepted upon donor's terms.*

An endowment which is an accretion to an already existing *debutter* can only be accepted upon the donor's terms. (*S. K. Ghose and Patterson, JJ.*) NIRMAL [illegible]

endowment—If created.

A Chettiar firm credited in their books of account a certain sum of money to a particular deity by way of charity. [illegible] ness as bef[illegible] ordinary r[illegible] [illegible] [illegible]ndowment of any property of the firm to hold any property. (*Sir George Rankin.*) [illegible]IYAR. **=42 C.W.N. 1125 (P.C.).**

——*Religious endowment—Creation of—Essentials.*

According to the Hindu law as administered in British India, the formal religious ceremonies of sankalp and

HINDU LAW—Religious Endowment.

samarpan, though ordinarily performed among the orthodox Hindus, are not essential for the creation of a valid endowment for religious purposes. So long as there is a clear and unequivocal manifestation of intention to create a trust and there is a formal divesting of the ownership in the property on the part of the donor and vesting the same in another, or even in the donor himself as a trustee, that is to say, so long as there is a clear change in the tenure of the property with the intention on the part of the donor to devote it to religious or public purposes, dedication thereof must be deemed to be complete. The evidence of divestiture may be contemporaneous and the subsequent acts and conduct of the donor are irrelevant and cannot reinvest him. A.I.R. 1934 Lah. 771 and A. I. R. 1935 Nag. 35, Rel. on. On more occasions than one, the dedicator declared in unequivocal terms that the house in question was set aside for the purpose of being used as a resting place for the marriage processions of the Khatris of the locality. More than one tablet was affixed on the house, the trend of all of which was to emphasize the wakf nature of the property. On the completion of the building the dedicator requested the Governor of the Pubjab to perform its opening ceremony and further invited almost all the gentry of the place on that occasion and there made a dedication to the effect that the house had been set aside for the purposes mentioned above.

Held, that in the face of these circumstances it could not be urged that the house was not wakf or that the dedication was bad in the eye of the law on account of its being indefinite and vague. Hence, the using by the son of the dedicator of a part of the house as his own residence and allowing the other portion to be used as a girls' school was counter to the wishes of the settlor and was thus a breach of trust. (*Addison, Ag. C. J. and Din Mohammad, J.*) JAI DAYAL *v.* DEWAN RAM.

A.I.R. 1938 Lah. 686.

——*Religious endowment—Shebait—Right to relinquish office in favour of successor by nomination.*

A shebait who has under the terms of the endowment a right to nominate his successor, can validly relinquish the shebaitship in favour of his nominee during his lifetime. (*S. K. Ghose and Patterson, JJ.*) NIRMAL CHANDRA *v.* JYOTI PRASAD. **42 C.W.N. 1138.**

——*Reversioner—Widow obtaining decree of her title to estate—Subsequent decree against widow in suit for possession by her in her own interest—If affects reversioner's right to possession.*

A widow obtained a decree of her title to the estate of the deceased; but in execution of that, entered into a compromise with persons in possession of the property. The compromise and consent decree thereon were declared void and inoperative as against reversionary heirs in a suit filed by the reversioner. Subsequently a suit by the widow in her own interest for possession against the persons in possession was dismissed.

Held, that the reversioner's right to possession was established as *res judicata* against the persons in possession of the estate, that the widow had no right to submit it to a fresh adjudication by the Court so far as the right of the reversionary heirs was concerned and that the decree against her in her suit for possession did not affect the reversioner's right to possession. (*Lort Thankerton.*) RAJLAKSHMI DASSI *v.* BHOLANATH.

1938 O.W.N. 819 = 48 L.W. 423 = A.I.R. 1938 P.C. 254 (P.C.).

——*Widow—Reversioner—Right to sue—Unauthorised acts of widow.*

A reversioner is entitled to challenge the unauthorized acts of the widow. To incur a debt without legal necessity for the same is an unauthorized act of the widow and if a creditor sues for such a debt and obtains a decree and attaches the property in the hands of the widow, a cautious reversioner may sue for a declaration that these acts do not bind the reversionary interest. A reversioner cannot sue for a mere declaration that he is a reversioner, but when a cloud is cast on his title and when he apprehends danger to his interest, there is no reason why he should not seek a declaration that a particular act of the widow is unauthorized so far as the reversionary interest is concerned. (*Stone, C. J. and Puranik, J.*) SITABAI *v.* HARI.

A.I.R. 1938 Nag. 401.

——*Widow—Right of residence in family house—Extent of.*

On a partition in a Hindu family, the Court can direct a widowed mother to vacate the family house if the circumstances demand it. She has a right to a suitable residence, and if one can be found among the family properties it is going very far to say that the Court cannot compel her to accept it when a fair partition demands it. The coparceners have a right to separate and a right to have the estate partitioned, and the Court must do justice to all parties. (*Leach, C. J. and Madhavan Nair, J.*) JANAKI AMMAL *v.* PERUMALASWAMI NADAR. **1938 M.W.N. 936 = 48 L.W. 408 = (1938) 2 M.L.J. 511.**

——*Widow—Surrender—Essentials of validity—Omission to include small portion of property in surrender through mistake or omission—If invalidates surrender.*

For a valid surrender by a Hindu widow (1) there must be a complete effacement of the surrendering widow with the intention of accelerating the succession of the next apparent heir; (2) the surrender must be *bona fide* and must not be a mere *cloak*, the real object of which is to divide the estate between the reversionary heir and the widow; (3) in determining whether a conveyance operates as a good surrender or not what has to be considered is the substance of the transaction; (4) even a provision for the maintenance of the widow by reserving a small portion of property for that purpose would not affect the validity of the surrender as a whole. If the deed of surrender, read as a whole, is, *ex facie*, a complete deed of surrender and not a device to divide the estate, and is otherwise valid, an honest omission, due either to ignorance or to oversight, to include a very small portion of the property in the surrender deed cannot affect the validity of the surrender, which apart from it, is a *bona fide* transaction. (*Rangnekar, J.*) HARIBHAI *v.* NARAYAN. **40 Bom.L.R. 876.**

INCOME-TAX ACT (XI OF 1922), S. 10—*Bad debt—Joint business divided by partitioning assets and liabilities—Partners carrying on separate business—Outstanding debts assigned becoming irrecoverable—Loss, if exempted from tax.*

A and *B* who carried on a joint business separated and divided between themselves the assets and liabilities of the joint business. Thereafter each carried on his separate business which had nothing to do with the former joint business. *B* during a year of assessment claimed that an outstanding debt assigned to him in partition with *A* was irrecoverable and hence should be exempted.

Held, that the loss claimed was in the nature of a capital loss and hence could not be exempted. (*Costello and Lort Williams, JJ.*) BISSENDOYAL DAYARAM, *In re.* **A.I.R. 1938 Cal. 636.**

INDIAN AND COLONIAL DIVORCE JURISDICTION ACT (1926), S. 1 (1), Proviso (a)—*"Law for the time being in force in England"—Construction of—If confined to law in force at time of passing of Act*

INSOLVENCY.

—*Grounds of divorce under Matrimonial Causes Act of 1937—If available in suit after 1937—Desertion by husband—Right to divorce.*

The words "law for the time being in force in England" in Proviso (*a*) to S. 1 (1) of the Indian and Colonial Divorce Jurisdiction Act, in their natural adaptation mean the law in force at the time when

the Act of 1926 on any of extended by the later Act of 1937, one of the desertion without cause for a peric years immediately preceding the petition. (*Beaumont, C. J.*) FIDO *v.* FIDO. 40 Bom.L R. 900.

INSOLVENCY—Amendment of insolvency petition—Powers of Court—Amendment to cure defect without

debt against insolvent—Jurisdiction of to refuse to admit—Power to go behind Insolvent—Principles—Official Assignee come on record—Effect.

The Insolvency Court is entitled in ce ances to refuse to admit a judgment-debt to go behind the decree of a Court pass insolvent if it is obviously an unjust decre not be enforced without doing injustice

INSURANCE—*Policy—Construction—Reference to Prospectus—Permissib*

Where a polidy hol rectify his contract of issued to him on the ground of fraud or mistake or to recover damages for alleged fraudulent misrepresentation, the prospectus issued by the Insurance Company but not referred to in the policy, cannot legitimately be referred to in order to construe the contract into been induced to enter. (*Derbyshire, C.J. ridge, J.*) SUN LIFE ASSURANCE CO. CANADA *v.* NILRATAN MOOKERJEE. 68 C.L J. 131 = 42 C W. [illegible] A.I.R. 1938 Cal 693.

INTEREST—Right to—Suit for rent of shop—Damages or interest for period prior to suit—Right to. See LANDLORD AND TENANT—RENT. 1938 P.W N. 689.

INTERPRETATION OF STATUTES—*Directory or mandatory—Test to decide—Statute creating public authority and imposing public duty—Conditions as to exercise or performance of duty—If imperative or merely directory.*

The scope and object of a statute are the only guides in deciding whether its provisions are directory or mandatory. In the absence of an express provision the intention of the Legislature is to be ascertained by weighing the consequences of holding a statute to be directory or imperative. The question is in the main governed by consideration of convenience and justice. Courts should not impute to the Legislature such intention as would involve general inconvenience or injustice to innocent

or under other may well be in cases when have no control over those exercising the duty would result if such requirements were essential and imperative. (*Dhavle and Agarwala, JJ.*) JHARIA WATER BOARD *v* JAGADAMBA LOAN CO., LTD. 1938 P.W.N. 635.

II OF 1914), *ssion to issue*

Jharia Water

58 (*b*) cannot render Notice under the be mandatory or *ala, JJ.*) JHARIA OAN CO, LTD. 1938 P.W.N. 635.

JUDICIAL OFFICERS—*Duty of—Need for absolute impartial position—Principles—Judicial Officer debtor of one of the parties—Competency to deal with matter between parties without disclosing same.*

Persons exercising judicial functions must be in an entirely impartial position. They ought not to have any interest, pecuniary or otherwise, in the subject matter of the litigation, and they must not be in such a position, or the other can be d not be proved, if seem likely. It is impossible to say that a debtor is not, from the nature of the case, subject to bias in favour of a creditor who can call in his money. It is not enough for the Court to say it is satisfied that in a particular case no bias existed that the position be such feel confident that justice tribunal, and it is of the is principle should not be stant Taxing Master of the High Court taxed three bills of costs of the respondent bank against the applicant. At the time he was a debtor of the respondent bank, but he did not disclose the fact at the time.

Held that the officer was not competent to entertain the taxation and the taxation was therefore bad *ab initio* (*Beaumont, C.J.*) SHAMDASANI *v.* CENTRAL BANK OF INDIA, LTD. 40 Bom L R. 904.

JURISDICTION—*Revenue Court—Duty to give effect to possession obtained through Civil Court—Limits—Sale of grove in contravention of Government Notification 521/1-A-93 of 1932.*

JURISDICTION.

Under the Government Notification 521/1-A-93 of 1932, it was not competent for a civil Court to effect the sale of agricultural land and grove being agricultural land, when it is sold, it cannot possibly be interpreted as either timber or standing timbers or ungathered produce of land. A Civil Court can order the sale of the latter but not of the former. Where a Civil Court sells a grove and the purchaser obtains possession, though ordinarily Revenue Courts cannot refuse to give effect to such possession obtained through Civil Court, yet where the civil Court had no jurisdiction to sell the grove, the Revenue Court can refuse to give effect to possession obtained under such a sale. (*Mehta, J.M.*) BIR BAHADUR RAI *v.* JAGDHAR. **1938 R.D. 744.**

JUS TERTII—*Plea of—When open—Suit for possession—Tile of true owner already adjudicated upon.*

Where the defendants have no right in themselves, in order to resist a suit for possession by setting up a plea of *jus tertii* they have first to prove that the third party whose right they desire to set up as a plea in defence, has an existing right and that, that right has not been finally determined by any Court of law. Such a plea is not open in a case where the third party' has in a suit admitted the right of the plaintiff. (*Bajpai, J.*) GUDA KUERI *v.* ADNATH PANDE.

1938 A.W.R. (H.C.) 535=A.I.R. 1938 All. 546.

KARACHI SMALL CAUSE COURTS ACT (IV OF 1929), S. 24—*Scope—Security—Amount of.*

The purpose of S. 24 is to allow the Court power to demand such security as to ensure the prompt institution by the applicant of his suit and as a proof that he is in earnest. The security can be fixed in such a sum as will test the good faith of the applicant and induce him to do that which the bond requires, so that he and his surety may be free of the liability which the bond imposes. This can be done within the provisions of the section but excessive or punitive security cannot be demanded. (*Davis, J.C. and C. Mehta, J.*) GUSTAD BAHRAM *v.* A. SAID. **A.I.R. 1938 Sind 191.**

LAND ACQUISITION ACT (I OF 1894), S. 23—*Valuation—Expert witness—Putting of—Written interrogatories—Procedure, if unusual.*

The putting of written interrogatories to an expert witness for submission of written answers later on is an unusual procedure. (*Costello and Biswas, JJ.*) SECRETARY OF STATE FOR INDIA *v.* BHUPATINATH DEB. **68 C.L.J. 90.**

——**S. 23**—*Valuation of land—Belting method.*

Where a plot of land which was acquired was approached by what was called a severed ditch from one street and also by what was referred to as a common passage from another street, that common passage not, however, skirting the plot along any of its frontages, but merely debouching on it at one corner,

Held, that the fact that the land lay in the proximity of those two streets was certainly a point to be taken into consideration in valuation but it should not be magnified to the extent of treating the plot as lying within a certain belt or zone of land abutting directly on any such street. (*Costello and Biswas, JJ.*) SECRETARY OF STATE FOR INDIA *v.* BHUPATINATH DEB. **68 C.L.J. 90.**

LANDLORD AND TENANT—*Rent—Charge for—Lessee undertaking to cultivate land, reap the crop and deliver amount of rent in kind to lessor—If covenant to pay out of crops raised on leased land—Charge for rent—If created.*

An undertaking by a lessee in the lease executed by him in favour of his lessor to cultivate the demised land, reap the crop and deliver to his lessor to deliver the stipulated amount rent in kind (paddy) does not amount to a covenant that the rent would be paid out of the crop actually reaped by him. The undertaking can only be regarded as being given by way of assurance that the rent would be paid. There being no covenant to make payment out of the paddy grown on the demised land there can be no charge on the produce of the land for the amount of rent payable under the lease. (*Leach, C. J. and Krishnaswami Ayyangar, J.*) KARUPPASWAMI GOUNDAN *v.* KONDAMA NAICKER.

1938 M.W.N. 917=(1938) 2 M.L.J. 565.

——Rent—Mortgagee from lessee under English mortgage—Liability of to landlord—Privity of contract *See* T. P. ACT (AS AMENDED IN 1929), S. 58 (E). **17 Pat. 499.**

——*Rent—Suit for rent of shop—Damages or interest prior to suit—Right to.*

In a suit for recovery of rent of a shop, the plaintiff's claim being a mere claim for money, the plaintiff is not entitled to damages or interest for the period before suit. (*James, J.*) GOBIND PRASAD *v.* ABDUL RASHID KHAN. **1938 P.W.N. 689.**

——*Tenancy at will—Nature of—If heritable.*

A tenancy at will amounts to no estate at all and terminates by the death of either party. It is not heritable. (*Stone, C. J. and Bose, J.*) ABDUL RAZAK *v.* SETH NANDLAL. **1938 N.L.J. 317.**

LEASE—Assignment by lessee by way of English mortgage—Validity—Liability of mortgagee for rent to lessor. *See* T. P. ACT (AS AMENDED IN 1929), S. 58 (E). **17 Pat. 499.**

——Construction—Charge for rent—When created—Undertaking by lessee to cultivate land, reap the crop and deliver rent fixed in kind to lessor—If covenant to pay out of crop raised—Right to charge on crops. *See* LANDLORD AND TENANT—RENT.

1938 M.W.N. 917=(1938) 2 M.L.J. 565.

——*Covenant for renewal—Construction—Terms of renewal not stated—One renewal or perpetual renewal—If intended.*

Where in a lease there is a covenant for renewal, if the option does not state the terms of renewal, the new lease would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof, except as to the covenant for the renewal itself. The leaning of Court is always against perpetual renewals. In order to establish this construction the intention has to be unequivocally expressed. Otherwise the lessee is entitled to only one renewal for the same period as the original lease. (*Syed Nasim Ali, J.*) SRISH CHANDRA NANDI *v.* DOA MAHAMMAD BYAPARI. **68 C.L.J. 128.**

LEGAL PRACTITIONER—Professional misconduct—Advocate cited as witness for prosecution—If disqualified from appearing for defence. *See* CRIMINAL TRIAL—EVIDENCE. **48 L.W 276=(1938) 2 M.L.J. 446.**

LEGAL PRACTITIONERS ACT (XVIII OF 1879), Ss. 13 and 14—*Misconduct—Allegations amounting to criminal charge—Proper procedure.*

Where the allegations against a legal practitioner amount to a criminal charge, the proper procedure is to prosecute him criminally in the first instance before bringing proceedings under the Legal Practitioners Act. Otherwise he is likely to be prejudiced in as much as these are summary proceedings in the nature of a summons trial. (*Jack and Patterson, JJ.*) EMPEROR *v.* SACHINDRA NATH MOULIK.

I.L.R. (1938) 2 Cal. 138.

LETTERS PATENT (Pat), Cl. 2—Scope—Chief justice—Death of during vacation—Delay in appointment of new Chief Justice—High Court—If not properly constituted—Vacation Bench—Jurisdiction to decide

LIMITATION ACT (1908), S. 3.

cases—If affected. *See* GOVERNMENT OF INDIA ACT 1935, S. 222 (1). **1938 P.W.N. 683.**

LIMITATION ACT (IX OF 1908), S. 3—*Applicability—Award under Co-operative Societies Act—Application to execute—Limitation.*

An application to execute an award under the Bombay Co operative Societies Act falls within S. 3 of the Limitation Act, and the Limitation Act, is applicable to such an application. (*Rangnekar and Wadia, JJ.*) MARATHA CO OPERATIVE CREDIT BANK OF DHARWAR *v.* KASHAV TRIMBAK HUNDE. **40 Bom.L.R. 889.**

——**S. 4**—*Applicability—Application for copy of decree.*

Even if it be assumed that the application for obtain-

S. 10, General Clauses Act must be given effect to namely that done on a closed on tha sidered as taken on the opened. (*Ab* HANS RAJ SHAH. **A.I.R. 1938 Lah. 707.**

——**S. 5**—*Applicability—Registration Act.*

S. 29 of the Limitation Act makes it quite clear that S. 5 of that act would not apply for the purpose of extending the period of limitation prescribed by a special law like that embodied in the Registration Act. (*Biswas, J.*) MAFIZUR RAHMAN *v.* JAMILA KHATUN. **42 C.W.N. 1174.**

——**S. 5**—"*Sufficient cause*"—Ex parte *decree—Proceedings to set aside in trial Court and appellate Court—Subsequent appeal from* ex parte *decree—Right to extension of time for appeal.*

The fact that an appellant appealing from an *ex parte* decree against him took proceedings both in the trial Court and in the appellate Court to set asi *parte* decree cannot be held to constitute cause" within the meaning of S. 5 of the Act, so as to entitle him to an extension o preferring the appeal. (*Rangnekar, J.*) JOTIBA *v.* RAMAPPA. **40 Bom.L.R. 957.**

——**S. 12**—*Exclusion of time—Time requisite for getting copies of judgment and decree.*

In calculating the period of limitation for filing an appeal, time requisite for obtaining a copy of the judgment of the appeal and a copy of the decree sheet must be excluded. A.I.R. 1925 All. 436, Rel. on. (*Abdul Rashid, J.*)

——**S. 1**

Execution of fresh note in renewal—Cancellation on prior instrument—Sufficiency to keep alive debt.

The endorsement of cancellation on a prior promissory note at the time of execution of a fresh promissory note for the amount due under the earlier one amounts to a valid acknowledgment of liability, so as to keep alive the original liability. (*Madhavan Nair, J.*) KONDAMMA *v.* VENKATARAYUDU. **1938 M.W.N. 875.**

——**S. 21**—"*Agent duly authorised*"—De facto *guardian of Hindu minor—If lawful guardian—Power to acknowledge debt of minor.*

A *de facto* guardian of a Hindu minor is not an agent duly authorised to acknowledge a debt on behalf of the minor within the meaning of S. 21 of the Limitation Act, as a *de facto* guardian cannot be considered to be a lawful guardian under S. 21; and an acknowledgment by him is not valid and cannot keep the debt alive against the minor. (*Madhavan Nair and Abdur Rahman, JJ.*) NAGAYYA *v.* NARASAYYA **1938 M.W.N. 878 = 48 L.W. 268 = (1938) 2 M.L.J. 501.**

LIMITATION ACT (1908), Art. 90.

——**S. 24**—*Applicability—Suit in respect of negligence constituting breach of contract.*

S. 24 of the Limitation Act applies only to suits based on tort and does not apply to a case of negligence which constitutes a breach of contract. (*Roberts, C. J., Ba U and Dunkley, JJ.*) S.A.A. ANNAMALAI CHETTIAR *v.* A FIRM OF ADVOCATES. **1938 Rang.L.R. 457.**

——**Art. 14**—*Applicability—Suit for declaration of extent of share in estate—No prayer for setting aside of*

A suit merely for a declaration of the extent of the share

——**Art. 60**—*Applicability—Deposit on current account—Insolvency of bank—Proof of claim—Annulment of adjudication—Receiver acting under S. 37 (1) of Provincial Insolvency Act—Suit for deposit—Limitation—Starting point.*

A banker with whom money was deposited on current account was adjudicated an insolvent. The creditor filed claim by a tender of proof of his debt. The adjudication was annulled and an order was passed under S. 37 (1), Provincial Insolvency Act. The appointee made a payment of dividend to the creditor. Subsequently the creditor filed a suit for recovery of the balance.

Held, that when the adjudication was annulled, the

whose insolvency is set aside to his original stipulation. Time could not run against the creditor while the estate was in the hands of the appointee, who must be considered as in the position of a trustee for the debtor.

Held also, that where the property of the late insolvent was handed back to the debtor, what was handed back to him, so far as regards the creditor's claim was his deposit and that deposit cannot lose its character as such. (*Mosely and Dunkley, JJ.*) DAW HNIT *v.* ANAMALAI CHETTYAR. **A.I.R. 1938 Rang. 335.**

——**Art. 60**—*Demand—If to be for entire payment.*

The demand contemplated by Art. 60 is a demand for the repayment of the whole amount of the deposit due, and not a demand for partial payment. (*Mosely and Dunkley, JJ.*) DAW HNIT *v.* ANAMALAI CHETTYAR. **A.I.R. 1938 Rang. 335.**

——**Art. 60**—*Demand—Proof of debt and claim in insolvency—If amounts to.*

Where a banker with whom deposit is made on current account is adjudicated insolvent, tender of proof of debt and claim made in insolvency by the creditor is not a demand within the meaning of Art. 60. (*Mosely and Dunkley, JJ.*) DAW HNIT *v.* ANAMALAI CHETTYAR. **A.I.R. 1938 Rang. 335.**

——**Art. 90**—*Starting point under—Suit against Advocate for negligent act or omission.*

Art. 90 of the Limitation Act does not say that time begins to run when the cause of action for neglect or misconduct became known to the plaintiff, but when the

neglect or misconduct became known. In a suit against an Advocate for neglect or misconduct in respect of his duty, it cannot be said that when once the plaintiff is acquainted with what has happened, he can sit still and say that time does not run against him until he chooses to take the view that the omission of which he is aware is actionable neglect or that the act of which he is aware amounts to actionable misconduct. (*Roberts, C. J. Ba U and Dunkley, JJ.*) S. A. A. ANNAMALAI CHETTYAR *v.* A FIRM OF ADVOCATES.

1938 Rang.L.R. 457.

———**Art. 116**—*Mortgage bond—Claim to personal decree—Limitation.*

Under Art. 116 of the Limitation Act, a claim to a personal decree under a registered mortgage-bond would not be barred at the date of the mortgage suit, if it is brought within six years of the expiry of the period of repayment. (*Biswas, J.*) MAHARAJ BAHADUR SINGH *v.* ABDUL MAJID. **68 C.L.J. 109.**

———**Arts. 120 and 124**—*Office of shebait not hereditary—Suit to declare that certain person is not shebait and deed appointing him is invalid—Article applicable.*

Where the office of the shebait is not hereditary, a suit in which the main relief asked for is that a certain person is not the shebait and that the deed appointing him as such is invalid is governed by Art. 120 and not by Art. 124 of the Limitation Act. Such a suit is therefore time barred, if not brought within six years from the date of the deed. (*S. K. Ghose and Patterson, JJ.*) NIRMAL CHANDRA *v.* JYOTI PRASAD.

42 C.W.N. 1138.

———**Art. 120**—*Partition proceeding—Plaintiff's title to land denied—Plaintiff never in possession—Suit for declaration—Limitation.*

In partition proceedings started in the year 1902, the plaintiffs' title to the land in dispute was denied at that time. The plaintiffs had never actually been in physical possession of the property in dispute.

Held, that a suit for declaration that the plaintiffs were owners of land instituted in 1935, was clearly barred by time under Art. 120. (*Addison and Abdul Rashid, JJ.*) MEHAR LANGAH *v.* MEHAR ALLAH YAR. **A.I.R. 1938 Lah. 671.**

———**Art. 132**—*Mortgage bond containing default clause—Money, when becomes due.*

The fact that the mortgage bond provides that the suit might be brought on the happening of a default would not make the mortgage money any the less due on the expiry of the period of repayment. (*Biswas, J.*) MAHARAJ BAHADUR SINGH *v.* ABDUL MAJID.

68 C.L.J. 109.

———**Art. 135**—*Suit by mortgagee for possession as owner—Starting point—Bengal Regulation XVII of 1806.*

A suit by a mortgagee without possession for possession of the mortgaged property on the basis of ownership is well within time, if lodged within twelve years of the foreclosure proceedings under Bengal Regulation XVII of 1806. (*Din Mohammad, J.*) AHSAN ELAHI *v.* ALLA-UD-DIN. **40 P.L.R. 798.**

———**Art. 142**—*Presumption of possession—Waste land adjoining boundary.*

Where a strip of land in question is a piece of waste land lying on the boundary of one's property, possession of such land must be presumed to be with the person who proves title to the property. (*Zia-ul-Hasan, J.*) MANZUR ALI KHAN *v.* PETESHWARI PRASAD SINGH.

1938 O.A. 589 = 1938 O.W.N. 744 = 1938 A.W.R. (C.C.) 71 = 1938 O.L.R. 363.

———**Art. 182**—Starting point—Decree on payment of court-fee. *See* C. P. CODE, S. 149—APPLICABILITY.

1938 A.W.R. (H.C.) 538 = A.I.R. 1938 All. 539.

———**Art. 182 (5)**—*Step-in-aid—Award under co-operative Societies Act—Application to Collector for execution—If saves limitation in respect of subsequent application to Court—Bombay Co-operative Societies Act, S.* 59 (1) (b).

The "Collector" acting under S. 59 (1) (*b*) of the Bombay Co-operative Societies Act is some agency for carrying out an award, different from a Court. S. 59, makes a distinction between a Civil Court as such and the Collector as such. An application to the Collector to enforce an award under S. 59 (1) (*b*) of the Bombay Co-operative Societies Act cannot therefore be regarded as an application made to a Court, and proceedings so taken under S. 59 (1) (*b*) are not steps in-aid of execution so as to save limitation under Art. 182 (5) of the Limitation Act in respect of a subsequent application made to a Civil Court for execution. (*Rangnekar and Wadia, JJ.*) MARATHA CO-OPERATIVE CREDIT BANK OF DHARWAR *v.* KASHAV TRIMBAK HUNDE.

40 Bom.L.R. 889.

———**Art. 182 (5)**—*Step-in-aid—Step taken by person claiming adversely to decree-holder—If available to decree-holder as saving limitation.*

Steps taken by a person claiming adversely to the decree-holder cannot be taken advantage of by the decree-holder as steps-in-aid of execution. Though the decree-holder prefers objections to the proceedings taken by the adverse claimant, and though there might be an agreement between the decree-holder and the rival to act in a particular manner; the steps taken by the rival claimant cannot enure to the benefit of the decree-holder nor can the judgment-debtor be deprived of his right to plead limitation by any agreement between persons with interests hostile to each other, who have been carrying on litigation amongst themselves. (*Varma, J.*) ACHUTANAND GIRI, MAHANTH *v.* SARAN SINGH.

1938 P.W.N. 652.

MADRAS DISTRICT MUNICIPALITIES ACT, (V OF 1920) S. 3 (25)—Construction—Reside—"Cease to reside"—Meaning of—Absence of hill-station for certain period—If cessor of residence. *See* MADRAS DISTRICT MUNICIPALITIES ACT, S. 93 (1) (*b*).

48 L.W. 329 = (1938) 2 M.L.J. 353.

———**S. 83**—*Applicability—Building dedicated and once used as choultry but ceasing to such—If exempt from property tax.*

The exemption from property tax of religious and charitable buildings provided by S. 83 of the District Municipalities Act cannot be claimed in respect of a building which had once upon a time been dedicated to such a purpose as a choultry, but has entirely ceased to be used for that purpose. Anything which is in fact a choultry is exempt from the tax. The exemption cannot be extended to a building which once was a choultry, but is no more a choultry, or to a building which is not but ought to be choultry and might return to the state of being a choultry if and when circumstances change. (*Wadsworth, J.*) RAJAHMUNDRY MUNICIPAL COUNCIL *v.* MALLAYYA. **48 L.W. 417 = (1938) 2 M.L.J. 639.**

———**S. 93 (1) (b)**—*Liability to profession-tax—Actual residence for 60 days—If essential—"Reside"—S. 3 (25).*

A person cannot be deemed to cease to reside in a house merely because he is absent from it if he has not abandoned his intention of returning. Nor can he be said to have abandoned his intention of returning when he merely signifies his intention of being absent at a hill-

MADRAS DIST. MUN. ACT (1920), S. 177.

station for a certain period. The assessee had a house within a Municipality in which he actually lived for a

that he intended to be absent from 7th April till about the end of August.

Held, that the assessee was liable to pay profession tax under S. 93 (1) (*b*) of the District Municipalities Act, though he had not resided in the Municipality for 60 days in the ordinary sense of the term. The assessee, however, had resided within the meaning of

Reading Ss. 177 and 339 of the District ties Act together, it is clear that a person c shed, if he has been given sanction unde

against the person who has entered into the contract under S. 176, unless he shows that by reason of his parting with the ownership he is unable to comply with the order. (*Horwill, J.*) VAIYAPURI CHETTIAR *v.* MUNICIPAL COMMISSIONER, SALEM.

1938 M.W.N. 911=(1938) 2 M L J. 579.

——S. 178—*Applicability — Owners of streets—Liability to conviction.*

The persons who are liable under S. 178 of the Madras District Municipalities Act are the owners or occupiers of the houses or lands fronting or abutting private streets or lanes, and not the owners of the streets or lanes themselves. (*Horwill, J.*) SYED MUSTAFA SAHIB *v.* EMPEROR. 48 L W. 350= 1938 M W.N. 865=(1938) 2 M.L J. 382.

——S 339—*Applicability—Conviction under—Sustainability—Proof of ownership in land abutting road—If necessary.*

To sustain a conviction under S. 339 of the Madras District Municipalities Act it would not be necessary

prove that

abutting the

SAHIB *v.* EMPEROR. 48 L.W. 350= 1938 M.W.N. 865=(1938) 2 M.L.J. 382.

LAGE OFFICES

Scope and effect—

Regulation VII of

(AMENDMENT) REGI

1938 M.

MADRAS HINDU

ee—

of

Civil Court.

A suit by a hereditary archaka of been dismissed by the trustee in powers of administration and management, to set aside the dismissal is not maintainable in the Civil Court.

MADRAS REV. RECOVERY ACT (1864), S. 58.

machinery of appeal and conferring finality on the decisions in appeal by dismissed office holders are oust the jurisdiction of the Civil Courts to propriety of an order of dismissal passed section and communicated to the person (*Wadsworth, J.*) RAMANATHA GURUKKAL *v.* ARUNACHALAM CHETTIAR.

48 L.W. 419=(1938) 2 M.L.J. 516.

——S. 73 (3)—Scope—Hereditary archaka of temple—Dismissal by trustee—Suit in Civil Court to set aside dismissal—Maintainability. *See* MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, SS. 43 (3) AND 73 (3).

48 L.W. 419=(1938) 2 M.L.J. 516.

receipt of money within the Local Board area by a t of the income of agent is receipt of of S. 93 of the

KOTTA. 1938 M.W.N. 931= (1938) 2 M.L J. 589.

——**S. 93 and Sch. IV and S 9**—*Scope and effect of—Retrospective assessment—Legality.*

The effect of S. 93 and Sch. IV & S. 9 of the Madras Local Boards Act is that persons liable to the profession-tax shall pay a half-yearly tax on their professional income on being assessed to the tax in the manner laid down in Sch. IV, that is to say, when the President of Local Board has decided in which of the classes enumerated in scale each person falls. Where an assessee has not been assessed for the first half year in a particular year, but towards the close of the second half-year he is classified by the President as having been for the whole year in receipt of a uniform monthly income of so much per month, and then a tax amount to twice the appropriate half-yearly tax is imposed on him, that procedure is illegal. A person cannot be assessed retrospectively. He must be assessed to the half-yearly

Stodart, JJ.) AUDIAPPA CHETTI *v* TALUK BOARD OF DEVAKOTTA. 1938 M.W N. 931= (1938) 2 M.L.J. 589.

MADRAS REVENUE RECOVERY ACT (II OF 1864), S. 58—*Scope — Co-sharers of revenue paying*

within the meaning of S. 58 of the Revenue Recovery Act. A co-sharer of a revenue paying estate who pays and does so save, by the Government ration of law entitled to a charge upon the share of each of his co sharers; S. 58 is no bar to the Civil Court apportioning the liability as between the co-sharers of the common (*Lakshmana Rao, J.*) SUNDARA NARASAYYA TAM RAJU. 1938 M.W.N. 882.

MADRAS SUBORDINATE COLLECTORS AND REVENUE MALVERSATION (AMENDMENT) REGULATION (VII OF 1828), S. 3—*Collector's powers of revision under—If abrogated by Madras Act III of* 1895.

There is no conflict between Madras Regulation VII of 1828 and Madras Act III of 1895, and the right of suit under S. 13 of the latter Act is not at all inconsistent with the continuance of the power of "superintendence, control and revision" which the District Collector has under the Regulation of 1828. It is only by virtue of the Regulation of 1828 that a Revenue Divisional Officer gets authority to exercise the powers of a Collector under Act III of 1895. The District Collector's power of revision created by the Regulation of 1928 must therefore be held to continue even after the passing of Act III of 1895. (*Burn and Lakshmana Rao, JJ.*) SRINIVASA AYYANGAR *v.* JAGANNATHA AYYANGAR. **48 L.W. 289 = 1938 M.W.N. 840 = (1938) 2 M.L.J. 488.**

MAHOMEDAN LAW—*Guardianship—Marriage of minor—Right to act as guardian for—Rule.*

Under the Mahomedan Law, the right to contract a minor in marriage belongs successively to the (1) father, (2) paternal grandfather how high so ever, and then, (3) brother and other male relations on the father's side in the order of inheritance enumerated in the Table of Residuaries. In default of paternal relations, the right devolves upon the mother, maternal uncle or aunt and other maternal relations within the prohibited degrees. (*Fazl Ali and Chatterji, JJ.*) AYESHA *v.* MUHAMMAD YUNUS. **1938 P.W.N. 656.**

———*Marriage—Minor girl — Option of puberty—Right to exercise—When lost—Delay after becoming aware of right—Effect of.*

When a marriage is contracted for a minor Mahomedan girl by any guardian other than her father or father's father, the minor has the option to repudiate the marriage on attaining puberty. But the right of repudiation would be lost if, after attaining puberty, and after being informed of the marriage and of right to repudiate it, she does not exercise her right without unreasonable delay. The right to repudiate a marriage is, however, a right which may be unknown to many girls. Where the girl has not been aware of her right of repudiation and there has been no consummation of the marriage, and the girl has never gone to her husband's house after attaining puberty, mere delay cannot entail loss of the right of repudiation. If, on becoming aware of her right, to repudiate the marriage under the Mahomedan Law, she at once repudiates the marriage, and brings a suit for dissolution of marriage without any unreasonable delay, it must be held that the right of repudiation is duly exercised and the marriage is dissolved. (*Fazl Ali and Chatterji, JJ.*) AYESHA *v.* MUHAMMAD YUNUS. **1938 P.W.N. 656.**

MALICIOUS PROSECUTION—*Action for—Burden of proof—Acquittal in Criminal Court, if affects onus.*

In an action for damages for malicious prosecution the plaintiffs must establish *inter alia* that there was no reasonable or probable cause for the defendant to prosecute the plaintiffs and further that the facts alleged by the defendant in the Criminal Case are such as from their nature, were necessarily untrue or false to his knowledge. The mere fact that the Judgment of the Criminal Court ended in favour of the plaintiffs does not relieve them of the necessity of proving in the suit, that the complaint was false to the knowledge of the defendant or was without reasonable or probable cause. In such cases, the burden always, initially, rests on the plaintiff. (*Misra, J.*) AN SINGH *v.* BHAGAT SINGH. **1938 A.W.R. (H.C.) 548.**

MORTGAGE.

———*Liability for—Corporation aggregate.*

A Corporation aggregate would be liable in an action for damages for malicious prosecution, if a like action against its agents or servants acting with authority or within the scope of their employment would have been maintainable against them, if they had acted as principals. (*Mitter and Biswas, JJ.*) CHATRA SERAMPORE CO-OPERATIVE CREDIT SOCIETY LTD. *v.* BECHARAM. **42 C.W.N. 1219.**

———*Reasonable and probable cause—Enquiry into facts—Duty of prosecutor.*

If in any case the facts known to the would-be prosecutor reasonably are such as to cause him fairly and honestly to conclude that the accused is guilty of the offence, there is no law which compels him to prosecute further enquiries in order to ascertain whether there is further information obtainable in support of the prosecution on which he has decided. Further, where the facts available to the prosecutor at or before he puts the criminal law in motion make out a *prima facie* case against the accused, he is under no duty to ascertain whether there is a defence to the charge. (*Mitter and Biswas, JJ.*) CHATRA SERAMPORE CO-OPERATIVE CREDIT SOCIETY LTD. *v.* BECHARAM. **42 C.W.N. 1219.**

MASTER AND SERVANT—*Dismissal of servant—Ground for—Cumulative effect of acts—If can be taken into account.*

In considering the question whether a summary dismissal is justified, the position of the employee and the nature of business entrusted to him must be considered. A single act of negligence on his part would not ordinarily be sufficient to justify a summary dismissal. A dismissal may be justified by the conduct of the employee consisting of an accumulation of acts which occurring singly would not in themselves justify dismissal. (*Mitter and Biswas, JJ.*) CHATRA SERAMPORE CO-OPERATIVE CREDIT SOCIETY LTD. *v.* BECHARAM. **42 C.W.N. 1219.**

———*Dismissal of servant—Justification for—Ground not known to master at time of dismissal.*

A dismissal of a servant can be justified on a ground not stated or known to the master at the time of dismissal. (*Mitter and Biswas, JJ.*) CHATRA SERAMPORE CO-OPERATIVE CREDIT SOCIETY LTD. *v.* BECHARAM. **42 C.W.N. 1219.**

———*Right of master—Power to suspend servant.*

There is no implied power in the employer to punish a servant by suspension. If a servant is suspended, when there is no power of suspension, he can sue for damages for not being allowed to work, if he was ready to work. If, however, there is a power to suspend, the effect of the suspension is to suspend the contract of service as a whole, with the result that the servant cannot insist on working or claim his pay for the period of suspension. (*Mitter and Sen, JJ.*) SECRETARY OF STATE FOR INDIA *v.* SURENDRA NATH. **42 C.W.N. 1186.**

MINOR — Execution proceedings—Judgment-debtor attaining majority in the course of—Procedure. *See* EXECUTION—MINOR. **1938 O.W.N. 758.**

MORTGAGE — *Mortgage suit — Costs— Personal decree for—Power of Court to pass—Construction of decree.*

Although the general rule in a mortgage suit is to add the costs of suit to the mortgage security, the Court may in an appropriate case make an order for costs personally against the mortgagor. It will really be a question in any particular case as to what the Court actually did. The mere absence of words that the

decree is made personally against the mortgagor is not at all conclusive. Apart from such words, there might yet be sufficient indications in the terms of the decree itself and in other circumstances of the case to show that a personal decree was intended. Where in an appeal by the mortgagee from an ... suit against some of the mortgagor ... set aside the decision of the trial ... the case to him making an order for ... that the appellant was entitled to get his costs in the appeal from the respondents and that the costs in the Court below would abide the final decision of that Court after remand, it would be a perfectly reasonable construction of the decree to hold that as regards the costs of the appeal the decree is a personal decree ...

owner of lorry of overloading—Burden of proof.

In a prosecution of the owner of a motor lorry under S. 16 of the Motor Vehicles Act for overloading the lorry in contravention of R. 15-A, of the Motor Vehicle Rules, the burden is on the prosecution to show that the accused knew that the lorry was overloaded. When the lorry in question with the load is shown to be proceeding from a place far away from the place where the owner of the lorry has his business, it cannot be held that the accused knew of the overloading. (*Horwill, J.*) DEVARAJA MUDALIAR *v.* EMPEROR.

48 L.W. 319 = 1938 M.W.N. 867 = (1938) 2 M.L.J. 582.

——S. 16—*Punjab Motor Vehicles Rules, R. 23—Owner of private lorry—Liability to conviction for excess load.*

Unless the wording of the rules ... manufacturers' specifications regar... which can be carried cannot be rea... made by the Punjab Government. When the rule-making authority has deliberately made a distinction between private lorries and public lorries and has specified that public lorries shall not carry more than a ...

under R. 23 of the Punjab Motor Vehicles Rules read with S. 16, Motor Vehicles Act, on the ground that his lorry was carrying a load in excess of ... capacity. (*Ram Lall, J.*) GURANDITTA *v.* ...

A.I.R. 1938 ...

MYSORE CITY MUNICIPALITIES ACT (1933), S. 41 (7)—*Applicability — Contract of bailment—Essentials of Validity—Bicycle stand put up by Municipality outside market—Municipal peon at stand giving tokens to person parking cycle at stand and taking same back when bicycle is taken away—Relationship of bailment—If created—Liability of Municipality for loss of parked bicycle.*

In the absence of a proper contract of bailment confirming to the provisions of S. 41 (7) of the City Municipalities Act, the Municipal Council cannot be made liable as a bailee. A bailment necessarily involves a delivery or change of possession and where there is no transfer of possession, there can be no relationship of bailment. A Municipal Council provided a bicycle stand outside a Municipal Court. It was usual for cyclists going into the market on business to leave their bicycles in that stand; and when a bicycle was so left there a peon of the Municipality handed to the

cyclist two discs or tokens supplied by the Municipal Council and he took away his bicycle from the stand on his return after handing back the discs or tokens to the peon at the stand. On a certain day the plaintiff went to the market and left his bicycle at the stand and was ... discs. When plaintiff after his ... handed back the discs to the ... bicycle in the stand and was ... taken away by some one else. Plaintiff sued the Municipality for return of his bicycle or the value thereof on the ground of an implied contract of bailment.

Held, (1) that was no bailment or entrustment of the bicycle by the plaintiff to the Municipal peon so as to render the Municipality liable to the plaintiff to return the bicycle to the plaintiff; (2) that the plaintiff at ... ee who kept his bicycle at the ... nd was therefore not entitled to ... on any contractual basis. ... *Rao, J.*) BANGALORE CITY MUNICIPALITY *v.* VISWANATHA RAO

16 Mys L.J. 368.

MYSORE CIVIL PROCEDURE CODE (III OF 1911), O. 41, Rr 11 and 12—*Second appeal—Admission in specific points only—Power of High Court to direct—Right of appellant to argue on whole appeal.*

It is perfectly competent and legal for a Bench of the High Court at the stage of admission of a second appeal to admit it only on a particular specified point or points. Such a restrictive order cannot be held to be *ultra vires* and there is nothing in Rr. 11 and 12 of O. 41, C. P. Code, against such a course. The appellant in such a case must at the subsequent hearing of the appeal be confined to the point or points on which the appeal has been admitted and cannot be permitted to argue the ...

——O. 41, R. 22—*Scope—Right of respondent—Cross objection against fellow respondent against whom right of appeal is barred—Maintainability.*

Ordinarily a respondent cannot be allowed to urge an ... nst another respondent, when he has ... ge that objection by way of his own ... lost the right to bring any appeal in regard to it by limitation. O. 41, R. 22 is itself a qualification of the law of limitation and cannot be extended ...

16 Mys.L.J. 376 = 43 Mys H.C.R. 415.

MYSORE HINDU WOMEN'S RIGHTS ACT (X OF 1933)—*Scope—Widow's right to share—Partition effected prior to Act coming into operation—Effect.*

A widow of a Hindu co-parcener in a Hindu joint family would be entitled to get a share at a partition in the family, under the Hindu Women's Rights Act provided the partition was made not earlier than the 1st of January, 1934, on which the Act came into force. But where the partition had been effected before the Act came into force, it is of no use for the widow to rely on the provisions of the Act for the purpose of claiming a share in the family property. (*Reilly, C.J. and Abdul Ghani, J.*) SANKARAMMA *v.* KRISHNA RAO.

16 Mys L.J. 376 = 43 Mys.H.C.R. 415.

——S. 9 (1)—*Applicability—Husband of adopting widow dying before Act—Presumption of authority—If arises.*

S. 9 (1) of the Hindu Women's Rights Act cannot be read as referring only to adoptions to men who die after the Act came into force, *i.e.*, who die not earlier than 1st January, 1934. The wording of the section does not warrant such an interpretation. Even if the husband has died before the date on which the Act came into force, the presumption in favour of the widow's authority to adopt must arise, if the other conditions are satisfied. (*Reilly, C.J. and Abdul Ghani, J.*) SANKARAMMA *v.* KRISHNA RAO. 16 Mys.L.J. 376 = 43 Mys.H.C.R. 415.

——**S. 9 (1)**—*Presumption under—Duty of Court to raise and to give effect to—Adopting widow—If bound to explicitly ask for presumption.*

It is not necessary for a Hindu widow making an adoption to her husband after 1st January, 1934, to explicitly ask the Court to raise the presumption in favour of her authority to make an adoption under S. 9 (1) of the Hindu Women's Rights Act. Under that section, in the absence of proof of any prohibition in writing against the widow adopting a son having been made by her husband, the Court is bound to set up the presumption in favour of her authority to adopt, and to give effect to it, if it is not rebutted. (*Reilly, C.J. and Abdul Ghani, J.*) SANKARAMMA *v.* KRISHNA RAO. 16 Mys.L.J. 376 = 43 Mys.H.C.R. 415.

MYSORE LIMITATION ACT (IV OF 1911), S. 10 —*Applicability—Temporary Manager of temple and its property—If "trustee"—Suit by Muzrai Officer for recovery of mesne profits of endowed land from temporary manager—Limitation.*

A person who is appointed merely as a temporary manager of a temple, a Muzrai institution, and its property for a fixed term subject to certain stringent conditions as to what he is to do is not a "trustee" within the meaning of S. 10 of the Limitation Act. He is not a person in whom property has been "vested in trust for a specific purpose" as contemplated by S. 10. A suit against such manager by the Muzrai Officer for recovery of mesne profits in respect of lands forming part of the endowment of the temple does not fall under S. 10. (*Reilly, C.J. and Abdul Ghani, J.*) RAJGOPALACHAR *v.* DISTRICT MUZRAI OFFICER, MYSORE DISTRICT. 16 Mys.L.J. 413 = 43 Mys.H.C.R. 466.

——**Art. 149**—*Applicability—Muzrai Officer—Suit by for mesne profits of temple lands under Government control or management—Limitation.*

Art. 149 of the Limitation which is intended for the protection of Government property applies only to a suit by or on behalf of the Government. A suit by the District Muzrai Officer, without any indication or suggestion in the plaint that it is brought by or on behalf of the Government, for recovery of mesne profits of land belonging to a temple which is a Muzrai institution is not a suit to which Art. 149 would apply. (*Reilly, C.J. and Abdul Ghani, J.*) RAJAGOPALACHAR *v.* DISTRICT MUZRAI OFFICER, MYSORE DISTRICT. 16 Mys.L.J. 413 = 43 Mys.H.C.R. 466.

MYSORE TRANSFER OF PROPERTY ACT (IV OF 1918), S. 10—*Applicability—Partition in Hindu family—Conditions against alienation of properties allotted to members—Enforceability—If void.*

A deed of partition in a Hindu joint family is a transfer within the meaning of the T. P. Act, and S. 10, T. P. Act, is applicable to a partition. Any condition against or restraint on alienation of the properties allotted to the sharers is void under S. 10 and therefore unenforceable. (*Shankaranarayana Rao and Nagesvara Iyer, JJ.*) CHANNA NANJAPPA *v.* KHALEEL. 43 Mys.H.C.R 376.

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), S. 4—*Promissory note—Payee not specified.*

Where a document does not specify the person to whom the money is to be paid nor does it say that it is payable to the bearer, it is certainly not a promissory note. (*Vivian Bose, J.*) NARBADA PRASAD *v.* MT. SUNKI. A.I.R. 1938 Nag. 464.

——**Ss. 9 and 59**—*Scope—Promissory note payable on demand—Date of maturity—Test to decide—Notice of demand by holder giving time for payment—Transfer to another before expiry of terms—Transferee—If holder in due course.*

A promissory note payable on demand cannot be regarded as having matured on the date on which it comes into existence. The date of maturity would depend on the circumstances of each case. The test is to ascertain if a demand has been made and refused. Defendant executed a promissory note to *G* on 29-8-1935. On 7-9-1935, *G* sent a notice to the defendant demanding payment by 15-9-1935, failing which, it was mentioned, the promissory note would be assigned. On 14-9-1935, *G* endorsed the note to plaintiff who brought a suit on the same. Plaintiff was not shown to have had any knowledge of the demand made by *G*. It was found that the defendant sent a reply to *G*, who got it only on 16-9-1935.

Held, that the promissory note could not be considered to have matured on the date of its transfer to *G*, the reply sent by defendant to *G* and delivered to *G* on 16-9-1935, assuming that it was a notice of dishonour, could not affect the validity of the transfer to the plaintiff on 15-9-1935, and that the plaintiff was not affected by S. 59 of the Negotiable Instruments Act, but must be presumed to be a holder in due course as defined by S. 9. (*Abdur Rahman, J.*) SAHABUDDIN SAHIB *v.* VENKATACHALAM CHETTIAR. 1938 MW.N. 897 = (1938) 2 M.L.J. 523.

——**S. 118**—*Scope and effect of—Promissory note—Suit on—Denial of execution and consideration—Proof of execution adduced by plaintiff—Effect—Proof of consideration—Necessity.*

In a suit on a promissory note where the defendant denies execution of the note and the loan, if the plaintiff proves due execution of the note, S. 118 of the Negotiable Instruments Act comes into play and the presumption of consideration for the note arises; and when there is nothing proved by the defendant in rebuttal of that presumption, it is unnecessary for the plaintiff to adduce any further evidence of the passing of consideration. (*James, J.*) MAHABIR SINGH *v.* ALIMOHAMMAD. 1938 P.W.N. 634.

OUDH ESTATES ACT (I OF 1869), S. 7—*Object of—Succession to movable property—If affected.*

The object of S. 7 of the Oudh Estates Act is to enable the taluqdar to ensure that the heirlooms mentioned in the inventory should pass along with the estate in all circumstances, but it does not warrant the inference that the legislature intended that the descent of movable property, for which no inventory was made, should be governed by the ordinary law. Where there is no evidence to prove a custom to the contrary, the non-taluqdari property, immovable as well as movable, is governed by the custom applicable to the taluqa. (*Sir Shadi Lal.*) HUZUR ARA BEGAM *v.* DEPUTY COMMISSIONER, GONDA. 176 I.C. 769 = 1938 O.A. 638 = 1938 O.W.N. 786 = 1938 O.L.R. 361 = 1938 A.W.R. (P.C.) 180 = A.I.R. 1938 P.C. 252 (P.C.).

——**S. 8**—*Entry in list 2—Effect—Presumption—If any.*

OUDH RENT ACT (1886), S 7-A.

Where as the entry of a taluqdar in list 2 prepared ... evidence ... ation on ... family ... ccession ... the pre- ... rebutted ... *Lal.*)

HUZUR ARA ... GONDA.

OUDH RENT ACT (XXII OF 1886), S. 7-A—*Expropriletary tenancy—When commences—Date of sale or date of possession.*

... subsequent date when the purchaser might happen to obtain actual possession, (*Thomas, C.J. and Zia-ul-Hasan, J.*) BINDRA PRASAD *v.* SURAJ *v.* BAKHSH SINGH. 1938 O W.N 739=1938 O.A. 594=1938 R.D. 717=1938 A.W.R. (C.C.) 72=1938 O L R. 367.

——S. 19-A—*Power to make remissions—Conditions—Fall in prices, if a ground—Resolutions of Local ...*

... abundant. Any resolution of Local Govt. as to remissions have no legal basis. (*Zia-ul-Hasan, J.*) RAM NARAIN *v.* CHANDRA SHEKHAR. 1938 O.A. 663.

——Ss. 36, 37 and 52—*Effect of partition—Completion of ten years—Benefit of Ss.* 36, *and* 37 *not available—Liability to ejectment.*

As a partition does not create a fresh contract of tenancy, if ten years have been completed, the benefit of Ss. 36 and 37 cannot enure in favour of the tenants, and they are liable to be ejected. (*Mehta, J.M.*) BADDRI PRASAD *v.* RAJENDRA SINGH.

1938 A.W.R. (B.R.) 266.

——S. 52—*Deposit in time—Small deficiency owing to mistake in calculation—Ejectment, if legal.*

Where in terms of a compromise a sum, more than the decretal amount, was deposited in time but owing to a mistake in calculation, it fell short of the correct figure by a few rupees, it was held that an ejectment of an occupancy tenant on this ground is illegal, for the amount equivalent to arrears of rent had been paid. ... *J.M.*) MST. MAHARAJA *v.* MAHABIR.

1938 A.W.R. (B.R.) ...

——Ss. 53 and 107-B—*Favourable rate of ...*

... able rate of ...

... chapter of the Oudh Rent Act. (*Darling, ... Mehta, J.M.*) HUB LAL *v.* DWARKA NATH

1938 ...

——S 61—*Partition as between joint pr... One of the proprietors losing proprietary intere... of—Liability to ejectment.*

PENAL CODE (1860) S. 28.

Where at a partition of joint proprietors, the entire proprietary interest in the village fell to one of them, and the other held the lands by sufferance and had no *sir* or *khudkasht* status, his position is that of a mere trespasser tenant and on non-payment of rent is liable to be ejected. (*Mehta, J.M.*) RAM LAL *v.* JAI DEVI.

1938 R.D. 750.

——S. 62-A (1) (b)—*Ejectment under—Facts to be ...*

... S. 62-A (1) (*b*) of the Oudh Rent Act, ... le a landlord to eject a statutory tenant, ... ed that the tenant in chief had sub-let ... part of the holding at the time of the institution of the suit and that the sub-lessee was in possession at that date. There is no cause of action under S. 62 A, if the sub-lessees are not in possession contrary ...

Rent is supposed to be favourable when it is less than the revenue payable plus cess. (*Darling, S.M. and Mehta, J.M.*) HOB LAL *v.* DWARKA NATH.

1938 R.D. 748.

——S. 108 (15)—*Suit for profits—Mortgage by co-sharer—Method of calculation.*

Where a co-sharer has mortgaged his property, for the purposes of a suit under S. 108 (15) of the Rent Act, ...

... *tion.*

Where a suit is for compensation for revenue paid by the lambardar on account of a joint lambarbar, it is covered by the third part of Cl. 16 of S 108 of the Oudh Rent Act and such a suit is governed not by S. 132 but by S. 129 of the Act and should be instituted within one year from the date of the accrual of the cause of action. (*Thomas, C.J.*) REJENDRA BAHADUR SINGH *v.* RAJA SRIPARTAP BAHADUR SINGH.

1938 O.W.N. 831=1938 A.W R. (C.C.) 79=1938 O A. 629=1938 R.D. 737.

——S. 132—Applicability—Suit for compensation for revenue paid for joint lambardar. *See* OUDH RENT ACT, SS. 129 AND 132.

1938 O.A. 629=1938 O.W.N. 831.

PARDANASHIN LADY—*Deed by—Binding character—Duty of Courts in deciding.*

The rule is firmly established that it is incumbent on ...

... the contents of a mortgage deed which sought to make ...

PENAL CODE (1860), S. 40.

The deception meant in S. 28 is with regard to the nature of the coins. It is deception through the resemblance of the true coin with the false and it means that some-one must be led to believe that the false coin is a true one. Where the accused counterfeited some coins and introduced them into another's house with the sole object that he should be thought to be the counterfeiter and be prosecuted accordingly, the accused cannot be said to counterfeit the coins. (*Gruer, J.*) SAHEBRAO AWADHUT *v.* EMPEROR. A.I.R. 1938 Nag. 444.

——S. 40—*Offence—Meaning—Breach of rule framed under local law.*

Where a local law declares a breach of the rules made under its authority to be punishable, then a breach of such rules might constitute an offence within the meaning of S. 40. (*Roberts, C.J. and Spargo, J.*) BUK SOO MEAH *v.* EMPEROR. A.I.R. 1938 Rang. 350.

——Ss. 52 and 79—*Good faith—Working outside limits of licensed area.*

An accused who lets his coolies work outside the area covered by his license at a distance of about a mile or so, cannot be said to be acting in good faith, *i.e.*, with due and proper care as distinguished from dishonestly or fraudulently. (*Roberts, C.J. and Spargo, J.*) BUX SOO MEAH *v.* EMPEROR. A.I.R. 1938 Rang. 350.

——S. 109—"*Abetment*" — *What is—Instigation—What amounts to—Actual words—If necessary.*

The mere omission to bring certain facts within the knowledge of the accused to the notice of the authorities does not itself constitute abetment, unless the omission is an illegal omission, *i.e.*, involves a breach of a duty imposed by law, and not merely a breach of a departmental rule of conduct or discipline. A mere omission on the part of a clerk in a public office to bring to the notice of the higher authorities offences committed by other clerks in the same office cannot amount to abetment of those offences. If he does nothing which facilitates the commission of the offences and if he is not shown to have instigated the same, he cannot be held to be guilty of abetment. The law, however, does not require that instigation should be in a particular form or that it should be only in words and may not be by conduct. The question is one of fact. (*Pandrang Row, J.*) ANANTHACHARI *v.* EMPEROR.
1938 M.W.N. 908=(1938) 2 M.L.J. 574.

——S. 120-B—*Applicability—Conspiracy to fabricate false evidence.*

As there is no express provision made in the Code for the punishment of conspiracy to fabricate false evidence, S. 120-B applies to such offence. (*Gruer, J.*) SAHEBRAO AWADHUT *v.* EMPEROR.
A.I.R. 1938 Nag. 444.

——S. 124-A—*Article censuring policy of Ministry as revealed through proposed legislation—If seditious.*

An article which amounts in essence to nothing more than a censure, expressed in exaggerated, inflated and intemperate language, on the policy of the Ministry of a Province as revealed through proposed legislation, is not seditious and does not fall within the mischief of S. 124-A, I. P. Code. (*Bartley and Khundkar, JJ.*) DHIRENDRA NATH SEN *v.* EMPEROR.
42 C.W.N. 1150.

——S. 124-A — *Government established by law—Ministry of a Province—Exciting disaffection towards them—If offence—Government of India Act, Ss. 49 and 50.*

Obiter.—The expression "Government established by law in British India" in S. 124-A, I. P. Code, denotes the person or persons authorised by law to administer executive Government in any part of British India. There is no specific provision in the Government of India Act vesting the Ministry of a Province with executive functions. On the other hand, such functions should under S. 49 of that Act "be exercised by the Governor either directly on through officers subordinate to him." It is difficult to maintain the position that a Ministry chosen from the elected representative of the people, and empowered, within prescribed limits, to dictate the policy of the executive Government, is in any real sense a body of officers subordinate to theGovernor. It would follow, therefore, that the Ministry are not persons authorised by law to administer executive Government and an attempt to excite disaffection towards them would not be an offence under S. 124-A, I. P. Code. (*Bartley and Khundkar, JJ.*) DHIRENDRA NATH SEN *v.* EMPEROR. 42 C.W.N. 1150.

——Ss. 143, 147 and 186—*Applicability—Assembly of more than five having common object of resisting execution of decree—Use of force and resistance to execution—Offence.*

If there is an assemblage of five or more persons with the common object of resisting by force or show of force the execution of process of law, every one of them is guilty of being a member of an unlawful assembly, whether resistance is offered or not. If force is used by any member of that assembly, each of one of them becomes liable under S. 147, I. P. Code. But if actual resistance is offered, a separate offence punishable under S. 186, I. P. Code, is also committed. Being a member of an unlawful assembly and resisting the process of law are two separate offences, though they may be committed in the course of the same transaction. (*Mahomed Noor and Rowland, JJ.*) SHEO AHIR *v.* EMPEROR. 19 Pat.L.T. 665

——S. 160 — *Affray—Ingredients — Fighting—What amounts to—Beating by members of one party—Members of beaten party not retaliating—Conviction for affray—Sustainability.*

One of the ingredients of the offence of affray is fighting by two or more persons. Fighting connotes necessarily a contest or struggle for mastery between two or more persons against one another. A struggle or contest necessarily implies that there are two sides each of which is trying to obtain mastery over the other. Where members of one party beat members of another party, and the latter do not retaliate or make an attempt to retaliate, the offence of affray cannot be said to be committed because there is no fight in such a case though there may be assault. A conviction under S. 160, I. P. Code, in such a case is unsustainable. (*Pandrang Row, J.*) RAMI REDDI *v.* NARASI REDDI.
48 L.W. 378=(1938) 2 M.L.J. 583 (2)

——Ss. 166 and 342—*Offence under—Bail order produced by sureties—Refusal to comply with.*

Where a Magistrate grants bail and delivers his order of release to the sureties, as it happened to be a holiday and where a Sub-Inspector fails to comply with such order on the ground that the order should have been communicated to him only through Superintendent of police, he is guilty of offences under Ss. 166 and 342 I. P. Code. The Cr. P. Code gives Magistrates the authority to order release on bail and the Sub-Inspector cannot refuse to carry it out. (*Bennet, J.*) MOHAMMAD YAKUB *v.* EMPEROR. 1938 A.L.J. 782=1938 A.W.R. (H.C.) 471=A.I.R. 1938 All. 534

——S. 184—*Construction—'Obstructs'—Meaning of—Abuse of bidders and presiding officer at an auction sale—If an offence—Physical obstruction, if necessary.*

S. 184, Penal Code, deals only with the obstruction of a proceeding conducted by lawful authority and a proceeding can be obstructed by measures other than physical methods. Where as the result of the abusive

ENAL CODE (1860), S. 184.

nguage used by the accused against the bidders and the fficer conducting the sale, further bids were not forthcoming and the sale had to be postponed, the sale of ie property is obstructed and the accused are guilty nder S. 184, Penal Code. The obstruction to be an ffence under this section, need not be physical (*Grille nd Gruer, JJ.*) PROVINCIAL GOVERNMENT, C. P. ND BERAR *v.* BALARAM. **1938 N.L.J. 299.**

——**Ss. 184 and 186**—*Distinction between—Difference in nature of obstruction.*

The obstruction contemplated by Ss. 184 and 186 of ie Penal Code are differer ... ites some show of ph; ... *Grille and Gruer, JJ.*)

...

ails to prove the fact of theft by him, may be convicted nder S. 215, I. P. Code. The section is not inapplicable to such a person. (*Noor and Rowland, JJ.*) RAMANAND TELI *v.* EMPEROR. **1938 P.W.N. 679.**

——**S. 215**—*Construction—"Unless he uses all means n his power, etc."—Meaning of—Failur ... o secure apprehension of offender—If ... ient to be established by prosecution—Bu ... f attempt at apprehension of offender.*

The words "unless the accused uses all means in his power to cause the offender to be apprehended and convicted of the offence," in S. 215, I. P. Code, should not be ...

...

elements of the offence under S. 215 have been established by evidence, the onus of proving that the accused s entitled to the benefit of the exception is on the defence. When there has been a spontaneous demand by the accused of money in circumstances indicating an intention not to bring the offender to justice, the accused is liable to conviction under S. 215. (*Noor and Rowland, JJ.*) RAMANAND TELI *v.* EMPEROR. **1938 P.W.N. 679.**

——**S. 279**—*Negligence—Collision in road crossing —Car and Ekka—Apportionment of blame.*

Where a collision between a car and an Ekka in a road crossing was caused by the Ekka-driver, who had ...

...

Ekka-driver neglecting the elementary precautions. (*Bennet, J.*) W. K. WESLEY *v.* EMPEROR. **1938 A.W.R. (H C.) 505.**

——**S. 300, Secondly and Fourthly**—*Murder—Blow on head with heavy pestle—Offence.*

A person who strikes a heavy blow on the head of another with a heavy pestle must be deemed to intend to cause such bodily injury as is likely to cause death. Though the accused may have no premeditation, the act of striking a man on the head with such a heavy weapon as a peste is one which is so imminently dangerous that in all probability it must cause death. The accused in such a case is guilty of murder. (*Burn and Lakshmana Rao, JJ.*) ... EMPEROR. 48 L ...

——**S. 326**—*Senten ... without provocation—I ... such cases.*

PENAL CODE (1860), S. 409.

The act of nose-cutting is one which imports deliberate design of a particularly brutal and cruel character and must be severely punished. A sentence of nine months' rigorous imprisonment for such an offence is inadequate. Accused and his wife used to quarrel with each other. One night while the wife was asleep, the accused cut off the tip of his wife's nose. There was no quarrel immediately before the accused attacked her and no provocation was proved. The tip of the nose was detached, and as a result of the injury the wife had to remain in hospital for treatment for about 17 days, ...

... ment.

Held, that the sentence of 9 months was inadequate and must be enhanced. The sentence was enhanced to one of two years' rigorous imprisonment. (*Broomfield and Norman, JJ.*) EMPEROR *v.* ISMAIL UMAR. **40 Bom.L.R. 832.**

——**S. 341**—*Applicability—Stopping a person by force by catching his bandy bull—Offence.*

...

tion of the accused under S. 341, I. P. Code. (*Burn, J.*) MUHAMMAD YUSUF SAHIB, *In re.* **48 L.W. 379 = (1938) 2 M.L.J. 583 (1).**

——**S. 366-A**—*Offence under—Proof.*

...

(*Ram Lall, J.*) HARDIAL *v.* EMPEROR. **A.I.R. 1938 Lah. 684.**

——**S 379**—*Seizure of debtor's property to force payment of debt—If an offence.*

Where a creditor seized the leather bag on the back of his debtor's buffalo and took it away with a view to force the repayment of the debt, it is an offence as the intention was clearly to retain the property till the debt was paid, and in the event of its non payment the intention must be presumed to be to keep the property for good. (*Grille, J.*) BHAGYA *v.* EMPEROR. **1938 N.L.J. 302.**

——**S. 409**—*Offence alleged of conspiracy to commit breach of trust and specific charges with regard to ... of splitting up charges*

... e Central Bank and the ... m embezzled the deposits which were sent from other central banks. The offences alleged were conspiracy to commit criminal breach of trust and also specific charges with regard to definite sums of money. When the case came on for trial the prosecution split up the case to be tried into four separate trials. In the first trial the Secretary was given three years under S. 409. He was also convicted of conspiracy. No separate sentence was passed upon him. In the second trial, he had been given two years under S. 409 No separate sentence for conspiracy was passed upon him. Assistant Secretary was given three years under S. 409 in the first trial and four years in the second trial. No separate sentence was passed upon him on the conspiracy charge. The prosecution in the first ... ite conspiracy to embezzle a parti... In the second trial, ... went a ... alleged ... cy to embezzle money

PENAL CODE (1860), S. 426.

Held, that though on a technical ground the two conspiracies of which the accused were found guilty were not the same, yet it was really so impossible to distinguish them that, if different sentences had been imposed, the High Court most certainly would have made them concurrent.

Held further, that the method of splitting up the charges as adopted by the prosecution was improper. Three items might have been selected as the subject-matter of separate charges. Then it would have been possible upon a verdict of guilty to impose a sentence that would be sufficient. There would then have been no necessity for proceeding with the trial of any more charges. The method of proceeding with an indefinite number of trials and imposing sentences to take effect one after the other was improper. (*Henderson and Khundkar, JJ.*) JAGADISH PROSAD *v.* EMPEROR.
A.I.R. 1938 Cal. 697.

——S. 426—*Applicability*—Bona fide *claim of right —Meaning—Tenants going in body to landlord's jungle and cutting trees in excess of rights—Offence.*

The accused who were tenants of a village went in a body to the rakhawat jungles of their landlord (preserved forests of the landlord) and cut down about 50 cartloads of *sakhua* saplings. The tenants pleaded that they had a customary right to cut trees from the jungle for fuel, agricultural purposes etc., and also pleaded *bona fide* claim of right. It was stated in the Record of Rights that while the tenants had customary rights to take wood from the jungle in reasonable quantities for house building and house repair, for agricultural purposes and for fuel, free of charge, they were excluded from the *rakhawat* forests; and it was found that the tenants had no right to cut down trees, such as *sakhua* saplings from such forests, except *jungle jharis*.

Held, that the very fact that the accused tenants went in a body to the forest and cut down about 50 cartloads of *sakhua* saplings (which could not be called *jungle jharis*, but were trees growing into valuable timber) excluded the plea of *bona fide* claim of right; the object of the tenants was to extend their rights to the preserved objects, and their plea of *bona fide* claim of right failed and therefore they were liable to conviction under S. 426, I. P. Code. (*S.C. Chatterji, J.*) PUNIT BARHI *v.* EMPEROR. 19 Pat.L.T. 656.

——S. 426 — *Applicability—Watercourse flowing through complainant's land—Obstruction to watercourse by complainant—Accused having rights of watercourse cutting off obstruction—Offence—"Wrongful loss".*

Where one person's enjoyment of possession of a certain plot of land is subject to the rights of another to a water-course flowing through that plot, it is no offence if the latter asserts his rights. If the former obstructs the watercourse by reclaiming the bed of the watercourse in his plot, his act in doing so is an act of trespass, and the latter who has rights of watercourse commits no offence in cutting or removing the obstructions. The loss, if any, caused to the owner of the plot by the destruction of the obstruction in exercise of the latter's right of watercourse cannot be considered to be wrongful loss, and the latter cannot be convicted of the offence of mischief under S. 426, I. P. Code. A trespasser cannot by the act of trespass immediately give himself what the law understands by possession against the person whom he ejects. (*James, J.*) DEOCHARAN SINGH *v.* RAM SUNDER SAHU.
1938 P.W.N. 642=19 Pat.L.T. 703.

——S. 498—"*Detention*"—*Meaning of—Married woman found living in accused's house—Accused having sexual intercourse—Offence.*

PLEDGING OF CHILDREN'S LABOUR ACT (1933), S. 2.

Providing shelter for a married woman is such an inducement as to amount to detention within the meaning of S. 498. Where a married woman was found living in the house of the accused for some time and sexual intercourse between them had taken place,

Held, that there was persuasion or inducement of the woman as would come within the meaning of the word 'detention'. (*Agarwala, J.*) BANARSI RAUT *v.* EMPEROR. A.I.R. 1938 Pat. 432.

——S. 499, **Eighth Exception**—*Applicability—Complaint to Police by residents of locality against acts of another and praying for protection against him—Offence—Conviction for defamation—Legality—Cr. P. Code, S. 196—Complaint of Police Officer—Necessity for prosecution:*

The presentation of a petition to the Sub-Inspector of Police by the residents of a certain locality against another person alleging that the latter was in the habit of getting drunk and abusing people and threatening to do evil by the use of black art and praying for protection against him, is the presentation of a petition to public officer with the intention of protecting the interests of the people who send the petition. The eighth exception to S 499, I. P. Code, applies to the case and when the complainant admits that he does not know any of the petitioners personally, and there is no evidence of any express malice or enmity, good faith must be presumed; there can in such a case be no conviction for defamation. Further, the offence, if at all, is only one of giving false information to a public officer or of making a false accusation, falling under Ss. 182 or 211, I. P. Code, and S. 196, Cr.P. Code, bars cognizance of the same without the complaint of the public servant concerned or of some authority to whom he is subordinate. It cannot be said that the offence of defamation is also committed simply because some part of the information or the accusation is found to be defamatory and false. (*Pandrang Row, J.*) SUBBA RAO *v.* VENKATACHALAPATHI. 48 L.W. 320=
(1938) 2 M.L.J. 397=1938 M.W.N. 871 (2).

——Ss. 500 and 120-B—*Defamation by several—Concerted action—Joint trial—Legality.*

Where it appeared that the different accused both jointly and singly began at about the same time to make defamatory statements about the complainant to different persons, it is a case of criminal conspiracy and there can be no question of misjoinder where all the accused are tried together for an offence under S. 500, I.P. Code read with 120 B. (*Bennet, J.*) TARPADO SHASTRI *v.* EMPEROR. 1938 A.W.R. (H.C.) 467=
1938 A.L.J. 769.

PLEADINGS—Fraud — Transaction impeached as 'fraudulent' and 'bogus'—Necessity to keep two distinct. *See* C. P. CODE, O. 6, R. 4—PLEADINGS.
1938 N.L.J. 279.

——*Powers of Court—Setting up new case for plaintiff.*

A Court has no jurisdiction to set up a new case on behalf of a plaintiff. (*Darling, S.M. and Mehta, J.M.*) SHARAFAT ULLAH *v.* NOOR MOHAMMAD.
1938 R.D. 746.

PLEDGING OF CHILDREN'S LABOUR ACT (1933). S. 2—*Applicability—Labour pledged to be expended after child becomes 15 years old.*

Where the labour pledged is not to be expended till after the time by which the child becomes 15 years of age, the agreement is not one to pledge the labour of a child under 15. (*Roberts, C.J. and Dunkley, J.*) DAW NYUN *v.* MANG NYI PU. A.I.R. 1938 Rang. 359.

of Judges not to pass over.

SECURITY LIFE ASSI

PRESIDENCY-TO

OF 1909), S. 17—*Se*

T. P. Act, for declaration of invalidity of trust deed executed by insolvent prior to adjudication—Leave of insolvency Court—Necessity.

A suit by a creditor of the Insolvent on behalf of himself and all the other creditors of the Insolvent for a declaration that a deed of trust executed by the insolvent prior to his adjudication in favour of himself and his relations is void against his creditors under S. 53, T. P. Act, is a suit which falls within the general prohibition enacted in S. 17 of the Presidency-Towns Insovency Act, and is not maintainable without leave of the insolvency Court. (*Beaumont, C.J. and Wassoodew, J.*) GANPATRAO *v.* JEHANGIR. **40 Bom L.R. 935.**

——**S. 52 (1) (a)**—*Book entry by insolvent firm crediting certain sum to deity as charity—Money continued to be used in business as before—Firm, if trustees for deity.*

A mere entry by a firm in their books of account crediting a certain sum to a particular deity by way of charity does not constitute the firm trustees for the deity in respect of that sum which is continued to be used by the firm in its business as before. Consequently on the insolvency of the firm the deity is not entitled to payment of that sum full. (*Sir George Rankin.*) SOONIRAM *v.* ALAGU NACHIYAR. **42 C W.N. 1125 = A.I.R. 1938 P.C. 259 (P.C.).**

——**S. 55**—Burden of proof under. *See* PROVINCIAL INSOLVENCY ACT, S. 53. **40 Bom L.R. 884.**

——**S. 86 and Sch. II, R. 25**—*Adjudication of claim by Official Assignee—Appeal to Judge—Proper form—Evidence, if should be taken before Judge.*

A claim that certain property has not vested in the Official Assignee at all or a claim to have a charge upon property which has vested in him cannot under the Presidency Towns Insolvency Act be dealt with by the Official Assignee as a tribunal. The Official Assignee in such a matter is a party litigan could be regarded as a mere qu rejecting a proof, when the Offici R. 25 of the Second Schedule, th from the "act or decision" of the Official Assignee to the Judge should be by motion and the oral evidence necessary should be taken before the Insolvency Judge

Sir George Rankin.) SOONIRAM *v.* ALAGU **42 C.W.N. 1125 = A.I.R. 1938 P.C. 259 (P.C.).**

5—*Copy—Meaning of—Copy of notes of ublic examination—Right of Official Assig-*

Assignee is therefore not entitled to obtain such a copy

ay the (Cal- EE OF 1146. *public* ination Act is

——**S. 125**—*Matter covered by S. 115—Power of Court to prescribe fee.*

S. 125 of the Presidency-towns Insolvency Act does not give the Court power to prescribe a fee in respect of a matter covered by S 115 of the Act. The purpose of S. 115 is clearly to save as much as possible of the insolvent's estate for distribution amongst the creditors (*Panckridge, J.*) OFFICIAL ASSIGNEE OF CALCUTTA, *In the matter of.* **42 C.W.N. 1146**

PREVENTION OF CRUELTY TO ANIMALS ACT (XI OF 1890), S. 3 (a)—*Prosecution under—Determination of preliminaries and publication in Gazette—If conditions precedent to maintainability.*

In a prosecution on a charge of overloading under S. 3 (*a*) of the Prevention of Cruelty to Animals Act, it is not competent to the Court to acquit the accused without hearing any evidence on the ground that the preliminaries required under Ss. 1 and 2 of the Act are not shown to have been made or done. These requirements are not necessary for determination of the case on the merits. The fact that the Local Government have not determined the maximum weight to be carried by animals, and that the District Magistrate's orders have not been published in the Local Gazette cannot render the prosecution incompetent. (*Pandrang Row, J.*) PUBLIC PROSECUTOR *v.* RANGAN. **48 L.W. 382 = 1938 M.W N. 912.**

PRINCIPAL AND AGENT—*Accounts—Suit for—Decree in favour of agent—If can be passed.*

A decree can be passed in favour of an agent in a suit brought by a principal for rendition of accounts. It cannot however be laid down that a decree must be passed in favour of the defendant. A.I.R 1932 Lah. 619, Diss. (*Dalip Singh, J*) KANSHI RAM *v.* DULA RAI & CO. **A I.R. 1938 Lah. 723.**

PROVIDENT FUNDS ACT (XIX OF 1925), S. 5—*If part of estate of deceased.*

and gratuity do not form part of a (*Lobo, J.*) MADU KRISHNA, *In re.* **A.I R. 1938 Sind 160.**

——**S. 5 (1)**—*Original nomination by subscriber—Mode of cancellation—Will by subscriber varying such nomination sent to authority after his death—Effect of.*

S. 5 (1) of the Provident Funds Act contemplates that the original nomination made by a subscriber will entitle the original nominee to receive the provident fund money absolutely until such nomination has been varied in the manner indicated therein. It contemplates that the variation or cancellation is to be made by the subscriber himself and not by anybody after his death. Consequently, a will made by the subscriber varying his original nomination and despatched to the Provident Fund authority by the executor after his death, cannot have the effect of cancelling such nomination. (*Nasim Ali and Henderson, JJ.*) SECRETARY OF STATE FOR INDIA *v.* NAGENDRA MOHAN DE.

42 C.W.N. 1143.

PROVINCIAL INSOLVENCY ACT (V OF 1920):

Ss. 4 and 56 (3)—*Realisation of assets in other people's hands—Receiver's remedy—Limitation.*

The words in S. 4 of the Provincial Insolvency Act 'subject to the provisions of this Act' are certainly not otiose, and one of the provisions which must apply is S. 56 (3). Before a receiver can realise the assets, they must be shown to belong to the insolvent. If they do not, the receiver has no present right to remove a stranger in possession, he would have to file a separate suit against him. Even on the view that proceedings under S. 4 of the Insolvency Act should be held to be tantamount to a suit under S. 53 of the T. P. Act, it would follow that such a suit would have to be in time when insolvency proceedings began and this would be six years under Art. 120 of the Limitation Act from the date of accrual of the cause of action. (*Gruer and Niyogi, JJ.*) GODBOLE *v.* MST. MANIBAI.

1938 N.L.J. 279.

——**Ss. 4, 53 and 56**—*Relative scope of—Power to attack partition made more than two years prior to insolvency.*

Ss. 53 and 56 of the Provincial Insolvency Act do not merely lay down a rule of substantive law or a rule of evidence favouring the Official Receiver but also confer jurisdiction upon a Court of insolvency, and hence limit the operation of S. 4 of the Act. Hence a partition which had taken place more than two years prior to the date of insolvency, was held to be incapable of being set aside under S. 4 of the Insolvency Act. (*Gruer and Niyogi, JJ.*) GODBOLE *v.* MST. NANIBAI.

1938 N.L.J. 279.

——**S. 5**—*Insolvency Court—Powers of amendment—Insolvency petition by creditor founded on act of insolvency within three months—Debt alleged to be due to firm of which petitioner was alleged to be sole proprietor—Application after three months for amendment states that petitioner became entitled to debt under award of arbitrator subsequent to petition but within three months of petition—Maintainability.*

The insolvency Court would not grant leave to amend an insolvency petition presented by a creditor if the effect of the amendment would be to introduce a debt which after the period of three months has elapsed, would not be a debt upon which the petition could be founded. But if within the period of three months a debt has been made a ground of the petition and it afterwards becomes desirable to add another party or to cure a mere debt or slip, the amendment will be allowed. An insolvency petition against a debtor was presented by a person describing himself as a creditor of the debtor and he found his petition on a debt due by the debtor to a firm of which he claimed to be sole proprietor and as such solely entitled to the debt. The petition was presented on 24-11-1930 and the acts of insolvency alleged occurred on 17-9-1930 and 15-10-1930. On 28-11-1930 an award was made in arbitration proceedings between

the petitioner and a third person who also claimed to be a partner in the firm, and as a result of that award the petitioner became solely entitled to the debt on which the petition was founded. Subsequently the petitioner applied, more than three months after the acts of insolvency, for leave to amend his petition by stating that the entire right to the debt vested in him by reason of the award.

Held, the amendment could be allowed, there being no attempt to introduce any new debt or new creditor, but that he should pay the costs that had been thrown away. (*Venkatasubba Rao and Abdur Rahman, JJ.*) CHOCKALINGAM CHETTIAR *v.* MUTHIAH CHETTIAR.

1938 M.W.N. 880=48 L.W. 263=(1938) 2 M.L.J. 390.

——**S. 6 (a)**—*Trust-deed by debtor for benefit of creditors—Creditor not party to deed—If can avail of act of insolvency.*

A creditor who is not a party to a trust deed executed by the debtor for the benefit of his creditors and to whom the trust has not been communicated, can avail himself of the act of insolvency committed by the debtor by the execution of the trust deed and get the payment of his debts out of the trust property. (*Nasim Ali and Henderson, JJ.*) HIMANSU KUMAR *v.* HASEM ALI KHAN.

42 C.W.N. 1131.

——**S. 6 (e)**—*Sale in execution of decree—Act of insolvency—When occurs—Date of sale or of its confirmation.*

An act of insolvency in S. 6 (*e*) of the Provincial Insolvency Act occurs when the property of the insolvent is sold in execution of a decree, and not when the sale is confirmed. (*Tek Chand, J.*) LAL CHAND *v.* BOGHA RAM.

40 P.L.R. 841

——**S. 16**—*Object of—Prevention of injury to other creditors.*

The object of S. 16 of the Provincial Insolvency Act is to prevent other creditors who by reason of collusion or otherwise may not diligently prosecute the petition. (*Thomas, C.J., Zia-ul-Hasan and Yorke, JJ.*) RAGHURAJ SINGH *v.* ABDUL RAHMAN 1938 O.A. 666=1938 O.W.N. 871 (F.B.).

——**S. 16**—*Substitution—Express order, if necessary—Inference from conduct of Court—Continuation of proceedings on application of creditor seeking substitution.*

An express order of substitution is not necessary under S. 16 of the Provincial Insolvency Act, but substitution can be inferred from the Court continuing proceedings on the application of the creditor applying to be substituted under that section. (*Thomas, C. J., Zia-ul-Hasan and Yorke, JJ.*) RAGHURAJ SINGH v. ABDUL RAHMAN.

1938 O. A. 666=1938 O.W.N. 871 (F.B.).

——**S. 16**—*Successive substitutions, if allowed.*

The substitution contemplated by S. 16 of Provincial Insolvency Act is that a creditor who has been substituted in place of the original creditor can in his turn be substituted by another creditor and so on. (*Thomas, C. J. Zia-ul-Hasan and Yorke, JJ.*) RAGHURAJ SINGH v. ABDUL RAHMAN.

1938 O. A. 666=1938 O.W.N. 871 (F. B.).

——**Ss. 28 and 59**—*Scope and effect—Suit by insolvent after adjudication and pending insolvency—Maintainability.*

It is fundamentally opposed to all principles of insolvency to hold that an insolvent after an adjudication order is competent to file a suit in his own name. That is clear from Ss. 28 and 59 of the Provincial Insolvency Act. A suit by an adjudicated insolvent during the pendency of the insolvency is therefore not maintainable.

(*Rangnekar, J.*) BALKRISHNA *v.* CALCUTTA SOAP WORKS. 40 Bom.L.R. 956.

——**S. 28 (1) (4) and (5)**—*Construction—Provident fund amount—When vests in receiver.*

The insertion of the word 'forthwith in S. 28 (1) has been to sweep away the Court's attempt to postpone the vesting. As soon as the amount of a provident fund reaches the hands of an undischarged insolvent depositor, it ceases to be a compulsory deposit that is not liable to attachment, and it becomes the absolute property of the depositor insolvent and therefore vests in the Insolvency Court. (*Pollock and Digby, JJ.*) MARTEN *v.* DUTT. **A.I.R. 1938 Nag. 408.**

——**Ss. 28 (2) and (7) and 51**—*Scope and operation—Execution sale subsequent to admission of insolvency petition but prior to adjudication—Validity—Purchase by decree-holder with leave of Court—If prot...*

The disability of a creditor under S. 2 Provincial Insolvency Act to have any reme the property of the insolvent is only after adjudication. A decree-holder can therefore bring the property of the judgment debtor to sale till the

By the conbined operation of Ss. 28 and 51 an execution sale of the property of the debtor is not prohibited until the date of the order of adjudication, in spite of the presentation and admission of an insolvency petition, though the creditor is not given the benefit of the remedy had by him. The title of the auction-purchaser who purchases in good faith is protected by S. 51 (3) of the Act, though there may be an adjudication order subsequent to the sale, the title of the purchaser to the property would remain unaffected. The doctrine of relation back of the Official Receiver under S. 28 (7) is subject to the exception enacted in S. 51 (3). T

the purchaser

in pursuance

with leave of the Court. (*Venkataramana Rao, J.*) VENKATA SIVAYYA *v.* SURYANARAYANA. **48 L.W. 279 = 1938 M.W.N. 841.**

——**S. 28 (7)**—Scope—Doctrine of relation back—If subject to S. 51 (3). *See* PROVINCIAL INSOLVENCY ACT, SS. 28 (2) AND (7) AND 51. **1938 M.W.N. 841.**

——**S. 42**—*Transactions not covered by Ss. 53 and 54—Power of Court to review.*

It is quite clear that, in view of the wide powers conferred upon the Court by S. 42

Insolvency Act, the Court has power

any questionable transactions covere

which are in any way relevant to the

such transactions could not be expressly avoided under Ss. 53 and 54 of the Act. (*Edgley, J.*) KAZI ABDUL SATTAR *v.* DINAJPUR TRADING AND

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——**S. 42 (1) (i)**—*Remote transacti... can take into consideration.*

Under S. 42 (1) (*i*) of the Provincial I

the Court ought to take into consi

such transfers by the insolvent as might

had some effect upon the insolvency. (*Ed...*

ABDUL SATTAR *v.* DINAJPUR TRADING AND BANKING CO. 42 C

——**S. 42 (1) (i)**—*Scope—Fraudule... prior to insolvency.*

A fraudulent transfer by the insolvent

insolvency comes within the purview of S. 42 (1) (*i*) of the Provincial Insolvency Act, and empowers the Court

to refuse to grant an absolute order of discharge. (*Edgley, J.*) KAZI ABDUL SATTAR *v.* DINAJPUR TRADING AND BANKING CO. **42 C.W.N. 1153.**

——**S. 51**—Scope and effect of—Execution sale after admission of insolvency petition but before adjudication—Validity—Rights of decree-holder purchaser—Title to property sold—If affected by subsequent adjudication. *See* PROVINCIAL INSOLVENCY ACT, SS. 28 (2) AND (7) AND 51. **1938 M.W.N. 841.**

——**S. 52**—*Scope—Execution sale—Order for—Subsequent presentation and admission of insolvency petition and appointment of interim receiver—No application by latter for delivery of property—Application by insolvent for stay of sale—Rejection—Sale in execution—Validity.*

S. 52 of the Provincial Insolvency Act places on the

cation made by the judgment-debtor insolvent for stay

ity with the requirements of

for sale was made by the

e date of sale was fixed for

ler a petition for insolvency of

the judgment debtor was presented, and that petition was admitted and an *interim* receiver appointed on 30-9-1935. The *interim* receiver did not apply for delivery of the property under S. 52, but the insolvent applied to the executing Court for stay of sale. The Court refused the stay and the property was sold on 2-10-1935

Held, that the sale was valid and the purchaser got a good title. (*Venkataramana Rao, J.*) VENKATA SIVAYYA *v.* SURYANARAYANA. **48 L.W. 279 = 1938 M.W.N. 841.**

——**S. 53**—*Burden of proof under—Transfer in*

against him. It is clear that the receiver has to prove not that the insolvent was acting fraudulently or in bad faith, but he has to prove that the transfer gave no value or consideration for the transfer, and if there was

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act in good

faith. Mere fraud on the part of the insolvent is not enough. What the section requires is fraud or want of

53 of the Provincial Insolvency Act. (*Rangnekar, J.*)

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from the date of registration of the transfer deed because it is by registration that the

effective and the title passes from the transferor to the transferee. (*Niyogi, J.*) BALKISAN *v.* BHANUPRASAD. **A.I.R. 1938 Nag. 454.**

——S. 54—*Limitation—Period of three months expiring during vacation—Application presented on opening day—If competent.*

Where the period of three months prescribed for making an application under S. 54, Provincial Insolvency Act, expires during the vacation and the application is presented on the day on which the Court reopens after the vacation, such application is competent under S. 4, Limitation Act, and S. 10, General Clauses Act. The application is governed by principles bearing on the construction of statute of limitation as contradistinguished from a fiscal enactment such as the Court-Fees Act. (*Niyogi, J.*) BALKISAN *v.* BHANUPRASAD. **A.I.R. 1938 Nag. 454.**

——S. 58 (3)—*Applicability—Decree-holder purchaser—If protected—"Good faith"—Notice of insolvency —If negatives good faith.*

The mere fact that a purchaser at an execution sale had notice of the insolvency proceedings against the debtor cannot connote want of good faith. A purchase made on the faith of a Court's order would negative all inferences of bad faith. There is no difference in this respect between a stranger purchaser and a decree-holder purchaser. (*Venkataramana Rao, J.*) VENKATA SIVAYYA *v.* SURYANARAYANA. **48 L.W. 279= 1938 M.W.N. 841.**

——S. 59—Scope—Suit by adjudicated insolvent pending insolvency—Competency. *See* PROVINCIAL INSOLVENCY ACT, SS. 28 AND 59. **40 Bom.L.R. 956.**

——S. 79—*Calcutta High Court Ruless R. 9—Creditors served with notice of hearing of application for discharge—If become parties to proceeding—Death of some of such creditors pending appeal filed against order disallowing application—Heirs not substituted—Appeal, if competent.*

Creditors upon whom notices of the date of hearing of the application for discharge are served in accordance with the provisions of R. 9, framed under S. 79 of Act V of 1920, do not thereby become parties to the proceedings in the same sense that plaintiffs and defendants are parties in a civil suit. If some of such creditors die during the pendency of an appeal filed by the insolvent against the order disallowing his application for discharge, the failure to make their heirs parties to the appeal does not necessarily render the appeal incompetent. The criterion which should be adopted for the purpose of deciding whether such heirs should be substituted, is to ascertain whether or not the interests of such persons are likely to be adversely affected by their non-substitution. Heirs of creditors who have taken no interest in the proceedings beyond proving their debts and heirs of creditors who have even failed to prove their debts, cannot be affected in any way by their non-substitution, and the fact that they have not been impleaded in the case, cannot therefore in any way affect the competency of the appeal. (*Edgley, J.*) KAZI ABDUL SATTAR *v.* DINAJPUR TRADING AND BANKING CO. **42 C.W.N. 1153.**

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), S. 17, Proviso—*Construction—Deposit or security—If for benefit of decree to be set aside or future decree after retrial—Setting aside of* ex parte *decree—If discharges surety for applicant.*

The deposit of the decree amount or the giving of security under the proviso to S. 17 of the Provincial Small Cause Courts Act, which is required of an applicant for an order to set aside an *ex parte* decree, is for the payment of the money under the actual decree, assuming that it is not set aside. The money is not lodged, nor the security given to abide the result of the suit on retrial after the setting aside of the *ex party* decree. The reference at the end of the proviso to performance of the decree or compliance with the judgment is to an existing decree or judgment, and not to one to come into existence in the future. A surety for the performance of the decree in the application to set aside the *ex parte* decree is discharged on the *ex parte* decree being set aside. (*Beaumont, C.J. and Wasoodew, JJ.*) MAGANLAL *v.* DAHYABHAI. **40 Bom.L.R. 898.**

PUNJAB COLONIZATION OF GOVERNMENT LANDS ACT (V OF 1912), S. 19— *A and B contracting that A should bid at auction for both A and B and that land so purchased should be treated as joint—A obtaining land and recorded as tenant—Suit by B to enforce his title—Maintainability.*

A entered into a contract with *B* by which *A* was to bid at an auction held by Government for the sale of land. The land if purchased was to be treated as the property of the parties in certain defined shares. *A* was successful in bidding for the land. *A* then had his name recorded as the occupancy tenant of that land until full payment of the purchase money and interest. A suit brought by *B* to enforce his title to the land under the agreement was resisted on the ground that under S. 19 the rights or interests vested in a tenant under the Act could not be transferred without the consent in writing of the Commissioner and that any transfer made without such consent in writing was void.

Held, that by virtue of the contract entered into between the parties, the title to the property vested in both the persons as soon as the purchase was effected, and *B* became joint tenant with *A* from the very beginning; and as *B* did not acquire any interest in pursuance of any transfer from *A*, the latter's objection must fail. A.I.R. 1930 Lah. 835, Foll. (*Addison and Din Mohammad, JJ.*) DALIP SINGH *v.* JAGAT SINGH. **A.I.R. 1938 Lah. 721.**

PUNJAB RELIEF OF INDEBTEDNESS ACT (VII OF 1934), S. 25—*Maintainability of application to Board—Jurisdiction of Civil Court to determine.*

Any other Court is not competent to determine those matters which have been placed exclusively within the jurisdiction of the Board, nor can it be urged that so long as the Board has not determined those matters, any other Court can continue the proceedings before it in relation to them. The sole jurisdiction to determine whether a certain person is a debtor or not is by virtue of S. 7 vested in the Board alone, and its decision thereon is final; and the determination of this question involves everything which relates to the competency of the application, including the amount of debt owned by the applicant. The Board is empowered to dismiss an application submitted to it under various sections of the Act and an application which exceeds the pecuniary limits of its jurisdiction is bound to be dismissed under the Proviso to S. 9. For an independent tribunal, therefore, to determine whether a certain application lies to the Board or not would be clearly to encroach upon its jurisdiction and to run counter to the entire scheme propounded in the Act itself. (*Addison, Ag.C.J. and Din Mohammad, J.*) GOPAL DAS *v.* KUSHI RAM. **A.I.R. 1938 Lah. 702.**

PUNJAB SIKH GURDWARAS ACT (VIII OF 1925), S. 2 (iv)—*Office-holder and minister—Difference between.*

While in the case of an 'office-holder,' participation in either the management or performance of public

worship in a Gurdwara or in the management or performance of any rituals or ceremonies observed therein is sufficient; in the case of a 'minister' the control not only of the management or performance of public worship in a Gurdwara is essential but also of the rituals and ceremonies observed therein. Secondly, while a person can be called an 'office-holder' if he participates in the management or performance of public worship in a Gurdwara or in the management or performance of any rituals or ceremonies observed therein, he cannot be called a 'minister' unless he is vested with the control of the management or performance of public worship in a Gurdwara and of the rituals and ceremonies observed therein either solely or along with others. When the Legislature used two different terms in two separate definitions, it did intend to distinguish one from the other and in using the word 'control' as distinguished from management, its intention was to import into the term 'control' the idea of domination or command. (*Addison and Din Mohammad, JJ.*) SHIROMANI GURDWARA PARBHANDAK COMMITTEE *v.* GURDIAL SINGH.

A.I.R. 1938 Lah. 734.

——**S. 29**—*Shiromani Gurdwara Parbhandak Committee—Unauthorized seizure of jurisdiction by—If subject to control of Court.*

Unauthorized seizure of jurisdiction would be subject to the control of Courts and an act done which is not within the competence of the Shiromani Gurdwara Parbhandak Committee to do, would be liable to be ignored. (*Addison and Din Mohammad, JJ.*) SHIROMANI GURDWARA PARBHANDAK COMMITTEE v. GURDIAL SINGH. **A.I.R. 1938 Lah. 734.**

PUNJAB TENANCY ACT (XVI OF 1887), Ss. 57 and 59—*Occupancy Tenancy—Period for redemption expiring—Mortgagee acquiring occupancy rights—Mortgagor losing his rights under S. 59—Mortgagee's rights, if retained.*

On the expiry of the period of limitation for the redemption of a mortgage of an occupancy right under Art. 148, Limitation Act, the mortgagee who acquires the status of an occupancy tenant cannot continue to retain it even on the death of th[illegible] leaving any heirs as mentioned in [illegible] 40 P.L.R. 240=A.I.R. 1938 Lah. [illegible] *son, Ag.C.J. and Din Mohammad, J.*) COURT OF WARDS *v.* DEVI DAWALA. **A.I.R. 1938 Lah. 675.**

——**S. 77 (3) (d)**—*Occupancy rights of judgment-debtor sought to be attached and sold—Jurisdiction of civil court to decide whether rights fall under S. 5 or Ss. 6 and 7.*

A Civil Court has jurisdiction to decide as to whether the occupancy rights held by a judgment debtor, which are sought to be attached and sold [illegible] decree, fall under S. 5 or Ss. 6 and 7 [illegible] not a suit by a tenant to establish a cl[illegible] occupancy or by a landlord to prove th[illegible] not such a right. (*Addison and Din* [illegible]) KARAM CHAND *v.* AMAR KAUR.

A.I.R. 1938 Lah. 677.

[illegible]

[illegible] be considered as appointed on behalf of all persons interested in the property, and he is entitled to his ordinary commission and allowance, and also to a lien on the estate as against all persons interested in it for the balance, whatever it may be, that s[illegible] be due to him on taking his accou[illegible] though discharged by the dismissal of t[illegible] he was appointed, is entitled to a lien

all his just claims and allowances. (*Roberts, C.J. and Dunkley, J.*) DAW OO. *v.* U BA THAUNG.

A.I.R. 1938 Rang. 357.

——*Discharge—Official Receiver appointed to take charge of mining estate—Receiver negligent and incompetent—Appointment of Chartered Accountant in his place—Propriety.*

The Official Receiver was appointed to take charge of leasehold property consisting of a mining estate. On a petition that the estate had not been efficiently administered and that the Receiver was not collecting the amounts properly due to the estate, the true position was not disclosed to the Court in the report of the Official Receiver and was concealed from the Court. The Official Receiver was wholly incapable of dealing with the 'statements' regarding royalty submitted by one of the most important lessees. The Official Receiver however made no attempt whatever to have them dealt with. He ignored the whole problem. The Official Receiver was not capable of extricating the estate from the position which it occupied or of dealing with the situation.

Held, that it would be wrong in allowing the management of the estate to continue in the receiver's hands. The Officer Receiver's legal knowledge was not of any advantage. Hence the Official Receiver should be discharged and a Chartered Accountant appointed receiver of the estate. (*Ameer Ali, J.*) STEVENSON *v.* SHAHZADI BEGUM. — **A.I.R. 1938 Cal. 627.**

——Position of—If representative of parties to litigation—Decree belonging to estate—Execution by receiver—Procedure. *See* C. P. CODE, O. 40, R. 1.

40 Bom.L.R. 932.

REGISTRATION ACT, (XVI OF 1908), S. 17—*Agreement to divide property if successful in obtaining it—Registration if necessary.*

An agreement between certain persons providing the manner in which certain property should be divided bet[illegible]

[illegible] ing another document later on. [illegible] *dison and Din Mohammad, JJ.*) [illegible] SINGH.

A.I.R. 1938 Lah. 721.

——**S. 17 (1) (b)**—*Registration—Necessity—Test—Rights created and not the object of the transaction to be considered—Sale of timber with right to enter to cut and take it—Trees to be cut not specified—Fixing of time limit and payment by instalments—Presence of a forfeiture clause—Deed, if requires registration.*

In determining whether a document has got to be [illegible] not with the object which [illegible] with the rights created or [illegible]. Where an instrument [illegible] arties was to cut and take [illegible] other and was allowed to go into the forest for that purpose, but the trees to be cut were not specifically mentioned, and a time limit was [illegible] was to be paid in instalments [illegible] was held that the instrument [illegible] n a mere license to enter in order to cut and remove ascertained timber sold and that something more, created rights and interests in immovable property and hence required registration under the Registration Act. (*Stone, C.J. and Bose, J.*)

REGISTRATION ACT (1908), S. 17.

tration—Effect—Award made decree of Court by inadvertence—Review—Power of Court—Error apparent on face of the record—C. P. Code, O. 47, R. 1.

An award made on arbitration comes under S. 17 (1) (*b*) of the Registration Act, and it purports or operates to create, declare, assign, limit or extinguish any right, title or interest of the value of one hundered rupees and upwards to or in immovable property, it is compulsorily registrable; where the award is compulsorily registrable but not registered, the Court is not competent to file it and pass a decree upon it, as that is contrary to the provisions of S. 49 of the Registration Act. If the Court passes a decree on the award without adverting to S. 49, the decree may be set aside on review on the ground of a mistake or error apparent on the face of the record, as the Court has been misled into making an order contrary to the statute. (*Broomfield and Wassoodew, JJ.*) CHIMANLAL *v.* DAHYABHAI.

40 Bom. L.R. 952.

——**S. 17 (2) (vi)**—*Applicability—Money suit—Attachment of immovable property before judgment—Raising of attachment on undertaking by defendant not to alienate attached property—Consent decree creating charge on some property—Registration — Necessity.*

Where in a money suit the immovable property of the defendant is provisionally attached before judgment, but such attachment is subsequently cancelled on the defendant giving an undertaking not to alienate the property by mortgage or sale till the suit was decided, and subsequently a consent decree is made by which the very property which is attached and released from attachment is charged under the consent decree, the decree does not require registration, because the property attached has been the subject-matter of a proceeding, *viz.*, the attachment proceeding, under S. 17 (2) (*vi*) of the Registration Act. The undertaking of the defendant not to alienate operates in law as an injunction against him with regard to the property till disposal of the suit. (*Divatia, J.*) KRISHNA *v.* MADHAV.

40 Bom. L.R. 929.

——**S. 35 (3) (b)**—*Registration of mortgage deed—Executant, if a major—Presumption.*

There is no presumption from the fact of registration of a mortgage deed that at the time of its execution the mortgagor was a major and not a minor. (*Biswas and Edgley, JJ.*) SM. SARASWATI DEBI *v.* BAHADUR LAL MISSIR. **68 C.L.J. 28.**

——**S. 49**—Scope—Award requiring registration not registered—If can be made decree of Court. *See* REGISTRATION ACT, SS. 17 (1) (*b*) AND 49.

40 Bom.L.R. 952.

——**S. 75**—*Document presented more than 30 days after order of Registrar—Validity of registration—Power to Registrar to extend time.*

The registering officer has no jurisdiction to register a document presented after the lapse of 30 days from the date of the order passed by the Registrar under S. 75 (1) of the Registration Act. It is wholly immaterial when the order made by the Registrar was known by or made known to the party concerned. The Registrar has no power under the Act to extend the time for presentation of a document. The registration of a document presented after the statutory period cannot, therefore, but be void. (*Biswas, J.*) MAFIZUR RAHMAN *v.* JAMILA KHATUN. **42 C.W.N. 1174.**

SALE OF GOODS ACT (III OF 1930), S. 38 (2)—*Contract of sale by instalments—Defaults—Separate suits in respect of each default—If barred.*

Parties to a contract agreed to deliver and take 1500 bags of corn in three instalments of 500 bags each. When the first instalment was defaulted, a suit was filed in respect of that instalment; when the second instalment was defaulted, similar action was taken. In respect of the third instalment when a suit was filed, it was contended that the cause of action for the second and third suits was the same and hence the third suit was barred by O. 2, R. 2, C. P. Code.

Held, that looking to the terms of the contract, the intention of the parties and the circumstance, in that objection on similar grounds was not taken in the second suit, the causes of action for default of each instalment were separate and that the suit was not barred. (*Roberts C.J. and Dunkley, J.*) RATILAL KOTHARI *v.* LAKMI CHAND. **A.I.R. 1938 Rang. 364.**

SANTAL PARGANAS SETTLEMENT REGULATION (III OF 1872), S. 6 (b)—*Construction and scope—Decree in contravention of—If void—Power of executing Court to refuse execution—Question whether decree is in contravention if section—If can be raised in execution S. 27—Distinction.*

S. 6 (*b*) of the Santal Parganas Settlement Regulation clearly imposes on a Court which is about to pass a decree a duty to observe the rule contained in that clause. The language of S. 6 (*b*) is totally different from that of S. 27 of the Regulation which enacts a general rule which debars any Court from recognizing a transfer of a raiyat's right in his holding; an executing Court is bound under S. 27 to decline to execute a decree for sale of a raiyat's right in his holding. That is not so in the case of a decree alleged to be in contravention of S. 6. The question whether the amount awarded is in excess of that permitted by S. 6 (*b*) is one which ought properly to be agitated before and considered by the trial Court and passes the decree or in appeal from the decree. It is not a question which may be agitated in the executing Court, and the executing Court cannot decline to execute the decree on the ground that it contravenes the provisions of S. 6 (*b*) of the Regulation. (*Agarwala and Varma, JJ.*) KUSUM KUMARI *v.* KISHORILAL. **1938 P.W.N. 617.**

——**S. 27**—Scope—Duty of executing Court under—Decree in contravention of—Executability—S. 6—Distinction. *See* SANTAL PARGANAS SETTLEMENT REGULATION, S. 6 (*b*). **1938 P.W.N. 617.**

SHIPPING—*Rules governing navigation in Hughli—R. 5—"Turning points or bends of the river"—Meaning.*

Although in construing the phrase "turning points or bends of the river" Court has to refer not to the navigable channel but to the river as a whole and in all its breadth, yet such considerations are not necessarily conclusive of the question, and the Court has to consider the matter with reference to the channel and from the practical standpoint of a navigator. The prohibition cannot be supposed to extend to all parts of the river where the channel is not completely straight, but must be interpreted with regard not only to the aggregate amount of deflection but to its gradualness or abruptness, which is only to say that the deflection must be considered in relation to the distance to be travelled. (*Sir George Rankin.*) MALACCA MARU *v.* MARIENFELS.

176 I.C. 336 = 1938 O.L.R. 378 = A.I.R. 1938 P.C. 63 (P.C.).

SPECIFIC RELIEF ACT (I OF 1877), S. 42, Proviso—*Scope—Suit for declaration of extent of share in tauzi in estate—Absence of prayer for cancellation or correction of entry in land registry—Effect—Suit—If maintainable.*

A suit for a declaration that the plaintiff's share in a certain tauzi should correspond to a certain proportion of the original estate cannot be held to be obnoxious to

STAMP ACT (1899), S. 35.

S. 42 of the Specific Relief Act on the ground that there is no prayer for a cancellation or correction of the entry in the Land Registration Register. The Civil Court has no jurisdiction over the Land Registration Department of the Collector at all, though when moved in the right way it would give a declaration regarding the shares of parties or even a declaration that certain entry in the Collector's register is wrong. But the Civil Courts will not direct the entries in the Collector's register to be corrected and a plaintiff is not bound to ask for any declaration other than a declaration as to the extent of his share. (*Dhavle and Agarwala, JJ.*) DHANI SAO *v.* BISHUN PRASAD.
1938 P.W.N. 631.

STAMP ACT (II OF 1899), S. 35—Document being acknowledgment as well as agreement to pay—Validation. *See* STAMP ACT, SCH. I, ARTS (1), 5 (c), AND S. 35. A.I.R. 1938 Nag. 464.

——S. 35—*Scope — Promissory note insufficiently stamped—Endorsement of payment on—Admissibility to prove acknowledgment.*

Although a promissory note is insufficiently stamped and inadmissible in evidence under S. 35 of the Evidence Act, if there is an endorsement of payment on the promissory note, which is an acknowledgment of the debt it can be admitted in evidence for the purpose of proving the acknowledgment. (*Madhavan Nair, J.*) KONDAMMA *v.* VENKATARAYUDU.
1938 M.W.N. 875.

——S. 36—"*Admitted in evidence*"—*Meaning of.*

If an instrument is let in, whether after deciding the objection to its addmissibility or not, it must be held to have been admitted in evidence within the meaning of S. 36 of the Stamp Act, and its admissil
thereafter be questioned. Where the Ju
on the back of the document that it is
stamped and that it is allowed to go in, an
bears a rubber stamp with the initials of
must be held to have been admitted i
(*Madhavan Nair,*
NAM. 1938 [illegible]

——Sch. I, Ar[illegible]
being acknowledgme
can be validated under Stamp Act.

Where a document is nothing more than an ordinary receipt or an acknowledgment containing also a promise to pay [illegible]
and
agre
high
be validated under S. 35. (*Vivian Bose, J.*) NARBA[illegible] PRASAD *v.* MT. SUNKI. A.I.R. 1938 Nag. 464.

SUCCESSION ACT (XXXIX OF 1925), Ss. 211 and 216—*Intestate succession—Grant of administration—Effect of—Power of heirs to dispose of estate.*

S. 211 of the Succession Act merely provides that the estate of a deceased person vests in his executor or administrator *as such*: these words "as such" are important, and show that the vesting is not of the beneficial interest in the property, but only for purposes of representation. In a case of intestate succession it does not admit of any doubt that the beneficial interest vests in the heir-at-law, and there is nothing in the Succession Act which limits the power of disposal of the heir at-law over such estate, merely because a grant of administration has been made. Nor does the Transfer of Property Act make the interest of the heir at-law in the estate property which may not be transferred. S 216 and other provisions of the Succession Act only provide for representation of the deceased's estate for purposes of administration, and are not intended to cut down the rights of the beneficiaries. (*R. C. Mitter and Biswas, JJ.*) MST. KULWANTA BEWA *v.* KARAMCHAND SONI. 68 C.L.J. 8.

——S. 216—*Administration completed—Grant, if revoked in effect.*

It is doubtful if S. 216 of the Succession Act may be regarded as lending any countenance to the proposition—once an administrator, always an administrator. The moment administration is completed, the purpose of the grant will have been fulfilled, and the administrator would virtually become *functus officio*. It seems only reasonable to hold that thereupon the grant would stand revoked in effect, if not by a formal order of Court. (*R. C. Mitter and Biswas, JJ.*) MST. KULWANTA BEWA *v.* KARAMCHAND SONI 68 C.L.J. 8.

——S. 263—*Revocation of grant of probate—Application for—Burden of proof—Evidence regarding execution of will—Correct method of approach by Court—Motive of Testator—Non-registration of will—Non-examination of its writer—If relevant considerations.*

An applicant for revocation of a grant of probate takes upon himself the burden of displacing the evidence which there is regarding the execution and attestation of the will. Where there is direct, cogent and positive testimony of all the attesting witnesses of a

suspicion" which make it improbable that the will could have been executed. In order to repeal the effect of such positive testimony regarding execution, an

f a mere conflict of testimony.
l of approach for Courts called
ntary cases. It can never be a
speculating as to what might have been, the motive which impelled the testator to make an alleged will, provided there is evidence and the Court has every right to call for such evidence and must, in fact, call for it—that the will was in point of
'act that a
as must
the will.
xamined,
the mere non-examination of the writer by itself is not such a circumstance that one must hold from this alone that the story told by the attesting witnesses is unworthy of credit. (*Costello and Biswas, JJ.*) KRISTO GOPAL NATH *v.* BAIDYA NATH KHAN.
I.L.R. (1938) 2 Cal. 173.

——S. 383—*Grounds for revocation of succession certificate—Certificate granted on untrue allegations and fraudulent concealment—Effect.*

Where a succession certificate is obtained on behalf of a minor by his next friend on allegations which were false as to the deceased's property and on allegations which in law would not justify the grant and by fraudulent concealment of material facts from Court, the grant can be revoked. (*Lobo, J.*) MADHU KRISHNA, *In re.*
A.I.R. 1938 Sind 160.

SURETY—Discharge of—Creditor excluding debt guaranteed by surety from settlement by the Debt conciliation Board. *See* CONTRACT. S. 134 139.

TORT—Damages — Recoverability — Immediate connection between act complained of and injury—Necessity —Remote damages—Recoverability, *See* DAMAGES—RIGHT TO. **1938 P.W.N. 621 = 19 Pat.L.T. 670.**

———*Defamation—Publication—Communication made in ordinary course of business to typist.*

Where a communication is made in the ordinary course of business to a typist, there is no publication such as will justify an action for alleged defamatory statements, more so when the communication is made on a privileged occasion, being made by an attorney in reply to serious charges made against his client. (*McNair, J.*) KESHAB LAL *v.* PROVAT CHANDRA. **A.I.R. 1938 Cal. 667.**

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 3—Actionable claim—Right of vendor to recover money left with vendee for payment of vendor's creditor. *See* T. P. ACT, SS. 6 (*e*) AND 3. **1938 A.W.R. (H.C.) 540 = A.I.R. 1938 All. 544.**

———**S. 6 (a)**—*Applicability—Family arrangement.*

A family arrangement is valid and binding not as an assignment or relinquishment of the rights in expectancy but as a settlement by which parties defined their respective interests to avoid future disputes and hence S. 6 (*a*) of the T. P. Act has no application to such an arrangement. (*Zia-ul-Hasan and Yorke, JJ.*) CHHATARPAL SINGH *v.* SANT BAKHSH SINGH. **1938 O.A 573 = 1938 O.W.N. 711 = A.I.R. 1938 Oudh 190.**

———**Ss. 6 (e) and 3**—*Scope of S. 6 (e)—Part of consideration for sale retained with vendee for payment to vendor's creditor—If a debt—If transferable.*

S. 6 (*e*) of the T. P. Act is confined in its operation to the transfer of a mere right to sue. Where a vendee was directed by the sale deed to pay part of the consideration to a creditor of the vendor, the relation between the vendor and vendee is that of a debtor and creditor and the money left in the hands of the vendee is a debt which could be transferred. The right to recover this is an actionable claim as defined in S. 3, T. P. Act. (*Ismail, J.*) AGRENATH MISIR *v.* RAM RATAN PANDEY. **1938 A.W.R. (H.C.) 540 = 1938 A.L.J. 851 = A.I.R. 1938 All. 844.**

———**S. 53**—*Applicability and scope—Execution Sale —Purchasar resisted in delivery of possession by transferee from judgment-debtor—Suit by plaintiff for possession alleging transfer to be fraudulent and colourable and sham transaction—Maintainability.*

There is no rule of law that a plaintiff who has purchased property at a sale in execution and who is sought to be defeated by a fraudulent and colourable transfer by the judgment-debtor which is a sham transaction, is limited to the remedy of S. 53, T. P. Act. Where the plaintiff is opposed in taking delivery by the transferee from the judgment-debtor on the ground that he is in possession, and the plaintiff sues for possession alleging that the transfer was benami or fictitious and collusive, the suit does not fall under S. 53. There is no bar to the plaintiff succeeding on the strength of his title after obtaining a declaration that the nominal transfer by the judgment-debtor in favour of the obstructor was a colourable and sham transaction. (*Rowland and Varma, JJ.*) SHEO GOBIND KOERI *v.* RAM ASRAY SINGH. **19 Pat.L.T. 697.**

———**S. 53**—*Trust deed by debtor for benefit of creditors—Validity—Test—Provision in deed for maintenance of debtor—Effect on validity.*

In determining the validity of a trust deed executed by a debtor for the benfit of his creditors, the deed must be considered as a whole. The deed is valid if it is substantially for the benefit of the creditors and not simply a device for retaining a benefit for the author of the trust at their expense. A trust, the main object of which is the payment of the debts of the author of the trust, is substantially for the benefit of the creditors, and it is not hit by S. 53 of the T. P. Act, although there is a provision for the maintenance of the family of the author of the trust which is not inconsistent with the tenor and object of the trust. (*Nasim Ali and Henderson, JJ.*) HIMANSU KUMAR *v.* HASEM ALI KHAN. **42 C.W.N. 1131.**

———**S. 53-A**—*Scope of—Contract to be in writing and not writing referring to prior oral contract.*

S. 53-A clearly contemplates that the contract itself shall be in writing, and not that there shall be a writing referring to some part or parts of a contract which may previously have been oral. A distinction must be drawn between a writing which is a reduction into writing of a previous oral agreement, which would fall within the provisions of S. 53-A and a writing in which there is a mere reference to a previous oral agreement. (*Roberts, C. J. and Dunkley, J.*) MAUNG OHN *v.* MAUNG PO KWE. **A.I.R. 1938 Rang. 356.**

———**S. 55 (6) (b)**—*Rights of vendee—No default of vendee—Right to recover price paid and earnest money.*

Where a vendee was in the process of paying the balance of purchase-money and was ready to pay it all, and was asking for performance by the vendors of the contract which they had entered into with him, then the vendee is entitled to recover not only that part of the purchase price which he has already paid, but also those moneys which have been paid by him by way of earnest and which are repayable to him because the transaction has not fallen through because of any default of his, and he is entitled to have a charge on the property. (*Roberts, C. J. and Dunkley, J.*) U THA NYO *v.* M. M. R. M. CHETTYAR FIRM. **A.I.R. 1938 Rang. 367.**

———**(as amended in 1929), S. 58 (e)**—*Scope—If exhaustive—Lease—Transfer by lessee by way of English mortgage—If operates as absolute transfer of interest—Right of landlord to recover rent from mortgagee—Privity of contract—Liability of mortgagee—Covenant by mortgagor and actual payment of rent by him for certain period—If absolves mortgagee.*

S. 58, T. P. Act, does not purport to enumerate a complete catalogue of permissible mortgages. Nor does it enact that a mortgage by absolute transfer shall not be effective unless it complies with all the terms of an English mortgage. A lessee in India mortgaging his interest by an English mortgage passes the whole of his interest to the mortgagee, and the latter (certainly when in possession) becomes liable for the rent reserved by the lease. The law has not been altered by the amending Act of 1929, as the legislature took no steps to amend S. 58 (*e*) of the Act; nor did it repeal S. 58 (*e*). The Act therefore continues to contemplate an absolute transfer of the mortgaged property. Where the lessee covenants on behalf of himself and his assigns to pay the rent reserved to the landlord, and the mortgagee from the lessee takes possession of the land under the mortgage with express knowledge of the mortgagor's covenant, there is privity of contract between the mortgagee and the landlord, and the mortgagee becomes liable to pay the rent to the landlord. Whether or not the mortgagor covenanted to pay rent to the landlord and whether or not for a period of time he actually paid the rent is immaterial.

Quaere:—Whether the English conception of privity of estate exists or not in Indian Law. (*Courtney-Terrell, C. J. and Fazl Ali, J.*) SHIVA PRASAD SINGH *v.* TOM SMITH. **17 Pat. 499.**

T. P. ACT (1882), S. 68.

——**S. 68 (a)**—*Applicability and scope—Covenant to repay mortgagee money—Express or implied—Right to sue for mortgage money—Deed—Construction, Cl.* (a) *of S. 68, T. P. Act, having regard to the proper meaning of the words used, refers to an express contract to repay the loan in contradistinction to a contract implied by law.*

A usufructuary mortgage deed after providing that the mortgagee in possession was to repay himself, so far as interest was concerned, out of the rents and profits, contained, *inter alia,* the following clause: "He (the mortgagee) should pay the aforesaid annual malikana rent in full to the proprietors of the village every year till the repayment of the said peshgi money on taking receipts from them in the name of me, the executant, through himself. When at the end of the month of Jeth 1336 fasli or after the expiry of the due date at the end of the month of Jeth of any year, I, the executant, shall repay the entire peshgi money in cash in one lump at one time to the aforesaid zuripeshgidar, I shall take back this deed and enter into possession of the ijara property." The deed then provided that the executant (mortgagor) "shall not put forth [illegible] or indirectly to redeem the reha[illegible] ment of the entire full amount of [illegible]

Held, that the clause was on [illegible] mortgagor undertook to repay the mortgage money and [illegible]

[illegible] (*[illegible], C. J. and Manohar Lall, J.*) RAJKUMAR BHARTHI *v.* SURAJDEO SAHI.
1938 P.W.N. 659.

——**S. 68 (1) (c)**—*Scope and applicability of—Usufructuary mortgage of house—Repairs not done—Loss in rent—If amounts to a deprivation* [illegible] *—Right to sue for mortgage-money.*

Under Cl. (*c*) of S. 68 (1) of the T[illegible] tion of the security becoming insuffi[illegible] meaning of S. 66 arises and the only question is whether or not the mortgagee has been deprived of the whole or part of the security by or in consequence of any wrongful act or default of the mortgagor or his representative in interest. Where in the case of an usufructuary mortgage of a house, it is found that owing to want of repairs, the house had become uninhabitable and that while a tenant had left the house, another had his [illegible]

[illegible] MATHURA DEVI *v.* MOHAN LAL.
1938 O.A. 615 = 1938 O.[illegible]

——**Ss. 83 and 84**—*Deposit of m*[illegible] *mortgagee to credit of prior mo*[illegible] *complying with terms of S. 83—Subsequent mortgagee's right to interest on amount deposited from prior mortgage.*

Where a subsequent mortgagee retains a part of the consideration money in order to discharge a prior mortgage and deposits that amount in Court under the provisions of S. 83 of the T. P. Act to the credit of the prior mortgagee, that amount does not become the property of the prior mortgagee unless he complies with the terms of the section and states his willingness to accept it in full discharge of his dues. If he does not do so, the subsequent mortgagee is at liberty to withdraw the money deposited by him. The subsequent mortgagee in such circumstances is not, therefore, entitled to interest on that amount from the prior mortgagee. (*Henderson, J.*) [illegible]

——[illegible] *gage—Right to subrogation.*

A person holding an invalid mortgage does not come within Cl. (*a*) of S. 91 of the T. P. Act and he is not, therefore, entitled to be subrogated to the rights of a prior mortgagee whose mortgage has been redeemed with the money advanced by him. (*Sen, J.*) PADMA LOCHAN ROY *v.* SHAIK AJIMADDIN.
42 C.W.N. 1106.

——**S. 92**—*Mortgage dues paid up by several persons—Right of one of them to subrogation.*

Where the entire mortgage dues have been paid up by more than one person and the mortgage has been redeemed in full, there is nothing in the proviso to S. 92 of the T. P. Act which would prevent one of such persons from claiming the right to be subrogated in the place of the mortgagee to the extent of the amount contributed by him. (*Sen, J.*) PADMA LOCHAN ROY *v.* SHAIK AJIMADDIN. **42 C.W.N. 1106.**

——**S. 92 (as amended)**—*Retrospective—Effect.* [illegible] [illegible]nended [illegible] (*[illegible]en, J.*)
[illegible] C.W.N. 1106.

——**Ss. 106 and 110**—Monthly tenancy commencing from 1st of a month—Notice to quit—When should expire. *See* T. P. ACT, SS. 110 AND 106.
42 C.W.N. 1115.

——**S. 106**—*Nature of tenancy—Construction of rent note—Agreement to pay rent every month and to vacate in default of payment for 3 months.*

Where a tenant undertook to pay rent regularly every [illegible] months to vacate the [illegible] e creates a lease of [illegible] three months' rent [illegible] one at will for on[illegible] to eject the tenant[illegible] There is a contract to the contrary and the holding cannot be regarded as a monthly tenancy. (*Stone, C. J. and Bose, J.*) ABDUL RAZAK *v.* SETH NANDLAL.
1938 N.L.J. 317.

——**S. 108 (c)**—*Effect of—Proprietor interfering with sub lessee—Remedy—Measure of damages.*

S. 108 (c), T. P. Act, secures to the lessee the benefit of an unqualified covenant for quiet title. Where the [illegible] re to another [illegible] expiry of the [illegible] the theatre [illegible] notice determining the lease, intervenes and prevents the sub lessee [illegible] led to [illegible] of an [illegible] quiet [illegible] a suit for damages against the original lessee. The sub-lessee is entitled to recover from the lessee the extra amount which he was required to pay to secure a fresh lease from the proprietor over and above other damages. (*Niyogi, J.*) GAJADHAR *v.* RAMBHAU.
A.I.R. 1938 Nag. 439.

——**Ss. 110 and 106**—*Monthly tenancy commencing from 1st of a month—Notice to quit—When should expire.*

The second paragraph of S. 110, T. P. Act is not independent of the first paragraph. If a lease is said to commence from a certain date, it means from the end of that date, and will have another day added on at the end. Where, therefore, a monthly tenancy is expressed to commence from the 1st of a month, [illegible]

should be so framed as to expire at the end of the 1st of the succeeding month. In such a case a notice to quit expiring at the end of the month is invalid. (*Ameer Ali, J.*) CHARU CHANDRA GHOSE *v.* BANKIM CHANDRA SETT. **42 C.W.N. 1115.**

TRUST—*Creation of—Relinquishment by father—Agreement by son to pay illegitimate brother—Agreement if creates trust in favour of illegitimate brother—Enforceability.*

Where by a deed of relinquishment a father relinquished all his rights and property to his son and purported to put him in possession forthwith and the son by means of an *ikrarnama* undertook among other things to pay a certain sum to his illegitimate brothers and to put them in possession of certain property on their attaining majority, it was held that the two instruments should be read together and that effect of the clause relating to payment to the illegitimate brothers, was to create a trust in favour of those persons enforceable at their instance. (*Sir George Rankin.*) UMA NATH BAKHSH SINGH *v.* JANG BAHADUR.

176 I.C. 883 = 1938 O.W.N. 796 = 48 L.W. 371 = 1938 A.W.R. (P.C) 175 = 1938 M.W.N. 928 = A.I.R. 1938 P.C. 245 (P.C.).

——*Trust for creditors—Debtor executing trust deed for benefit of creditors after decree obtained by one of them—Trustee added as party but not substituted in execution case—Trust property sold in execution—Title of trustee—If affected by sale.*

A debtor, after a money decree was obtained against him by a creditor, conveyed by a trust deed his entire estate in trust for the benefit of his creditors. In the petition for execution of the decree, the trustee was added as a judgment-debtor along with the debtor but was not substituted in his place. No notice was served upon the trustee and he was not aware of this execution case at all. The trust properties were thereafter attached and sold in execution of the decree.

Held, that the ownership of the properties having been vested in the trustee by the trust deed the execution sale could not in any way affect his title or possession. (*Nasim Ali and Henderson, JJ.*) HIMANSU KUMAR *v.* HASEM ALI KHAN. **42 C.W.N. 1131.**

TRUSTS ACT (II OF 1882), Ss. 5 and 6—*Trust relating to immovable property—Creation of—Declaration of trust—If sufficient.*

Under S. 6 read with S. 5 of the Trusts Act, in order to create a valid trust in relation to immovable property the author of the trust should transfer the trust property to the trustee. The word 'transfer' has been used in a wider sense. It includes not only sales, mortgages, leases, gifts, but it also includes vesting declarations. In the case of immovable property, only a declaration is necessary to vest the property in the trustee. (*Nasim Ali and Henderson, JJ.*) HIMANSU KUMAR *v.* HASEM ALI. **42 C.W.N. 1131.**

——**S. 34**—*Summary nature—Scope of inquiry—Question of conversion of trust property—If can be considered.*

Proceedings in an application under S. 34 are intended to be summary and the Court would not be exercising a proper discretion if it disposed of matters of such vital importance as involving the conversion of the entire trust property, especially when there is no question of emergency. (*Lobo, J.*) MOOSAJI VALIJI, *In re.* **A.I.R. 1938 Sind 182.**

——**Ss. 88 and 90**—*Scope and effect of—Partnership—Leasehold property—Renewal of lease by one partner—Right of co-partners to benefit of—Presumption.*

The Indian Legislature has nowhere indicated an intention to enact an absolute rule of law or an irrebut

table presumption in respect of renewals of leases obtained by one co-partner. There is no warrant for holding that in no case can a partner during continuance of a partnership contract for a new lease to be granted to himself, of property which is in lease to the partnership without the new lease being held to be subject to trusts for the benefit of the partnership. Except in cases otherwise specially provided for by statute, a constructive trust can be held to arise only if the conditions of Ss. 88 and 90 of the Trusts Act are satisfied. Illustrations (*d*) and (*e*) to S. 88 refer only to cases where the partner uses funds belonging to the partnership or clandestinely stipulates for a personal benefit in a transaction negotiated by him on behalf of himself and his co-partners. A general presumption that in obtaining the renewal the partner availed himself of his character or the advantage of the old lease cannot be justified in cases where the lease is not renewable by contract or custom. Except in case of *trustees*, there is no irrebuttable presumption in support of the equity. The equity arising from the fiduciary obligation or duty subsisting between partners cannot be extended to cover every transaction entered into by one of them merely on the ground that there is *some* connection between the partnership and the transaction complained of; it must be shown that the transaction was within the scope of the partnership or part of the business of the partnership or an undertaking in rivialry with the partnership or indeed connected with it in any proper sense. (*Varadachariar and Horwill, JJ.*) RAMALINGA REDDI *v.* RAMALINGAM SETTY. **48 L.W. 334 = 1938 M.W.N. 854.**

UNITED PROVINCES AGRICULTURISTS RELIEF ACT (XXVII OF 1934), S. 2 (2) Prov. 1 and 2—*Agriculturist—Who is—Payment of income-tax by Agriculturist—If removes him from the class of Agriculturists.*

Apart from S. 2 (2) (*a*), the first proviso to the Section lays down that for the purpose of certain Sections and Chapters of the Act including Chapter V, an agriculturist means also a person who would belong to a class of persons mentioned in parts (*a*) to (*g*) of this Sub-section, if the limits of land revenue, local rates, rent and area mentioned in these parts were omitted. A person who is an agriculturist by virtue of this proviso, does not cease to be an agriculturist by the payment of Income-tax, by reason of second proviso to S. 2 (2). It is not the payment of Income-tax absolutely which takes away the effect of the first proviso, but in the case of a person belonging to cl. (*a*), only when the income-tax which he pays exceeds the local rate payable on the land which he holds. The proviso clearly shows that it is not the payment of income-tax irrespective of its amount that attracts the operation of that proviso. (*Thomas, C.J. and Zia-ul Hasan, J.*) VYAS *v.* RAJA BARKHANDI MAHESH PRATAP NARAIN SINGH.

1938 O.W.N. 836 = 1938 R.D. 738 = 1938 A.W.R. (C.C.) 81 = 1938 O.A. 631.

——**S. 7**—*Intention and object of—Section, if retrospective.*

The intention of the legislature in enacting S. 7 of the U. P. Agriculturists Relief Act is that no Court should have jurisdiction to entertain a suit when it is filed or to try it unless the conditions mentioned in that section are fulfilled. The object of the section apparently is that an agriculturist should not be dragged to a distant place to defend claims preferred against him. S. 7 is applicable to suits instituted before the Act came into force, and the fact that an *ex parte* decree which was subsequently set aside, was passed in the suit, before the Act came into force is immaterial. (*Zia-ul-Hasan and Yorke, JJ.*)

U. P. AGRIC. REL. ACT (1934), S. 30.

GULZARI SINGH *v.* RAM ADHIN.
1938 R.D. 723=1938 A.W.R. (C.C.) 75=
1938 O.L.R. 376=1938 O A. 618=
1938 O.W.N. 801.

———**S. 30**—*Applicability—Renewed promissory note—Reopening of old debt, if permissible.*

The taking of renewed bill or promissory note for a debt does not amount to a payment of the old debt. S. 30 of the Agriculturists Relief Act is wide enough to cover the case of an old debt renewed subsequently. (*Thomas, C.J. and Zia ul-Hasan, J.*) VYAS *v.* [illegible]

[illegible]

TATES ACT (XXV OF 1934), Ss. 1 (2) and 7—*Exception in S. 1 (2)—Meaning and effect of—If exc* [illegible]

of [illegible] this, that encumbered estates which [illegible] the excluded areas cannot derive an [illegible] provisions of the Act. This does [illegible] that the benefits which have been co[illegible] upon the landlord and the disabi[illegible] imposed generally on the creditor [illegible] within the areas excluded by Sub-S[illegible] words 'United Provinces' occurring in S. 7 must necessarily include the particular areas excluded by Sub-S. (2) of S. 1 of the Act. (*Mulla, J.*) BRIJ BEHARI LAL *v.* UDAI NATH SHAH. 1938 A.L J. 832=
1938 A W.R. (H.C.) 551.

———**Ss. 4, 6 and 46**—*Applicant declaring that he is not a member of joint Hindu family—Existence of sons not disclosed—Order under S. 6—Sons applying to special Judge to be made parties—Jurisdiction of special Judge to allow—Correction of order under S. 6—Powers of Board.*

Where an applicant under S. 4 declared that he is not a member of a joint Hindu family and failed to disclose the existence of adult sons and an order under S.6 was passed and later on the sons appeared before the special Judge and prayed to be added as parties to the application and the special Judge ordered them to be added, it was held that the special Judge had no jurisdiction to so order, for the right to decide as to the validity of an application under S. 4 lay within the prerogative of the Revenue Courts alone, but that the order inadvertently passed under S. 6 could be cancelled under the Board's powers of revision under S. 46. (*Darling, S.M. and Mehta, J.M.*) PARTAP *v.* RANJIT.
1938 R.D. 741.

———**Ss. 4 and 13**—*Application under S. 4 and order under S. 6—* [illegible]

Or [illegible] *if* [illegible]

E[illegible] ur[illegible] be[illegible] Ju[illegible] been discharged according to S. 13 of the Act, then such a creditor has no *locus standi* to object before the Collector [illegible] A[illegible] J.[illegible]

———**Ss. 4, 6 and 46**—*Defe*[illegible] *S. 4—Order under S. 6 inadver*[illegible] *for correction of vital defect—* [illegible] *under S. 6 in revision—Powers.*

U. P. ENCUM. EST. ACT (1934), S. 7.

Where an application under S. 4 of the U. P. Encumbered Estates Act failed to comply with the mandatory provisions of the second proviso to that section, but nevertheless an order had been passed under S. 6, and the defect is discovered too late for correction, the Board in the exercise of its revisional powers under S. 46 could cancel the order inadvertently passed under S. 6. (*Darling, S.M. and Mehta, J.M.*) KARORI MAL *v.* RATI RAM. 1938 R.D. 736.

———**S. 4**—*Omission to include sons—Objection after issue of notice under S. 9—Order to be passed.*

[illegible] otice under S. 9 of the [illegible] or raises an objection [illegible] the applicant are not [illegible] be so, it was held that the application did not comply with the provisions of S. 4 of the Act and that the order inadvertently [illegible] 6 should be cancelled. (*Darling, S.M.* [illegible] *M.*) MOHAN SINGH *v.* HAR BAKHSH
1938 A W.R. (B.R.) 276.

[illegible] *le.* [illegible] cumbered [illegible] where the [illegible] s not pre- [illegible] cumbered [illegible] *S.M. and* [illegible]
[illegible] (B.R.) 270.

———**S. 4 (4)**—*'Prevented'—Mistaken reliance on co-debtors—If amounts to.*

Where certain debtors pleaded that they thought their interests would be sufficiently protected by the application of their co-debtors and that they were misled in so thinking, that circumstance was held to be not such by which these debtors were 'prevented' from presenting their appication in time. (*Darling, S.M. and Bomford, J.M.*) BABOO RAM *v.* SUKH LAL.
1938 A.W.R. (B.R.) 270.

———**Ss. 6 and 46**—*Order under S. 6—Cancellation by S D. O.—Legality—Proper procedure.*

The S. D. O. has no authority to cancel the order under S. 6 of the Encumbered Estates Act, passed by his predecessor, if he thought that a mistake had been made he should have submitted the record to the Board for orders under S. 46 of the Act. (*Darling, S. M. and Bomford, J.M.*) BABOO RAM *v.* SUKH LAL.
1938 A.W.R. (B.R.) 270.

———**S. 7**—*Application for stay under—Forum.*

An application for stay of proceedings under S. 7 of the U. P. Encumbered Estates Act must be made not to the special Judge, but to the Court in which those proceedings are pending which it is sought to be stayed, for, the first point to be decided in such an [illegible]

[illegible]

1938 A.W.R. (C.C.) 69=1938 O.W.N. 750.

———**S. 7 (1) (a)**—*Compromise after execution sale—*

[illegible]

95 and got possession of property, it was held though the sale had been held, it had not been confirmed and that on the passing of an order under S. 6 of the Encumbered Estates Act, all proceedings had to be stayed under S. 7 and the delivery of possession became null and void and had to be set aside. (*Zia-ul-Hasan and Yorke, JJ.*) SHEO NATH *v.* MADAN MOHAN LAL. **1938 O.A. 684.**

———S. 14—*Different debtors in respect of a mortgage debt—Applications in different districts for relief under U.P. Encumbered Estates Act—Procedure to be followed—Transfer to one special Judge and re-transfer after decision.*

Where the heirs of a mortgagor living in different districts apply under the U. P. Encumbered Estates Act in their respective districts, in respect of the same mortgage and as regards their respective share in the equity of redemption, it would lead to a decision of the claim by two Courts in respect of a single mortgage. Hence the proper thing is to transfer the claim from the Court of one special Judge to that of the other for disposal, with a direction that after decision by that special Judge, the case shall be re-transferred back to the Court of the special Judge from whom the case was originally transferred. (*Yorke, J.*) GOVIND PRASAD *v.* MUSTAFA BEGAM. **1938 A.W.R. (C.C.) 77 = 1938 O.L.R. 382 = 1938 O.A. 621 = 1938 O.W.N. 775.**

———S. 46—Revision—Powers—Inadvertent order under S. 6—Correction. *See* U. P. ENCUMBERED ESTATES ACT, S. 46. **1938 R.D. 741.**

———S. 46—Revision— Powers— Inadvertent order under S. 6—Correction. *See* U. P. ENCUMBERED ESTATES ACT, SS. 4, 6 AND 46. **1938 R.D. 736.**

UNITED PROVINCES LAND REVENUE ACT (III OF 1901), S. 24—*Appeal—Appointment of patwari—Disappointed candidate—If can appeal.*

Where there are rival nominations for the post of a [patw]ari, and an appointment is made, the disappointed [ca]ndidate alone, cannot appeal. It is not the candidate who should push forward his candidature in appeal but the nominators are given the right in appeal to seek further relief. (*Mehta, J.M.*) DUKH HARAN LAL *v.* SHEO GOVIND SINGH. **1938 R.D. 713.**

———S. 33 (2)—*Correction of papers—Application for, when justified—Entry based on order of Record Officer—Proper remedy.*

An application under S. 33 of the U. P. Land Revenue Act can only be made in respect of a change that may have taken place, or in respect of a transaction affecting the rights or interests recorded. Where there has been neither any such change nor transaction for a period of 8 years and the entry was based on a regular order of an Assistant Record Officer and as such cannot be said to be an error within Cl. (2) of S. 33 justifying correction, the proper remedy is to establish the applicant's right in the plots in any competent Court and not to resort to summary proceedings under the correction sections of the U. P. Land Revenue Act. (*Darling, S.M. and Mehta, J.M.*) DALLOO *v.* PHULA. **1938 R.D. 733.**

UNITED PROVINCES LOCAL GOVERNMENT RESOLUTION 4308-1-B (1932), Cl. 9 (f)—*Applicability—Ex-proprie tary tenants whose rent is fixed by Court.*

Cl. 9 (*f*) of the Revenue (B) Department Resolution of the Local Government No. 4308-1-B (1932) applies only to those tenants who obtained land from the zamindar in 1339 or 1340 F. and agreed to pay certain amount of rent, and does not apply to ex-proprietary tenants whose rent is fixed by Court. (*Thomas, C.J. and Zia-ul-Hasan, J.*) BINDRA PRASAD *v.* SURAJ BAKHSH SINGH. **1938 O.W.N. 739 = 1938 O.A. 594 = 1938 R.D. 717 = 1938 A.W.R. (C.C.) 72 = 1938 O.L.R. 367.**

UNITED PROVINCES MOTOR VEHICLES RULES (1928), R. 87—*Report of accident, the next day—If sufficient compliance with rule.*

Where the accident occurred at night and the accused made two detailed reports on the day following, it was held that the accused had not failed to comply with R. 87 of the U. P. Motor Vehicles Rules. (*Bennet, J.*) W. K. WESLEY *v.* EMPEROR. **1938 A.W.R. (H.C.) 505.**

UNITED PROVINCES MUNICIPALITIES ACT (II OF 1916), S. 186 and 307—*Notice under S. 186—When can be issued—Notice before orders on application far sanction of construction—Validity—Disobedience, if an offence.*

It is not necessary for the validity of a notice under S. 186 of the U. P. Municipalities Act, that it should be issued only after orders had been passed on notice of construction given under S. 178. S. 186 is quite general and applies equally to cases where notice under S. 178 has been given and to those where it has not been given. Disobedience to a notice issued under S. 186, even though no orders have been passed on notice of construction is an offence under S. 307 of the Act. (*Zia-ul-Hasan, J.*) KAUSILA *v.* EMPEROR. **1938 O.L.R. 373 = 1938 O.W.N. 833 = 1938 O.A. 625 = A.I.R. 1938 Oudh 199.**

———S. 302—*Reasonable time—Province of Court to determine—Three days—Sufficiency.*

It rests with the Court to determine whether the time specified in any notice is a reasonable time for the performance of the required act. It was held in this case that a period of three days fixed by a notice under S. 186 for the demolition of a wall was not a reasonable time. (*Zia-ul-Hasan, J.*) KAUSILA *v.* EMPEROR. **1938 O.A. 625 = 1938 O.L.R. 373 = 1938 O.W.N. 833 = A.I.R. 1938 Oudh 199.**

———S. 326 (1)—*Applicability—Claim for balance due for work done—Notice of suit, if necessary.*

Where a suit against the Municipality is in respect of a claim for balance due for work done under a contract between the parties, it cannot be regarded as a claim falling within S. 326 (1) of the Municipalities Act and hence notice of suit is unnecessary. (*Harries and Misra, JJ.*) RAM NARAIN *v.* MUNICIPAL BOARD, MUTTRA. **1938 A.W.R. (H.C.) 545 = A.I.R. 1938 All. 540.**

UNITED PROVINCES PREVENTION OF ADULTERATION ACT (VI OF 1912), S. 6 (a)—*Written warranty—Cash voucher from whole sale firm with printed statement as to purity.*

When a person sets up a defence under S. 6 (*a*) of the Prevention of Adulteration Act, it is not enough if he merely produces cash vouchers from the wholesale suppliers, with a printed line stating that the ghee is actual village ghee. This line cannot amount in any sense to a written warranty and the fact that the signature of the vendor appeared in the bottom of the voucher does not imply that the signature is attached to that particular line. The line in question is a mere advertisement. (*Bennet, J.*) EMPEROR *v.* PANCHAM RAM. **1938 A.L.J. 780 = 1938 A.W.R. (H.C.) 490 = A.I.R. 1938 All. 538.**

———S. 6 (c)—*'Sold in the same state'—Proof.*

In order to substantiate a plea under S. 6 (*c*) of the Prevention of Adulteration Act, that an accused sold the article in question 'in the same state in which he purchased', it is not enough, if the munib makes a statement to that effect. Some independent evidence in support of this statement is necessary. (*Bennet, J.*) EMPEROR *v.* PANCHAM RAM. **1938 A.L.J. 780 = 1938 A.W.R. (H.C.) 490 = A.I.R. 1938 All. 538.**

USURIOUS LOANS ACT (X OF 1918), S. 3 (as amended by S. 5 of Punjab Act VII of 1934)—*Prior and subsequent mortgage—Consideration for second mortgage being amount due on first—Transactions, if different.*

In a mortgage of 1930, the property mortgaged comprised one-half of the house, and on the principal sum thus secured, interest was agreed to be paid at 18¾ per cent. per annum and the term of that mor

years. Accounts under that transaction

and were finally closed. Another mortgag

on 7th March, 1934, and the property mortgaged by it was the whole house and not one-half as before. The rate of interest fixed was Rs. 9 on the entire mortgage-

dispute were two independ

Held, further, that th

series of transactions but

of March, 1934, only, which was independent trans action from the first. Hence the Explanation to Proviso (1) of S. 3 did not apply. (*Tek Chand, J.*) GIAN CHAND *v.* MOHAMMAD ALI. **A.I.R. 1938 Lah. 729.**

WILL—*Construction—Condition subsequent—Presump tion*

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pay

she shall continue to reside in Canada', on a question whether it amounts to a condition subsequent and whether it was void for uncert

where it was doubtful whether a

or subsequent the Court prima

BETH ARMINELLA BURROWS SIFTON *v.* CLIFFORD SIFTON. **48 L.W. 353 = 176 I.C. 657 = A.I.R. 1938 P.C. 270 (P.C.).**

——*Construction—Rules of—Irreconcilable inconsistencies.*

WORKMEN'S COMPEN. ACT (1923), S. 3,

clauses of the will cannot in any way be reconciled, resort must be had in the last instance to the principle that the last clause of the will dealing with the particular disposition of the properties should be taken to be the real intention of the testator. In the preamble of a will a testator stated that he was making disposition of

properties according to her requirements and that she would have no power to sell the remaining 8 annas

a pious wish

Edgley, JJ.)

ENDRA BIJOY DUTTA. **68 C.L.J. 22.**

——*Executor—Specific bequest to him on trust—Executor assenting to it—If becomes trustee.*

If there is a specific bequest to the executor himself on trust, and he assents to it, the executor becomes a

interested. He is

with the thing be-

(*Ameer Ali, J.*)

ANKIM CHANDRA SETT. **42 C.W.N. 1115.**

WORKMEN'S COMPENSATION ACT (VIII OF

out of employment—

mpensation under the

but there was no real

ed as affecting the balance of probability one way or the other and where the whole subject was a matter of guesswork, and death from violence at the hands of the elephant, or death from epilepsy or death from some unexplained cause might afford a right answer. It

the applicant had failed to dis-

of proving his case. (*Roberts, C.J.* and

BOMBAY BURMA TRADING CORPORA-

DAW CHI. **A.I.R. 1938 Rang. 349.**

95 and got possession of property, it was held though the sale had been held, it had not been confirmed and that on the passing of an order under S. 6 of the Encumbered Estates Act, all proceedings had to be stayed under S. 7 and the delivery of possession became null and void and had to be set aside. (*Zia ul-Hasan and Yorke, JJ.*) SHEO NATH *v.* MADAN MOHAN LAL. **1938 O.A. 684.**

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UNITED PROVINCES LAND REVENUE ACT (III OF 1901), S. 24—*Appeal—Appointment of patwari —Disappointed candidate—If can appeal.*

Where there are rival nominations for the post of a patwari, and an appointment is made, the disappointed candidate alone, cannot appeal. It is not the candidate [illegible] should push forward his candidature in appeal but [illegible]minators are given the right in appeal to seek [illegible] relief. (*Mehta, J.M.*) DUKH HARAN LAL *v.* [illegible] GOVIND SINGH. **1938 R.D. 713.**

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Cl. 9 (*f*) of the Revenue (B) Department Resolution of the Local Government No. 4308-1-B (1932) applies only to those tenants who obtained land from the zamindar in 1339 or 1340 F. and agreed to pay certain amount of rent, and does not apply to ex-proprietary tenants whose rent is fixed by Court. (*Thomas, C.J. and Zia-ul-Hasan, J.*) BINDRA PRASAD *v.* SURAJ BAKHSH SINGH. **1938 O.W.N. 739=1938 O.A. 594=1938 R.D. 717= 1938 A.W.R. (C.C.) 72=1938 O.L.R. 367.**

UNITED PROVINCES MOTOR VEHICLES RULES (1928), R. 87—*Report of accident, the next day—If sufficient compliance with rule.*

Where the accident occurred at night and the accused made two detailed reports on the day following, it was held that the accused had not failed to comply with R. 87 of the U. P. Motor Vehicles Rules. (*Bennet, J.*) W. K. WESLEY *v.* EMPEROR. **1938 A.W.R. (H.C.) 505.**

UNITED PROVINCES MUNICIPALITIES ACT (II OF 1916), S. 186 and 307—*Notice under S. 186—When can be issued—Notice before orders on application far sanction of construction—Validity—Disobedience, if an offence.*

It is not necessary for the validity of a notice under S. 186 of the U. P. Municipalities Act, that it should be issued only after orders had been passed on notice of construction given under S. 178. S. 186 is quite general and applies equally to cases where notice under S. 178 has been given and to those where it has not been given. Disobedience to a notice issued under S. 186, even though no orders have been passed on notice of construction is an offence under S. 307 of the Act. (*Zia-ul-Hasan, J.*) KAUSILA *v.* EMPEROR. **1938 O.L.R. 373= 1938 O.W.N. 833=1938 O.A. 625= A.I.R. 1938 Oudh 199.**

——S. 302—*Reasonable time—Province of Court to determine—Three days—Sufficiency.*

It rests with the Court to determine whether the time specified in any notice is a reasonable time for the performance of the required act. It was held in this case that a period of three days fixed by a notice under S. 186 for the demolition of a wall was not a reasonable time. (*Zia-ul-Hasan, J.*) KAUSILA *v.* EMPEROR. **1938 O.A. 625=1938 O.L.R. 373= 1938 O.W.N. 833=A.I.R. 1938 Oudh 199.**

——S. 326 (1)—*Applicability—Claim for balance due for work done—Notice of suit, if necessary.*

Where a suit against the Municipality is in respect of a claim for balance due for work done under a contract between the parties, it cannot be regarded as a claim falling within S. 326 (1) of the Municipalities Act and hence notice of suit is unnecessary. (*Harries and Misra, JJ.*) RAM NARAIN *v.* MUNICIPAL BOARD, MUTTRA. **1938 A.W.R. (H.C.) 545=A.I.R. 1938 All. 540.**

UNITED PROVINCES PREVENTION OF ADULTERATION ACT (VI OF 1912), S. 6 (a)—*Written warranty—Cash voucher from whole sale firm with printed statement as to purity.*

When a person sets up a defence under S. 6 (*a*) of the Prevention of Adulteration Act, it is not enough if he merely produces cash vouchers from the wholesale suppliers, with a printed line stating that the ghee is actual village ghee. This line cannot amount in any sense to a written warranty and the fact that the signature of the vendor appeared in the bottom of the voucher does not imply that the signature is attached to that particular line. The line in question is a mere advertisement. (*Bennet, J.*) EMPEROR *v.* PANCHAM RAM. **1938 A.L.J. 780=1938 A.W.R. (H.C.) 490= A.I.R. 1938 All. 538.**

——S. 6 (c)—*'Sold in the same state'—Proof.*

In order to substantiate a plea under S. 6 (*c*) of the Prevention of Adulteration Act, that an accused sold the article in question 'in the same state in which he purchased', it is not enough, if the munib makes a statement to that effect. Some independent evidence in support of this statement is necessary. (*Bennet, J.*) EMPEROR *v.* PANCHAM RAM. **1938 A.L.J. 780= 1938 A.W.R. (H.C.) 490=A.I.R. 1938 All. 538.**

USURIOUS LOANS ACT (X OF 1918), S. 3 (as amended by S. 5 of Punjab Act VII of 1934)—*Prior and subsequent mortgage—Consideration for second mortgage being amount due on first—Transactions, if different.*

In a mortgage of 1930, the property mortgaged comprised one half of the house, and ... thus secured, interest was agreed to ... cent. per annum and the term of the ... years. Accounts under that transaction were gone into and were finally closed. Another mortgage was executed on 7th March, 1934, and the property mortgaged by it was the whole house and not one-half as before. The rate of interest fixed was Rs. 9 on the entire mortgage-money. The term of this mortgage was also fixed different. The mortgagee brought a suit on the second mortgage.

Held, that in these circumstances the two transactions were independent of each other and the mere fact that the consideration for the second transaction was the amount due on the first, would not make them one transaction. Hence it was permissible to the Court to re-open account of mortgage transaction of 1930 under S. 3 of the Act, as that mortgage and the mortgage in dispute were two independ...

Held, further, that th... series of transactions but ... of March, 1934, only, which was independent transaction from the first. Hence the Explanation to Proviso (1) of S. 3 did not apply. (*Tek Chand, J.*) GIAN CHAND *v.* MOHAMMAD ALI. **A.I.R. 1938 Lah. 729.**

WILL—*Construction—Condition subsequent—Presumption in favour of—Events mentioned too indefinite—Condition if void for uncertainty.*

Where a testator provided among other things that the payments to his daughter 'shall be made only so long as she shall continue to reside in Canada', on a question whether it amounts to a condition subsequent and whether it was void for uncertainty, it was held that where it was doubtful whether a condition be precedent or subsequent, the Court *prima facie* treated it as being subsequent as there was a presumption in favour of early vesting. It was further held that the condition in question was a condition ...

...ulate the conditions, the condition subsequent failed as being void for uncertainty. (*Lord Romer.*) ELIZABETH ARMINELLA BURROWS SIFTON *v.* CLIFFORD SIFTON. **48 L.W. 353 = 176 I.C. 657 = A.I.R. 1938 P.C. 270 (P.C.).**

——*Construction—Rules of —Irreconcilable inconsistencies.*

It is a well-known principle of construction that no part of a will should be discarded and the will as a whole should be construed. An attempt should be made to reconcile apparent inconsistencies; and if the different clauses of the will cannot in any way be reconciled, resort must be had in the last instance to the principle that the last clause of the will dealing with the particular disposition of the properties should be taken to be the real intention of the testator. ...

... latter portion of this paragraph he stated that his wife would be competent to sell an 8 annas share of all his properties according to her requirements and that she would have no power to sell the remaining 8 annas share, but that if there was any urgent necessity, she would be competent to sell any Mahal as a whole. There was no express provision in the will for the devolution of the said 8 annas share on the death of the wife. In paragraph (2), the testator said that his wife would be at liberty to devise to anybody she liked the property left by him.

Held, that the wife was given absolute interest with power of disposition over the whole of the properties left by the testator and that the last part of paragraph ... r of alienation ... a pious wish ... *Edgley, JJ.*) ...ENDRA BIJOY DUTTA. **68 C.L.J. 22.**

——*Executor—Specific bequest to him on trust—Executor assenting to it—If becomes trustee.*

If there is a specific bequest to the executor himself on trust, and he assents to it, the executor becomes a trustee for those who are beneficially interested. He is thereupon precluded from dealing with the thing bequeathed or making title as executor. (*Ameer Ali, J.*) CHARU CHANDRA GHOSE *v.* BANKIM CHANDRA SETT. **42 C.W.N. 1115.**

WORKMEN'S COMPENSATION ACT (VIII OF 1923), S. 3 (1)—*Accident arising out of employment—Onus.*

In the case of a claim for compensation under the Workmen's Compensation Act, if the facts proved give rise to conflicting inferences of equal degrees of probability ...

In a case where compensation was claimed on the ground that the deceased met with his death at the hands of an elephant in the course of employment but there was no real evidence which might be considered as affecting the balance of probability one way or the other and where the whole subject was a matter of guesswork, and death from violence at the hands of the elephant, or death from epilepsy or death from some unexplained cause might afford a right answer. It was held that the applicant had failed to discharge the onus of proving his case. (*Roberts, C.J. and Spargo, J.*) BOMBAY BURMA TRADING CORPORATION, LTD. *v.* DAW CHI. **A.I.R. 1938 Rang. 349.**

II—TRAVANCORE CASES.

APPEAL—*Maintainability—Dismissal of suit for default—Judgment on the merits—Applicability.*

Where a suit was disposed of for default and the judgment was passed on the merits.

Held, such a disposal is not one affecting the merits and no appeal lies. The plaintiffs ought to have applied for restoration of the suit. (*Verghese, C. J. and Parameswaran Pillai, J.*) **12 T.L.T. 1249.**

——*Order appointing* interim *receiver—Appeal—Revision.*

An order appointing an *interim* receiver being only an *interim* order and not a final one, no appeal lies from such order. A revision petition is competent. (*Sankarasubba Iyer, J.*) **12 T.L.T. 1081.**

CHITTY—*Foreman—Assignment of chitty security bond without permission of executants—Validity.*

So long as the foreman of a chitty has not become an insolvent, the assignment of the chitty security bond without the permission of the executants thereof is not invalid. (*Verghese, C. J. and Parameswaran Pillai, J.*) KRISHNA KAMMATHI *v.* MATHU KATHANAR. **28 T.L.J. 637.**

CHRISTIAN SUCCESSION REGULATION, S. 24—*Death of woman intestate—Husband, mother and cousin—Rights of—Re-marriage of husband—Effect—Suit by cousin for partition—Properties available for distribution—Extent of.*

One Eli died intestate leaving no issue. She left her husband, mother and a cousin, who was her father's brother's son. On the death of Eli, her properties were taken equally by her husband and mother, they being entitled to a life estate in them. Subsequently the husband re-married, and thereby he lost all interest in the properties left by Eli. Eli's cousin brought the present suit for partition.

Held, that S. 24 of the Christian Succession Regulation clearly indicated that the property over which the limited interest had ceased was alone to be distributed among the heirs; in the present case, the properties over which the life-estate of the husband terminated. Over one half of these properties, the mother got a life-estate; and the plaintiff got an absolute estate over the other half. (*Joseph Thaliath and Gopal Menon, JJ.*) OUSEPH *v.* MARIAM. **28 T.L.J. 533.**

CIV. PRO. CODE REGULATION, S. 40—*Parties—Defendant against whom suit dismissed—If party.*

The explanation to S. 40, C. P. Code, makes even a defendant against whom a suit has been dismissed, party to the suit. (*Joseph Thaliath and Gopal Menon, JJ.*) RAMAKRISHNA PILLAI *v.* PANKAJAKSHI PILLAI. **12 T.L.T. 944.**

——**S. 40**—*Scope—Question relating to re-delivery—If one relating to execution—Limitation—Application for re-delivery by party or representative—Limitation.*

When a question relating to re-delivery of property delivered in execution arises between the parties to the suit or their representatives, such question must be held to relate to the execution, discharge or satisfaction of the decree under S. 40, C. P. Code. An application for re-delivery made by a party to the suit or his representative is governed by Art. 165 of the Limitation Regulation and not by Art. 150. (*Gopal Menon, Parameswaran Pillai and Sankarasubba Iyer, JJ.*) MADHAVA PYE *v.* VARKI. **12 T.L.T. 1114 = 28 T.L.J. 591 (F.B.).**

——**S. 41 (2)**—*Applicability—"Fraud"—Delaying execution by frivolous and futile contentions—Effect on limitation.*

Under Sub-S. (2) of S. 41 of the C. P. Code, fraud or force which prevents execution gives a fresh starting point for limitation for the execution of the decree. In order to give the benefit of the sub-section, it must be proved that there was force or fraud on the part of the judgment-debtor and that the decree-holder was thereby prevented from executing the decree. The delaying of execution by frivolous and futile contentions is *fraud* within the meaning of the sub-section. (*Parameswaran Pillai and Sankarasubba Iyer, JJ.*) GOPALAN *v.* KRISHNAN. **12 T.L.T. 1130 = 28 T.L.J. 545.**

——**S. 59**—*Applicability—"Assets"—Amount deposited under O. 21, R. 86—If assets available for rateable distribution—Conflict between section of Code and rules in Schedule I—Section to prevail.*

Held (*Parameswaran Pillai and Gopal Menon, JJ., Sankarasubba Iyer, J., dissenting*):—Money deposited in Court under O. 21, R. 86 of the C. P. Code to set aside a Court sale does not belong exclusively to the decree-holder at whose instance the Court sale was held, but is available for rateable distribution among other creditors of the judgment-debtor as 'assets held by the Court' under S. 59 of the Code. While under the Old Code, S. 292 (corresponding to S. 59) applied only to funds realised in execution by a process of the Court or by one or other of the modes expressly prescribed in the Code, the present S. 59 applies to all assets held by the Court in its execution side whether realised by process of the Court or received by the Court in any other manner for the purpose of satisfying a decree debt.

Held, further (*Parameswaran Pillai and Gopal Menon, JJ.*):—Where there is a conflict between the provisions in the Rules of Schedule I of the C. P. Code and those in the sections of the Code, the latter must prevail.

Per *Sankarasubba Iyer, J.*—The deposit made under O. 21, R. 86 cannot be considered as "assets" available for rateable distribution. (*Gopal Menon, Parameswaran Pillai and Sankarasubba Iyer, JJ.*) SAMARAYAN POTTI *v.* ITTIAVIRA. **12 T.L.T. 1030 = 28 T.L.J. 405 (F.B.).**

——**S. 59**—*Scope—If affected by O. 21, R. 72 (2)—Purchase by decree-holder at sale—Application by another creditor for rateable distribution—Decree-holder-auction-purchaser's right.*

Under S. 59, C. P. Code and O. 21, R. 72, Cl. (2), a decree-holder-auction-purchaser cannot prevent any other creditor of the judgment-debtor from claiming rateable distribution. But the decree-holder-purchaser can claim the right to be allowed to elect either to have the property resold, or pay into Court the rateable amount to which the rival decree-holder may be entitl-

C. P. CODE REGN., S. 115.

ed. (*Sankarasubba Iyer, J.*) SUBRAMONIA IYER *v.* PANKAJAKSHAN PILLAI. 12 T.L.T. 1020= 28 T.L.J. 393.

——**Ss 115 and 117**—*Scope—Decree against wrong person following mistake in plaint—Amendment—Procedure.*

The plaintiff made the mistake of naming X as defendant against whom a decree was passed, instead of Y, against whom the decree really should have been passed.

Held, the proper course of the Court was to send a notice to Y and give him an opportunity of showing that the error was not one that could be corrected under Ss. 115 to 117, C. P. Code, and if he could show that the error was not of that nature, then the plaintiff['s appli]cation would have to be dismissed; but if he [failed to] do this, there was no reason why the Court s[hould not] make the necessary correction under the pro[visions of] Ss. 115 to 117. In that case, however, [the order] would be, not that the decree should be set a[side and] the suit re-heard but merely that a nominal [correction] should be made in the record of the pr[oceedings]. (*Sankarasubba Iyer, J.*) KATHIRUKUNJU *v.* INNAS CRUZ. 12 T.L.T. 969=28 T.L.J 466.

——**O. 1, R. 10**—*Power to add co-plaintiff—Limitations on.*

A plaintiff cannot be allowed to convert a suit which is untenable into one tenable in law by impleading the Official Receiver as a co-plaintiff. The power given under O. 1, R. 10, C. P. Code, to add a plaintiff can be exercised only in cases where the right of the plaintiff to be added is the same as the right in suit. In other words, a substitute can be added only to enforce the right pleaded. A Court has no power to import into the case as co-plaintiff a person who has a different cause of action inconsistent with that of the original plaintiff. (*Sankarasubba Iyer, J.*) SUBBIAH PILLAI *v.* KRISHNA PILLAI. 28 T.L.J. 647.

——**O. 6, R. 17**—*Amendment of plaint—Court ordering amendment* suo motu *without motion from either side—Legality of.*

In a suit based upon Vetchupakuthy lease, it was contended that the defendant was holding the property independently and under certain deeds one of which was anterior in date to the Vetchupakuthy lease relied on by the plaintiff. Without any application by the plaintiff, the Court passed an order calling upon the plaintiff to amend the plaint so as to convert the suit into one of title and pay court-fee on the market value of the property.

Held, that the expression "allow" in R. 17 of O. 6, C. P. Code, indicated that it was at the instance of a party that an amendment had to be allowed. There was no justification for the Court taking upon itself the task of ordering the amendment of pleadings without a motion on that behalf by either party to the suit. (*Sankarasubba Iyer, J.*) AVIRA *v.* KRISHNAN. 12 T.L.T. 1071=28 T.L.J. 399.

——**O. 20, R. 11 (1)**—*Order under—When to be made—Material time.*

Held, that in view of the clear language employed in sub rule (1), R. 11 of O. 20, the discretion to be exercised under the rule must be so exercised at the time of the passing of the decree. The point of time when the Court is competent to pass an order un[der the afore said] sub-rule is when the decree is passe[d]. ([*Sankarasubba*] *Iyer, J.*) EAPEN *v.* KOSHI. 1[illegible]

——**O. 21, R. 14**—*Assignment of decree—When takes effect—Notice—Necessity.*

C. P. CODE REGN., O. 21, R. 99.

Where a decree is transferred by the execution of a transfer deed it takes effect from the date of the transfer. Recognition of Court is not necessary for the validity of the transfer deed. The notice contemplated under O. 21, R. 14 is in regard to the application for execution and not of the assignment. The recognition of the assignment of the Court is necessary only to enable the assignee to execute the decree. (*Verghese, C. J. and Joseph Thaliath, J.*) VARKI *v.* VARKI. 28 T.L.J. 662.

——**O. 21, Rr. 58 and 59**—*Inquiry—Scope of—Question of benami—If can be gone into—"In trust"—Meaning of.*

The words "in trust" occurring on O. 21, R. 58, [illegible]

ordinarily be entertained to revise an order passed under O. 21, R. 58 or 59, inasmuch as the party against whom the order is made has a special remedy by way of suit. But this does not bar the High Court's power of interference in exceptional cases. (*Verghese, C. J. and Joseph Thaliath, J.*) ABRAHAM *v.* THOMMA. 12 T.L.T. 1238=28 T.L.J. 639.

——**O. 21, R. 72 (2)**—Scope—If controls S. 59—Purchase by decree-holder—Claim to rateable distribution by other creditors—Procedure—Option of decree-holder. *See* C. P. CODE, S. 59. 12 T.L.T. 1020= 28 T.L.J. 393.

——**O 21, R. 86**—*Scope—Setting aside of sale by persons not party to decree—Refund of amount deposited—Right to.*

A person who, not being himself a party to the decree, protests against a Court sale of property in execution of a decree against a judgment-debtor but gets the same set aside under O. 21, R. 86 cannot be allowed to claim refund of the amount so deposited. (*Verghese, C.J. and Sankarasubba Iyer, J.*) PEERUMUHAMMAD *v.* PAKIR VAVA. 12 T.L.T. 1133=28 T.L.J. 613.

——**O. 21, R. 99**—*Applicability—Money decrees.*

The principle of R. 99 of O. 21, C. P. Code, has been held to apply also to the case of decrees for money in which property has been attached in execution and the judgment-debtor has, during such attachment, transferred his properties. Rr. 92 and 99 of O. 21, C. P. Code, have to be read together and have to be taken as covering between them the cases of the representatives in case of transfers after attachment under a money decree and transfers of property whose possession is decreed to the plaintiff. (*Sankarasubba Iyer, J.*) 12 T.L.T. 991.

——**O. 21, R. 99**—*Applicability to case of money decrees—Transferee of property after attachment—Right to obstruct delivery to execution purchaser.*

Though the rule in O. 21, R. 99 deals specifically only with cases of a decree for possession of immovable property and does not deal with decrees for money in which property has been attached in execution and the judgment-debtor, during such attachment, has transferred his properties, the principle of R. 99 of O. 21, C. P. C[ode] [illegible]

ment under money decrees and transfers of property whose possession has been decreed to plaintiff. The

transferee cannot therefore be allowed to obstruct delivery. (*Sankarasubba Iyer, J.*) ROSSA *v.* CHAKKO.
28 T.L.J. 677.

——O. 23, R. 3—*Court's duty to record compromise.*

Where it is proved to the satisfaction of a Court that there is nothing unlawful in the compromise or agreement effected between the parties the Court is bound to record the compromise in accordance with the mandatory provisions under O. 23, R. 3. (*Verghese, C.J. and Sankarasubba Iyer, J.*) MADHAVAN PILLAI *v.* KRISHNA PILLAI. 12 T.L.T. 1023=28 T.L.J. 380.

——O. 23, R. 3—*Scope—Compromise—Inclusion of matters not included in suit—Powers of Court—Decree—Executability as to extraneous matter.*

When a petition of compromise is accepted by the Court and a decree is passed in terms of it, the compromise passes from the domain of a mere contract into that of a decree. Under the terms of O. 23, R. 3, C. P. Code, the Court is competent to pass a decree only so far as it relates to the suit. That does not mean that a compromise which includes matters extraneous to the suit can be rejected by the Court. In such cases the proper course for the Court is to set out the compromise as a whole in its decree but to restrict the operative portion of it to those terms of the compromise which relate to the suit. Where a compromise comprises within its scope matters unconnected with the suit and a decree is passed in terms of it, the decree can be held to be executable only in respect of those matters which relate to the suit. The remaining terms of the compromise will not constitute part of the operative portion of the decree but will be capable of being enforced only by means of a separate suit. (*Verghese, C.J. and Sankarasubba Iyer, J.*) PARAMESWARA AIYAR *v.* RAMAKRISHNA AIYAR.
12 T.L.T. 1241=28 T.L.J. 732.

——O. 26, R. 10—*Commissioner's report—Admissibility without proof.*

A Commissioner's report is not inadmissible in evidence for want of proof in view of O. 26, R. 10, C. P. Code. (*Verghese, C.J.*) NARAYANA PANIKKER *v.* DAMODARAN. 12 T.L.T. 1013=28 T.L.J. 387.

COMPANY—*Winding up—Rules of evidence—Evidence Act—Applicability.*

The strict rules of the Evidence Act are not applicable to winding up proceedings where the petitioner is given the advantage of being able to give legal proof of essential matters of hearsay. (*Parameswaran Pillai and Sankarasubba Iyer, JJ.*) TRAVANCORE NATIONAL AND QUILON BANK, LTD. *v.* SUBRAMONIA IYER. 12 T.L.T. 1278=28 T.L.J. 737.

COMPANIES REGULATION, S. 166 (v) and (vi)—*Bank—Winding-up petition*—Prima facie *case—"Unable to pay its debts"—Meaning of—Provisional liquidator—Appointment of—Discretion of Court.*

The law is well-settled that a petitioning creditor who cannot get paid a sum presently payable has, as against the company, a *prima facie* right *ex debito justitiae* to a winding-up order. "It is settled law that what the Court has to see in a case like this is whether the company is 'commercially insolvent', *i.e.*, whether it is unable to meet its current demands, although the assets when realised, including uncalled capital, exceed its liabilities." The appointment of a provisional liquidator is essentially a matter within the discretion of the Judge before whom the winding-up petition was presented. Of course, such discretion should be exercised in the way in which judicial power and discretion ought to be exercised. It is difficult to lay down a set of iron rails on which discretion should always run. There is great danger in crystallising into a rigid definition that judicial power and discretion which the Legislature and the rules

of the Court have for the best of all reasons left undetermined and unfettered. (*Parameswaran Pillai and Sankarasubba Iyer, JJ.*) TRAVANCORE NATIONAL AND QUILON BANK, LTD., QUILON *v.* SUBRAMONIA IYER. 12 T.L.T. 1174=28 T.L.J. 579.

——S. 166 (v)—*Company—Application by creditor to wind up*—Prima facie *cause.*

It is clear law that an unpaid creditor to whom money is presently payable is *prima facie* entitled to a winding-up order. What the Court has to see in a winding-up proceeding is whether the company is 'commercially insolvent', *i.e.*, whether it is unable to meet its current demands, although the assets when realised including uncalled capital exceed its liabilities. (*Parameswaran Pillai and Sankarasubba Iyer, JJ.*) TRAVANCORE NATIONAL AND QUILON BANK, LTD., QUILON *v.* SUBRAMONIA IYER. 12 T.L.T. 1278=28 T.L.J. 737.

——S. 176—*Discretion of Court—Scheme of reconstruction of Bank—If to be considered before winding-up order—Considerations.*

It is possible that there may arise cases, where, from the materials available to the Court it is demonstrably to the advantage of all parties concerned that a scheme of reconstruction is considered and decided upon even before a compulsory winding-up order is passed. But the discretion to be exercised in this respect must necessarily depend on the circumstances of each case. Before a meeting of the creditors and shareholders can usefully be convened to consider any scheme of reconstruction, it is essential to ascertain the true state of affairs of the company or Bank so that the creditors as well as the Court may be in a position properly to appreciate the merits of the proposal for reconstruction and to decide what would be to the best advantage of the creditors of the Bank. Schemes of reconstruction presented for consideration are likely to contain proposals which may favour one class of creditors against another or which may be designed to place the shareholders in a position of advantage over the depositors. Unless the creditors and the Court are fully appraised of the true financial situation of the Bank, of the real value of its assets and the extent of its bad debts, it will be impossible to exercise any intelligent judgment on the merits of the scheme and while Courts of law should pay the utmost consideration to *bona fide* schemes of reconstruction which may be approved by a large majority of creditors, no Court can ignore its paramount duty properly to adjudge what is and what is not to the benefit of the creditors. The utmost caution should be exercised by Courts in this respect especially, where, as in Travancore, Banking institutions doing extensive business over wide jurisdiction are of comparatively recent growth. (*Parameswaran Pillai and Sankarasubba Iyer, JJ.*) TRAVANCORE NATIONAL AND QUILON BANK, LTD., QUILON *v.* SUBRAMONIA IYER.
12 T.L.T. 1278=28 T.L.J. 737.

CRIMINAL PROCEDURE CODE REGULATION, S. 128—*"Crops and produce"—Meaning of—Share of produce in rubber and coffee.*

By the term "crops and produce" is meant only such seasonable produce as is ordinarily understood by the word "*Adayam*" (income) as per instance cocoanut, pepper and paddy. The expression cannot include share of produce in rubber and coffee. (*Sankarasubba Iyer, J.*) THOMMAN *v.* KUMARA PILLAI.
28 T.L.J. 727.

——S. 128—*Duty of Magistrate to arrive at own finding of likelihood of breach of peace—Right to act upon expression of opinion by the police.*

A Magistrate should exercise his own judgment in arriving at a conclusion as to the likelihood of a breach

CR. P. CODE REGN., S. 130.

of the peace from the materials before him or the circumstances within his knowledge, and he ought not to act upon a mere expression of opinion by the police not accompanied by a statement of facts sufficient to satisfy him and to enable him to form his own opinion. A Magistrate cannot act on a statement contained in a police report regarding the possession of one of the parties, without instituting proceedings, giving notice to the parties hearing them and receiving the evidence produced by them. (*Sankarasubba Iyer, J.*) AIYAKANNU NADAR *v.* NAGARAMMA.
12 T.L.T. 1159=28 T.L.J. 461.

——S. 130—*Jurisdiction—Order under—Conditions for making—Nature of order to be passed.*

It is undoubted law that a condition precedent to making of an order under S. 130 of the Crimi Procedure Code is that a breach of the peace is 'like... Although in some cases it has been said that the breach of the peace should be imminent or immediate it has been explained in various other cases that what was meant was that the breach of the ... time when the proceedings were ... words, there must be a present dis... of breach of the peace when th... passed. There need not be ... immediate breach of the peace. ... mere possibility of a breach of the peace taking place will not be sufficient. Where the dispute relates to the right to use a particular piece of land for purpose of cremation, the proper section that applies is S. 130, Cr. P. Code, but the Magistrate is certainly incompetent to pass a general prohibition to the effect that till the decision of the case the counter-petitioner shall not in any way interfere with the exercise of the alleged right by the applicant. An order to this effect can be passed only after investigation of the rights of the contending parties and an adjudication on the merits. (*Parameswaran Pillai, J.*) BALAKRISHNA IYEN *v.* SUBRAMANIA IYER. 12 T.L.T. 1164=28 T.L.J. 574.

——S. 183—*Preliminary enquiry—Right of defence to examine witnesses—Waiver of—Effect.*

During the course of the preliminary enquiry the counsel for the defence agreed to have the arguments in the case heard on 3—8—1113 and ... ingly posted for arguments to ... 3—8—1113, instead of commencing ... defence stated that they had produc... who should be examined and that ... ses should be summoned for ...

been waived could not be demanded as of right. (*Verghese, C.J.*) NAYAYANA PILLAI *v.* SIRKAR.
12 T.L.T. 955=28 T.L.J. 513.

CRIMINAL TRIAL—*Procedure—Change of Magistrate—Charges framed by predecessor — Powers of succeeding Magistrate—Fresh enquiry or consideration of evidence of on record.*

...

ence and circumstances in the case. It is even open to the Magistrate to resummon the witnesses and recommence the enquiry or if this is not considered necessary to rehear the arguments and thereafter frame a charge and pass an order of commitment or discharge, the accused if he sees no sufficient reason for commitment. (*Parameswaran Pillai, J.*) SUBRAMONIA PILLAI *v.*

EXECUTION.

MYTHEEN KANNU. 12 T.L.T. 1229=
28 T.L.J. 635.

——*Revision—Finding of fact—High Court's power to interfere.*

While it will be very unusual for the High Court to interfere with a finding of fact, it is always open to the accused to invite the High Court to consider questions of fact, where the Court below has approached the case from a wrong standpoint, when the evidence produced has not received due consideration or when the finding of the Court below is manifestly erroneous and a miscarriage of justice would result from it if left uncorrected. (*Sankarasubba Iyer, J.*) SANKARA KURUP *v.* SIRKAR. 12 T.L.T. 1169=28 T.L.J. 617.

...-*Effect of.*

... document by itself ... from denying that he knew all its contents or that he consented to the transaction. But this general rule does not apply where the circumstances show that the attesting witness was in fact aware of the contents of the deed especially when ...

If ceases.

Where an irregular order is passed by the Court, when there was no default on the part of the decree-holder, the attachment cannot be deemed to have terminated. (*Verghese, C. J. and Parameswaran Pillai, J.*) GEORGE *v.* KRISHNA PILLAI.
28 T.L.J. 403.

——*Attachment of fund in Court—Communication of order—Necessity when attaching Court and the custody Court are the same.*

Where the custody Court and the attaching Court are the same, it would be a meaningless formality to require a Court to send a communication to itself, justifying the attachment. (*Sankarasubba Iyer, J.*) NARAYANAN *v.* VENKITESWARA IYEN.
28 T.L.J. 628.

——*Attachment—Right of attaching creditor to be* ...

... hment ... to be ... nforc- ... perty. ... *J.*)

... 383.

...*—Power to go behind decree and* ... *ee against unsound person not represented—If nullity.*

It is well-understood law that the execution Court can go behind the decree and refuse to execute the decree provided the decree sought to be executed is a nullity on the ground that the trial Court had no jurisdiction to pass the decree against a person of un-

AMMUKUTTY AMMA *v.* SUBRAMONIAN.
12 T.L.T. 1139=28 T.L.J. 548.

——*Jurisdiction — Transfer of decree to another Court—When takes effect—Date of transfer or date of receipt by transferee Court.*

The transfer of a decree to another Court for execution dates from the time the order of transfer is made,

EXECUTION.

and when once the order of transfer is made, the Court to which the decree is transferred has jurisdiction to entertain an application for execution even though a copy of the decree has not been received by it. It is not essential that to validate an application for execution it should, when presented, be accompanied by a copy of the decree. (*Verghese, C.J., Joseph Thaliath and Parameswaran Pillai, JJ.*) BHARGAVAN *v.* JANAKI AMMA. 12 T.L.T. 1232=28 T.L.J. 656.

———*Step-in-aid—Decree-holder—Certification of payments by—Effect of.*

Petitions by the decree-holder certifying payments of certain amounts towards the decree are steps-in-aid of execution provided the payments were actually made. (*Joseph Thaliath and Gopal Menon, JJ.*) KRISHNAN *v.* RAMANATHAYAN. 12 T.L.T. 1137=28 T.L.J. 645.

FRAUD—*Inference of—Suit to set aside decree on the ground of fraud—Service of summons not proper—Fraud—If inferable.*

Mere non-service of summons is insufficient to raise an inference of fraud, so as to form a ground for setting aside a decree in a suit. (*Parameswaran Pillai and Sankarasubba Iyer, JJ.*) SEKHARAN *v.* KRISHNAN. 12 T.L.T. 1211=28 T.L.J. 684.

———Plea of—Particulars. *See* PRACTICE—PLEADINGS—FRAUD. 28 T.L.J. 611.

FRAUDULENT TRANSFER—*What amounts to transfer by debtor to creditor—When protected.*

Held, no man can legally be stated to be an insolvent or bankrupt unless he has been adjudicated an insolvent under the insolvency law. A transfer by a debtor to a creditor is fraudulent only if the transferee gets something more than what he is legally entitled to or some benefit is reserved to the transferor. If this is not done, transfers by debtors to creditors in discharge of their debts are deemed to be done in good faith and are not fraudulent. (*Verghese, C.J. and Sankarasubba Iyer, J.*) KUNJURAMAN *v.* PADMANABHAN. 12 T.L.T. 1223.

GUARDIAN AND WARDS REGULATION, S 36—*Procedure — Remedy of ward attaining majority against guardian—Duty of Court.*

The provisions in the Guardian and Wards Regulation and the rules relating to the production of accounts before the minority had ceased will not apply to action taken under S. 36 after the ward had attained majority. The proper course would therefore be to direct the guardian to deliver all the accounts in his possession, to refuse discharge if the objections filed by the ward are *prima facie* valid and to refer the ward who has attained majority to a regular suit for rendition of accounts. (*Verghese, C.J. and Parameswaran Pillai, J.*) KULAMEETHEEN PILLAI *v.* BEEVI AMMAL. 12 T.L.T. 1199=28 T.L.J. 747.

———S. 43—*Order under S.* 36—*Appealability.*

The provisions of S. 43 of the Guardian and Wards Regulation do not contemplate any appeal from orders passed under S. 36. (*Verghese, C.J. and Parameswaran Pillai, J.*) KULAMEETHEEN PILLAI *v.* BEEVI AMMAL. 12 T.L.T. 1199=28 T.L.J. 747.

———S. 44—*Scope—Orders under—Finality of.*

S. 44 of the Guardian and Wards Regulation cannot be said to lay down a rule of procedure contrary to or inconsistent with the powers of restoration vested in a Civil Court. The view that an order under S. 44 is final and shall not be liable to be contested either by suit or otherwise, is too broad a statement of the case. (*Verghese, C. J. and Parameswaran Pillai, J.*) RAMAN PILLAI *v.* PARAMESWARAN PILLAI. 12 T.L.T. 1069=28 T.L.J. 401.

INSOLVENCY REGULATION (1108), S. 27.

HINDU LAW—*Joint family—Trading family—Power of manager to take loans and make alienations—New business and continuation of old business—Distinction.*

It is now well settled that the manager of an ancestral joint family trading business has full authority to take loans and make alienations and to raise money for the purpose of that business. Such a transaction will be binding on the entire joint family including the minor members. The creditor is not bound to inquire into the finances of the business so long as the business forms the purpose of the debt. All that is necessary for him to see is that the money is really required for the proper purpose of the business and there is no element of speculation or gambling in the transaction. The principle is equally well-recognised that as a general rule the manager of a joint family has no power to impose on a minor member of the family the risk and liability of a new business started by him. Where the ancestral business of a Mitakshara joint family has been carried on in partnership with another person, and upon his retiring there has been a dissolution and winding up of the partnership, the business carried on immediately thereafter on behalf of the joint family in the same commodities and upon the same premises, though under a new firm name and with new books, is not a new business but a continuation of the ancestral business. (*Gopal Menon, Parameswaran Pillai and Sankarasubba Iyer, JJ.*) DWARKADAS *v.* YADAVJI KATTAVU. 12 T.L.T. 946=28 T.L.J. 444 (F.B.).

INCOME-TAX REGULATION, Ss. 17, 22 (3) (b) and 25—*Notice—Necessity for assessment under S.* 25—*Order of remand cancelling assessment and directing fresh assessment—If cancels all proceedings taken by Collector—Fresh assessment—If subject to limitation of one year.*

Held:—(*i*) A notice required by S. 17 of the Income-tax Regulation is not necessary for an assessment or re-assessment under S. 25 of the Regulation and an assessment under S. 25 without such notice being given is not *ab initio* void for want of jurisdiction. (*ii*) An order of remand cancelling an assessment order and directing a fresh assessment does not cancel all the proceedings taken in the case by the Collector. (*iii*) If an assessment under S. 25 of the Income-tax Regulation is cancelled in appeal, and the case is remanded to the Collector to make a fresh assessment as provided in S. 22 (3) (*b*) the fresh assessment will not be an assessment under S. 25. The fresh assessment will be an assessment under the authority of the appellate order remanding the case and the Income-tax Officer making the fresh assessment will not be subject to the limitation of one year mentioned in S. 25. In fact there is no period of limitation in regard to proceedings taken under S. 22 (3) (*b*). (*iv*) When an assessment made by the Collector under S. 25 is set aside by the Commissioner in appeal on the ground of failure to serve a notice on the assessee, and a fresh assessment is ordered under S. 22 (3) (*b*), it is not necessary that a notice as required under S. 17 should be served on the appellant before ordering a fresh assessment. (*Gopal Menon, Parameswaran Pillai and Sankarasubba Iyer, JJ.*) COMMISSIONER OF INCOME-TAX, TRAVANCORE *v.* MUTHUSWAMI KARAYALAR. 12 T.L.T. 1089=28 T.L.J. 476 (F.B.).

INSOLVENCY REGULATION (1108), S. 27 (1)—*Scope—If retrospective—Person adjudicated insolvent under Insolvency Regulation of* 1090—*Duty to apply for discharge within specified period.*

A person who was adjudicated an insolvent under the Insolvency Regulation of 1090 cannot be compelled

INSOLVENCY REGULATION (1108), S. 57.

under the Insolvency Regulation of 1108 to apply for his discharge within a period specified by the Court. There ... ply for his ... Regulation ... mposed by ... Regulation ... tor cannot have any retrospective operation in the ... express declaration to that effect. (*K. P.* ... *R. Gopala Menon and Sankarasubba* ... KRISHNA SASTRIGAL *v.* OFFICIAL ... TRIVANDRUM DISTRICT COURT. 12 ... 28 T.L.J. 453 (F.B.).

——S. 57 (3)—*Powers of Insolvency Court—Questions of title—Jurisdiction to decide.*

Held, under S. 57, Cl. (3) of the Insolvency Regulation, the Insolvency Court is given ample powers to decide such questions as would incidentally arise in considering whether the receiver has got a right to take possession of a particular property as belonging to the insolvent. A Court exercising powers under the Insolvency Regulation has jurisdiction to enquire whether the property in the possession of a third party and alleged by the receiver to be the property of the insolvent, is really so or not; and if it finds it is the property of the insolvent, it can order delivery to the receive (*Joseph Thaliath and Gopal Menon, JJ.*) KOCHAPPI RAJANGOM IYER. 12 T.L.T. 125

INTEREST—*Rate of—Absence of contract—Rule.*

Where there has been no contract with regard to payment of interest, the Courts generally do not allow more than 6 per cent. interest. (*Verghese, C. J. and Parameswaran Pillai, J.*) MATHEN *v.* VELAYUDHAN PILLAI. 28 T.L.J. 642.

... prescribes that the date of first hearing shall be ... not less than ... and the date ... nant to deposit the arrears in order to ...

... PILLAI *v.* ANTHONI. 12 T.L.T. 1142 = 28 T.L.J. 530.

JURISDICTION — *Submission to — Non-resident foreigner appearing for contesting jurisdiction—Effect.*

The appearance of a foreigner defendant even for the purpose of contesting the jurisdiction of the Travancore Court constitutes in law a voluntary submission to the jurisdiction of such Court. (*Parameswaran Pillai, J.*) RAMASWAMI NADAR ...

——*Suit on* ... *dence of holder.*

Where the promissory note does not specify the place where the payment should be made; the rule is that payment should be made at the place where the holder of the note permanently resides or carries on business. (*Parameswaran Pillai, J.*) KRISHNA IYER *v.* RAMA SASTRIGAL. 12 T.L.T. 1028 = 28 T.L.J. 395.

LAND ACQUISITION REGULATION, S. 6 (2) and (3)—*"Public purpose"—Acquisition for benefit of section of public—Declaration—Effect of.*

LIMITATION REGULATION, Art. 62.

The acquisition of land for the benefit of a section of the public is acquisition for a public purpose. As seen from Cl. (3) of S. 6 of the Land Acquisition Regulation when a declaration as prescribed by Cl. (2) of the section is published in the Government Gazette, such declaration shall be conclusive evidence that the land was needed for a public purpose. After such a ...

—*Application for restoration of suit dismissed for default—Inherent powers of the Court.*

An application for restoration of a suit under O. 9, R. 9 cannot be allowed under the inherent powers of the Court when it has been barred by limitation. No Court can invoke its inherent jurisdiction to revive a suit, an appeal or application, which is barred under the Statute of Limitation, unless such bar can be executed by any provisions contained in the Statute itself. S. 5 of the Limitation Regulation, no doubt, confers such powers in certain instances but that section does not apply to applications for restoration of suits. It is open to the High Court to extend the operation of S. 5 to such cases ... by certain British ... has been done ... *v.* VARGHESE. 12 T.L.T. 981 = 28 T.L.J. 622.

——S. 19—*Acknowledgment—Secondary evidence—Judgment—Abstract of a pleading contained in judgment—Sufficiency to prove acknowledgment.*

The abstract of a pleading contained in a judgment falls under the category of secondary evidence admissible to prove a written acknowledgment required by S. ...

——Arts. 57 and 105—*Applicability—Promissory note—Absence of date of payment and absence of words "on demand"—Effect of—Suit on—Limitation.*

S. 19 of the Negotiable Instruments ...

payment is specified is held to be a promissory note payable on demand. Thus considered, suits based on such promissory notes must be taken to be governed ... by Art. 10 ... a specific ... cannot app ...

——Arts. 62 and 105—*Applicability—Instalment bond payable on demand.*

There is no warrant for excluding instalment bonds ... demand from the purview of Art. 105 of the ... Regulation. But it is open to the obligee ... a bond to give the notice of ... tioned in column 3 of Art. 62 and then avail ... that article. The cause of action on a ... demand is something different from the ... action which must be held to have arisen ... a notice claiming all the instalments in ... soon as such a notice has been given, the ... of action based on the bond must be ... superimposed by a cause of action entitl... under the bond to claim all the instal... The suit then must be considered to be

e Court
d when once the order of transfer is made, th tion to which the decree is transferred has jurisdic ough a ertain an application for execution even th t is not py of the decree has not been received by it. I ution it sential that to validate an application for exec copy of ould, when presented, be accompanied by a ith and e decree. (*Verghese, C.J., Joseph Thalia* JANAKI *rameswaran Pillai, JJ.*) BHARGAVAN *v.* .J. 656. MMA. 12 T.L.T. 1232=28 T.L *t of pay-*

——*Step-in-aid—Decree-holder—Certificatior ents by—Effect of.* nents of

Petitions by the decree-holder certifying payn n-aid of rtain amounts towards the decree are steps-i ly made. xecution provided the payments were actual ISHNAN *Joseph Thaliath and Gopal Menon, JJ.*) KR .J. 645. RAMANATHAYAN. 12 T.L.T. 1137=28 T.L *e on the*

'RAUD—*Inference of—Suit to set aside decr proper— round of fraud—Service of summons not raud—If inferable.* raise an

Mere non-service of summons is insufficient to r setting nference of fraud, so as to form a ground fo *illai and* side a decree in a suit. (*Parameswaran P* SHNAN. *Sankarasubba Iyer, JJ.*) SEKHARAN *v.* KRI .J. 684. 12 T.L.T. 1211=28 T.L PLEAD

——Plea of—Particulars. *See* PRACTICE- L.J. 611. NGS—FRAUD. 28 T.I

ounts to

FRAUDULENT TRANSFER—*What am ransfer by debtor to creditor—When protected.* an insol-

Held, no man can legally be stated to be icated an vent or bankrupt unless he has been adjudi fer by a insolvent under the insolvency law. A tran ransferee debtor to a creditor is fraudulent only if the t ntitled to gets something more than what he is legally e If this is or some benefit is reserved to the transferor. discharge not done, transfers by debtors to creditors in faith and of their debts are deemed to be done in good *arasubba* are not fraudulent. (*Verghese, C.J. and San Iyer, J.*) KUNJURAMAN *v.* PADMANABHAN. T. 1223. 12 T.L

ON, S 36

GUARDIAN AND WARDS REGULATIO *majority —Procedure — Remedy of ward attaining against guardian—Duty of Court.* s Regula-

The provisions in the Guardian and Ward f accounts tion and the rules relating to the production o to action before the minority had ceased will not apply majority. taken under S. 36 after the ward had attained direct the The proper course would therefore be to ession, to guardian to deliver all the accounts in his poss ward are refuse discharge if the objections filed by the as attain- *prima facie* valid and to refer the ward who f accounts. ed majority to a regular suit for rendition o *illai, J.*) (*Verghese, C.J. and Parameswaran P* KULAMEETHEEN PILLAI *v.* BEEVI AMMAL. L.J. 747. 12 T.L.T. 1199=28 T *ity.*

——S. 43—*Order under S. 36—Appealabil* rdian and

The provisions of S. 43 of the Gua ppeal from Wards Regulation do not contemplate any a *C.J. and* orders passed under S. 36. (*Verghese,* EN PILLAI *Parameswaran Pillai, J.*) KULAMEETHE L.J. 747. *v.* BEEVI AMMAL. 12 T.L.T. 1199=28 T

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——S. 44—*Scope—Orders under—Finalit* tion cannot

S. 44 of the Guardian and Wards Regula trary to or be said to lay down a rule of procedure con ested in a inconsistent with the powers of restoration v r S. 44 is Civil Court. The view that an order unde either by final and shall not be liable to be contested the case. suit or otherwise, is too broad a statement of .) RAMAN (*Verghese, C. J. and Parameswaran Pillai, J* PILLAI *v.* PARAMESWARAN PILLAI. .L.J. 401. 12 T.L.T. 1069=28 T

HINDU LAW—*Joint family—Trading family—Power of manager to take loans and make alienations—New business and continuation of old business—Distinction.*

It is now well settled that the manager of an ancestral joint family trading business has full authority to take loans and make alienations and to raise money for the purpose of that business. Such a transaction will be binding on the entire joint family including the minor members. The creditor is not bound to inquire into the finances of the business so long as the business forms the purpose of the debt. All that is necessary for him to see is that the money is really required for the proper purpose of the business and there is no element of speculation or gambling in the transaction. The principle is equally well-recognised that as a general rule the manager of a joint family has no power to impose on a minor member of the family the risk and liability of a new business started by him. Where the ancestral business of a Mitakshara joint family has been carried on in partnership with another person, and upon his retiring there has been a dissolution and winding up of the partnership, the business carried on immediately thereafter on behalf of the joint family in the same commodities and upon the same premises, though under a new firm name and with new books, is not a new business but a continuation of the ancestral business. (*Gopal Menon, Parameswaran Pillai and Sankarasubba Iyer, JJ.*) DWARKADAS *v.* YADAVJI KATTAVU.
12 T.L.T. 946=28 T.L.J. 444 (F.B.).

INCOME-TAX REGULATION, Ss. 17, 22 (3) (b) and 25—*Notice—Necessity for assessment under S. 25—Order of remand cancelling assessment and directing fresh assessment—If cancels all proceedings taken by Collector—Fresh assessment—If subject to limitation of one year.*

Held:—(*i*) A notice required by S. 17 of the Income-tax Regulation is not necessary for an assessment or re-assessment under S. 25 of the Regulation and an assessment under S. 25 without such notice being given is not *ab initio* void for want of jurisdiction. (*ii*) An order of remand cancelling an assessment order and directing a fresh assessment does not cancel all the proceedings taken in the case by the Collector. (*iii*) If an assessment under S. 25 of the Income-tax Regulation is cancelled in appeal, and the case is remanded to the Collector to make a fresh assessment as provided in S. 22 (3) (*b*) the fresh assessment will not be an assessment under S. 25. The fresh assessment will be an assessment under the authority of the appellate order remanding the case and the Income-tax Officer making the fresh assessment will not be subject to the limitation of one year mentioned in S. 25. In fact there is no period of limitation in regard to proceedings taken under S. 22 (3) (*b*). (*iv*) When an assessment made by the Collector under S. 25 is set aside by the Commissioner in appeal on the ground of failure to serve a notice on the assessee, and a fresh assessment is ordered under S. 22 (3) (*b*), it is not necessary that a notice as required under S. 17 should be served on the appellant before ordering a fresh assessment. (*Gopal Menon, Parameswaran Pillai and Sankarasubba Iyer, JJ.*) COMMISSIONER OF INCOME-TAX, TRAVANCORE *v.* MUTHUSWAMI KARAYALAR. 12 T.L.T. 1089=
28 T.L.J. 476 (F.B.).

INSOLVENCY REGULATION (1108), S. 27 (1)—*Scope—If retrospective—Person adjudicated insolvent under Insolvency Regulation of 1090—Duty to apply for discharge within specified period.*

A person who was adjudicated an insolvent under the Insolvency Regulation of 1090 cannot be compelled

INSOLVENCY REGULATION (1108), S. 57.

under the Insolvency Regulation of 1108 to apply for his discharge within a period specified by the Court. There

have any retrospective operation in the absence of an express declaration to that effect. (*K. P. Gopal Menon, R. Gopala Menon and Sankarasubba Iyer, JJ.*) KRISHNA SASTRIGAL *v.* OFFICIAL RECEIVER, TRIVANDRUM DISTRICT COURT. 12 T.L.T. 972=28 T.L.J. 453 (F.B.).

——S. 57 (3)—*Powers of Insolvency Court—Questions of title—Jurisdiction to decide.*

Held, under S. 57, Cl. (3) of the Insolvency Regulation, the Insolvency Court is given ample powers to decide such questions as would incidentally arise in considering whether the receiver has got a right to take possession of a particular property as belonging to the insolvent. A Court exercising powers under the Insolvency Regulation has jurisdiction to enquire whether the property in the possession of a third party and alleged by the receiver to be the property of the insolvent, is really so or not; and if it finds it is the property of the insolvent, it can order delivery to the receiver. (*Joseph Thaliath and Gopal Menon, JJ.*) KOCHAPPI *v.* RAJANGOM IYER. 12 T.L.T. 1251.

INTEREST—*Rate of—Absence of contract—Rule.*

Where there has been no contract with regard to payment of interest, the Courts generally do not allow more than 6 per cent. interest. (*Verghese, C. J. and Parameswaran Pillai, J.*) MATHEN *v.* VELAYUDHAN PILLAI. 28 T.L.J. 642.

JENMI AND KUDIYAN REGULATION, S. 9—*Period of three months—Calculation of—Starting point.*

It is true that S. 9 of the Jenmi and Kudiyan Regulation prescribes that the date of first hearing shall be so fixed that there shall be an interval of not less than three months between the date of service and the date of first hearing. This is to enable the tenant to deposit

waran Pillai and Sankarasubba Iyer, JJ.) RAMAN PILLAI *v.* ANTHONI. 12 T.L.T. 1142=28 T.L.J. 530.

JURISDICTION — *Submission to — Non-resident foreigner appearing for contesting jurisdiction—Effect.*

The appearance of [illegible] purpose of contesting [illegible] Court constitutes in [illegible] jurisdiction of such C[illegible] RAMASWAMI NADAR *v.* SUBBIAH PILLAI. 12 T.L.T. 1076=28 T.L.J. 471.

——*Suit on promissory note—Place of suing—Residence of holder.*

Where the promissory note does not specify the place where the payment should be made; the rule is that payment should be made at the place where the holder of the note permanently resides or carries on business. (*Parameswaran Pillai, J.*) KRISHNA IYER *v.* RAMA SASTRIGAL. 12 T.L.T. 1028=28 T.L.J. 395.

LAND ACQUISITION REGULATION, S. 6 (2) and (3)—*"Public purpose"—Acquisition for benefit of section of public—Declaration—Effect of.*

LIMITATION REGULATION, Art. 62.

The acquisition of land for the benefit of a section of the public is acquisition for a public purpose. As seen from Cl. (3) of S. 6 of the Land Acquisition Regulation when a declaration as prescribed by Cl. (2) of the section is published in the Government Gazette, such declaration shall be conclusive evidence that the land was needed for a public purpose. After such a declaration it is not open to the owner to contend in any Court that the land was not needed for a public purpose. (*K. P. Gopal Menon and R. Gopala Menon, JJ.*) EIPE *v.* THE DEWAN OF TRAVANCORE. 28 T.L.J. 551.

LIMITATION REGULATION, S. 5—*Applicability—Application for restoration of suit dismissed for default—Inherent powers of the Court.*

An application for restoration of a suit under O. 9, R. 9 cannot be allowed under the inherent powers of the Court when it has been barred by limitation. No Court can invoke its inherent jurisdiction to revive a suit, an appeal or application, which is barred under the Statute of Limitation, unless such bar can be executed by any provisions contained in the Statute itself. S. 5 of the Limitation Regulation, no doubt, confers such powers in certain instances but that section does not apply to applications for restoration of suits. It is open to the High Court to extend the operation of S. 5 to such cases also, as has been done by certain British Indian High Courts, but no such thing has been done till now. (*Sankarasubba Iyer, J.*) EIPE *v* VARGHESE. 12 T.L.T. 981=28 T.L.J. 622.

——S. 19—*Acknowledgment—Secondary evidence—Judgment—Abstract of a pleading contained in judgment—Sufficiency to prove acknowledgment.*

The abstract of a pleading contained in a judgment falls under the category of secondary evidence admissible to prove a writte[illegible] 19 of the Limitation [illegible] *Sankarasubba Iyer, J* [illegible] DAN.

——Arts. 57 and 105—*Applicability—Promissory note—Absence of date of payment and absence of words "on demand"—Effect of—Suit on—Limitation.*

S 19 of the Negotiable Instruments Regulation [illegible] promissory note, a promissory note in which no time for payment is specified is held to be a promissory note payable on demand. Thus considered, suits based on such promissory notes must be taken to be governed only by [illegible] When there is a sp[illegible] ticle (Art. 67) [illegible] 2 T.L.T. 993.

[illegible] 62 and 105—*Applicability—Instalment [illegible] on demand.*

There is no warrant for excluding instalment bonds payable on demand from the purview of Art. 105 of the Limitation Regulation. But it is open to the obligee under such a bond to give the notice of demand mentioned in column 3 of Art. 62 and then avail himself of that article. The cause of action on a bond payable on demand is something different from the new cause of action which must be held to have arisen on the issue of a notice claiming all the instalments in a lump. As soon as such a notice has been given, the original cause of action based on the bond must be held to have been superimposed by a cause of action entitling the obligee under the bond to claim all the instalments in a lump. The suit then must be considered to be one not based on

LIMITATION REGULATION, Art. 105.

the bond but on a new cause of action which is dependent on the bond considered as an instalment bond and not as a bond considered as one payable on demand. (*Parameswaran Pillai and Sankarasubba Iyer, JJ.*) THE CITY BANK, LTD., NAGERCOIL *v.* CHELLAKKAN. 12 T.L.T. 1189 = 28 T.L.J. 648.

——**Art. 105**—Applicability—Instalment bond payable on demand. *See* LIMITATION REGULATION, ARTS. 62 AND 105. 28 T.L.J. 648.

——**Art. 105**—Applicability—Promissory note—Date for payment not specified—Suit on—Limitation. *See* NEGOTIABLE INSTRUMENTS REGULATION, S. 18. 28 T.L.J. 679

——**Art. 105**—Applicability—Promissory note without date of payment and without words "on demand"—Suit on—Limitation. *See* LIMITATION REGULATION ARTS. 57 AND 105. 12 T.L.T. 993.

——**Arts. 150 and 165**—Applicability—Application for re-delivery—Limitation. *See* C. P. CODE, S. 40. 12 T.L.T. 1114 = 28 T.L.J. 591 (F.B.).

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LIS PENDENS—*Applicability—Sale in execution of mortgage decree at instance of subsequent mortgagee—Latter not a party to pending litigation on superior mortgage—Sale, if affected by* lis pendens.

A sale in execution of a mortgage decree, held at the instance of a subsequent mortgagee who is not party to a pending litigation on the superior mortgage, will not be affected by the rule of *lis pendens*. The priority of date of purchase would thus give priority of right to possession. (*Gopala Menon and Sankarasubba Iyer, JJ.*) KUTTI AMMA *v.* MADHAVAN NAIR. 28 T.L.J. 696.

MARUMAKKATHAYAM LAW — *Alienation—Necessity—Acquisition of fresh property—If binding or justifying purpose.*

Acquisition of fresh property for the Tarwad by alienating Tarwad properties is considered as binding on the Tarwad only under special circumstances when such fresh acquisition was to the manifest advantage of the Tarwad and the alienation of the Tarwad property for the purpose of the acquisition had the consent of all the adult members of the Tarwad. The alienation of Tarwad property in such cases is justified not because it was not obligatory that the transaction entered into should be for Tarwad necessity, but because the special beneficial circumstances attendant on the acquisition of fresh property might be deemed to constitute sufficient necessity justifying such alienation. A transaction, before it can be treated as being to the manifest advantage of the family, must be one arising out of a situation of which no prudent person acting as manager could fail to take advantage. The manager is not entitled to speculate with the family property, even if he does so in good faith believing that his conduct of affairs will ultimately be of advantage to the family. (*Verghese, C. J. and Parameswaran Pillai, J.*) CHEERA *v.* VASUDEVA KAMMATHI. 28 T.L.J. 489.

MORTGAGE—*Prior and subsequent mortgagees.—Prior mortgagee made party to a suit by a puisne mortgagee—Omission to set up prior lien—Effect of—Right to enforce same against subsequent mortgagee.*

Where a prior mortgagee made party to a suit by a puisne mortgagee omits to set up his prior lien and a decree is passed generally for sale without imposing a liability on the subsequent mortgagee in favour of the prior mortgagee, the latter cannot afterwards seek to enforce his lien against the said subsequent mortgagee. (*Verghese, C. J. and Gopal Menon, J.*) THUPPAN

MUNICIPAL REGULATION, S. 138.

NAMBURIPAD *v.* OUSEPH KATHANAR. 12 T.L.T. 1203 = 28 T.L.J. 715.

——*Subrogation—Purchaser of mortgaged property undertaking to discharge two charges—Discharge of one only—Claim subrogation in suit by puisne mortgagee—Sustainability.*

Held, where the purchaser of a mortgaged property undertakes to discharge out of the purchase-money two subsisting charges on the property and in fact discharges only the earlier one, the said purchaser is not competent to claim subrogation and to hold up the payment of the earlier mortgage as a shield against the suit of the puisne mortgagee for sale. Subrogation is a principle of equity and in order that equity may be applied there should be *bona fides* on the par[illegible] person who seeks this equity, and unmeri[illegible] should never be caused to a party in the administration of equity. (*Verghese, C. J. and Go[illegible]pala Menon, J.*) PARVATHI AMMA *v.* ITHACKU. 12 T.L.T. 1213 = 28 T.L.J. 516.

——*Substituted security—Mortgage by co-sharer of share—Subsequent partition—Mortgaged item allotted to another sharer in partition—Right of mortgagee.*

Where a co-sharer hypothecates his share in one ancestral property to a stranger and where that item falls in partition to another sharer, the hypothecatee cannot proceed against the hypothecated property but must work out his rights against the property which falls to the share of the hypothecator on partition. (*Joseph Thaliath and Sankarasubba Iyer, JJ.*) GNANAKKANNU NADACHY *v.* VEDAKANNU NADAR. 12 T.L.T. 958.

MORTGAGOR AND MORTGAGEE—*Money deposited by mortgagor for payment to mortgagee—If property of mortgagee.*

Money deposited in Court by the mortgagor for payment to the mortgagee does not become the property of the mortgagee, unless the latter has signified his willingness to accept the amount so deposited in full discharge of the amount due under the mortgage. (*Sankarasubba Iyer, J.*) KUNJUNNI POTHUVAL *v.* SANKARANARAYANA PANIKKER. 12 T.L.T. 1197 = 28 T.L.J. 633.

MUNICIPAL REGULATION, S. 95—*Application for reference made after disposal of appeal—High Court's power to compel Division Peishkar to make reference.*

Even though the application to the Division Peishkar to make a reference to the High Court under S. 95 of the Municipal Regulation is made after the disposal of the appeal before the Division Peishkar, the High Court would be competent to compel the Division Peishkar to make the reference if that course is considered proper and necessary. (*Parameswaran Pillai and Sankarasubba Iyer, JJ.*) PRESIDENT, MUNICIPAL COUNCIL, KUZHITHURAI *v.* KUMARASWAMI. 12 T.L.T. 1148 = 28 T.L.J. 528.

——**S. 95 (5)**—*Reference by Division Peishkar to High Court whether appeal is barred by limitation—Competency.*

Whether an appeal before the Division Peishkar is barred by limitation is a matter solely for decision by the Division Peishkar and a reference on the point under S. 95 (5) of the Municipal Regulation for decision by the High Court is incompetent. (*Parameswaran Pillai and Sankarasubba Iyer, JJ.*) TRIUMPH SYNDICATE MOTOR SERVICE, NAGERCOIL, *In re.* 12 T.L.T. 1078 = 28 T.L.J. 473.

——**S. 138**—*Trading in and storing of beedi leaves—If offensive or dangerous trade—Licence—Necessity.*

NAIR REGULATION.

Although several articles of an inflammable nature are specified in the bye laws no reference is made to beedi leaves. Even assuming that beedi leaves may also be regarded as inflammable material under S. 138 of the Municipal Regulation, the bye-laws framed under S. 244 (4) seem to indicate that a licence is required for such trade only when a place is used as a "yard or depot" for trade in such articles. Unless, therefore, specific bye-laws are framed to regulate such trade in places other than "yard or depot" it is extremely doubtful whether

NAIR REGULATION—*Scope and effect of—Nair Tarwad—Competency of member of Tarwad to relinquish right to Tarwad properties before Nair Regulation by Udampadi.*

some time before suit and that he had no subsisting right to a share in the Tarwad properties It was argued for the plaintiff that the only transferable rights which the plaintiff had on the date of the Udampadi were his rights of management and his right to possession of the Tarwad properties as Karnavan and these rights alone could have been conveyad under the Udampadi. It was argued that the right to share in Tarwad properties having been conferred only by the Nair Regulation which was enacted after the date of the Udampadi, the plaintiff could not be deemed to have transferred such a prospective right under the Udampadi.

Held, there was no substance in the plaintiff appellant's contention. Although the members of the Nair Tarwad obtained a statutory right for partition only under the Nair Regulation, there was nothing before the enactment of that Regulation to prevent the members of a Nair Tarwad from effecting a division of the Tarwad properties by agreement. What was renounced was not the prospective right to share in the Tarwad properties,

document, cutting himself away from the Tarwad. The words used in the Udampadi could be explained as amounting only to an irrevocable surrender of the rights of the plaintiff as Karnavan. The right to compel a partition of a Tarwad was conferred only by the Nair Regulation of 1100. Till then all the members of a

the time of the Udampadi. (*Joseph Thaliath, Gopala Menon and Sankarasubba Iyer, JJ.*) RAMAN THAMPI *v.* KARTHIYAYANI PILLAI KOCHAMMA.

——S. 31—*Applicability—Aw Co-operative Society—If "decree."*

The expression "decree" in S was intended to be comprehensive other than decrees passed in suits Co-operative Registrar, which should be treated as if it were a decree for the purpose of execution would not be excluded from the purview of the expression "decree" as used in S. 31 of the Nair Regulation. (*Sankarasubba*

PRACTICE.

Iyer, J.) ACHYUTHAN PILLAI *v.* PADMAKSHI AMMA.
12 T.L.T. 1261=28 T.L.J. 681.

NEGOTIABLE INSTRUMENTS—*Promissory note—Finding against genuineness—Endorser's liability to endorsee.*

Although a promissory note has not been found to be genuine, the endorsee is entitled in law to recover from the endorser the sum that was paid for the transfe ation.

JJ.)

NEGOTIABLE INSTRUMENTS REGULATION, S. 18—*Promissory note—No time for payment fixed—Limitation for suit on notes—Limitation Regulation, Art* 105.

A promissory note or bill of exchange in which no time for payment is specified is payable on demand. Suits based on such promissory notes must be taken to Art. 105, Limitation Regulation. *J.*) OUSEPH *v.* ULAHANNAN.
28 T.L.J. 679.

EGULATION, S. 5 (4)—*"Obscene in character"—Meaning of — Motive whether material.*

The meaning of the word "obscene" is, as given in Bouvier's Law Dictionary, something offensive to chastity, delicacy or decency; presenting to the mind or view something without delicacy and purity; forbidden to be expressed or which brings about corruption of morals. The Newspapers Regulation is not concerned with the motive of the publication. It is only concerned with the fact whether there has been a publication of indecent matter, whether the motive be good or bad. (*Verghese, C.J., Joseph Thaliath and Sankarasubba Iyer, JJ.*) 12 T.L.T. 987.

PENAL CODE, Ss 380 and 459—*Convictions under—Proper sentence—Sentence of fine only on ground of ill-health of accused—Propriety.*

In a prosecution for offences under Ss. 380 and 459, the Magistrate convicted the accused of the above offences and sentenced him to pay a fine only on the ground of his ill-health.

Magistrate should properly have of fine and imprisonment; ill-health

—*Notice under—Contents of.*

S. 67 (4) of the Police Regulation requiring notice should be strictly construed. It must be deemed sufficient if it substantially fulfils the object in informing the the nature of the suit merely wants notice to suit. (*Sankarasubba*
12 T.L.T. 1018=
28 T.L.J. 391.

PRACTICE—*Adjournment—Application by defendant for time—Terms—Court's duty to give sufficient oppor-*

impose terms on a when granting his give the party sufficient or the same being *and Parameswaran Pillai, J.*)

——*Pleadi*

—*Particulars*

the bond but on a new cause of action which is dependent on the bond considered as an instalment bond and not as a bond considered as one payable on demand. (*Parameswaran Pillai and Sankarasubba Iyer, JJ.*) THE CITY BANK, LTD., NAGERCOIL *v.* CHELLAKKAN. **12 T.L.T. 1189 = 28 T.L.J. 648.**

———**Art. 105**—Applicability—Instalment bond payable on demand. *See* LIMITATION REGULATION, ARTS. 62 AND 105. **28 T.L.J. 648.**

———**Art. 105**—Applicability—Promissory note—Date for payment not specified—Suit on—Limitation. *See* NEGOTIABLE INSTRUMENTS REGULATION, S. 18. **28 T.L.J. 679**

———**Art. 105**—Applicability—Promissory note without date of payment and without words "on demand"—Suit on—Limitation. *See* LIMITATION REGULATION ARTS. 57 AND 105. **12 T.L.T. 993**

———**Arts. 150 and 165**—Applicability—Application for re-delivery—Limitation. *See* C. P. CODE, S. 40. **12 T.L.T. 1114 = 28 T.L.J. 591 (F.B.).**

———**Art. 165**—Applicability— Application for redelivery—Limitation. *See* C. P. CODE, S. 40. **12 T.L.T. 1114 = 28 T.L.J. 591 (F.B.).**

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A sale in execution of a mortgage decree, held at the instance of a subsequent mortgagee who is not party to a pending litigation on the superior mortgage, will not be affected by the rule of *lis pendens.* The priority of date of purchase would thus give priority of right to possession. (*Gopala Menon and Sankarasubba Iyer, JJ.*) KUTTI AMMA *v.* MADHAVAN NAIR. **28 T.L.J. 696.**

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Acquisition of fresh property for the Tarwad by alienating Tarwad properties is considered as binding on the Tarwad only under special circumstances when such fresh acquisition was to the manifest advantage of the Tarwad and the alienation of the Tarwad property for the purpose of the acquisition had the consent of all the adult members of the Tarwad. The alienation of Tarwad property in such cases is justified not because it was not obligatory that the transaction entered into should be for Tarwad necessity, but because the special beneficial circumstances attendant on the acquisition of fresh property might be deemed to constitute sufficient necessity justifying such alienation. A transaction, before it can be treated as being to the manifest advantage of the family, must be one arising out of a situation of which no prudent person acting as manager could fail to take advantage. The manager is not entitled to speculate with the family property, even if he does so in good faith believing that his conduct of affairs will ultimately be of advantage to the family. (*Verghese, C. J. and Parameswaran Pillai, J.*) CHEERA *v.* VASUDEVA KAMMATHI. **28 T.L.J. 489.**

MORTGAGE—*Prior and subsequent mortgagees—Prior mortgagee made party to a suit by a puisne mortgagee—Omission to set up prior lien—Effect of—Right to enforce same against subsequent mortgagee.*

Where a prior mortgagee made party to a suit by a puisne mortgagee omits to set up his prior lien and a decree is passed generally for sale without imposing a liability on the subsequent mortgagee in favour of the prior mortgagee, the latter cannot afterwards seek to enforce his lien against the said subsequent mortgagee. (*Verghese, C. J. and Gopal Menon, J*) THUPPAN

NAMBURIPAD *v.* OUSEPH KATHANAR. **12 T.L.T. 1203 = 28 T.L.J. 715.**

———*Subrogation—Purchaser of mortgaged property undertaking to discharge two charges—Discharge of one only—Claim subrogation in suit by puine mortgagee—Sustainability.*

Held, where the purchaser of a mortgaged property undertakes to discharge out of the purchase-money two subsisting charges on the property and in fact discharges only the earlier one, the said purchaser is not competent to claim subrogation and to hold up the payment of the earlier mortgage as a shield against the suit of the puisne mortgagee for sale. Subrogation is a principle of equity and in order that equity may be applied there should be *bona fides* on the part [illegible] person who seeks this equity, and unmerited [illegible] should never be caused to a party in the administration of equity. (*Verghese, C. J. and Gopala Menon, J.*) [illegible] PARVATHI AMMA *v.* ITHACKU. **12 T.L.T. 1213 = 28 T.L.J. 516.**

———*Substituted security—Mortgage by co-sharer of share—Subsequent partition—Mortgaged item allotted to another sharer in partition—Right of mortgagee.*

Where a co-sharer hypothecates his share in one ancestral property to a stranger and where that item falls in partition to another sharer, the hypothecatee cannot proceed against the hypothecated property but must work out his rights against the property which falls to the share of the hypothecator on partition. (*Joseph Thaliath and Sankarasubba Iyer, JJ.*) GNANAKKANNU NADACHY *v.* VEDAKANNU NADAR. **12 T.L.T. 958.**

MORTGAGOR AND MORTGAGEE—*Money deposited by mortgagor for payment to mortgagee—If property of mortgagee.*

Money deposited in Court by the mortgagor for payment to the mortgagee does not become the property of the mortgagee, unless the latter has signified his willingness to accept the amount so deposited in full discharge of the amount due under the mortgage. (*Sankarasubba Iyer, J.*) KUNJUNNI POTHUV[illegible] SANKARANARAYANA PANIKKER. **12 T.[illegible]**

MUNICIPAL REGULAT[illegible] *for reference made aft[illegible] Court's power to c[illegible] reference.*

Even t[illegible] to make a [illegible] the Munici[illegible] the appeal be[illegible] would be comp[illegible] make the referenc[illegible] and necessary. (*P[illegible] subba Iyer, JJ.*) P[illegible] KUZHITHURAI *v.* KU[illegible] **12 [illegible]**

———**S. 95 (5)**—*Referen[illegible] High Court whether appeal [illegible] Competency.*

Whether an appeal before the [illegible] barred by limitation is a matter sol[illegible] the Division Peishkar and a refere[illegible] under S. 95 (5) of the Municipal Regu[illegible] sion by the High Court is incompetent. (*[illegible] Pillai and Sankarasubba Iyer, JJ.*) SYNDICATE MOTOR SERVICE, NAGERCOIL, [illegible] **12 T.L.T. 1078 = 28 T.[illegible]**

———**S. 138**—*Trading in and storing of beedi l[illegible] If offensive or dangerous trade—Licence—Necessity.*

suit relating to it. (*Verghese, C.J.* *and Sankarasubba Iyer, J.*) MAMMAN *v.* NARAYANI AMM

12 T.L.T. 1011=

TRANSFER OF PROPERTY ACT

of mortgagee—Purchase by mortgagee in

—Right of mortgagor to benefit of.

It is the duty of the mortgagee, in accordance with the principles adumbrated in S. 72 of the Transfer of Property Act, to do all that he can for the preservation

of the property from forfeiture or sale in revenue auction

to his mortgage interest and must enure to the benefit of the mortgagor. (*Verghese, C.J. and Parameswaran Pillai, J.*) GOVINDAN *v.* SIRKAR.

12 T.L.T. 1151=28 T.L.J. 535.

III—COCHIN CASES.

AGRICULTURISTS' TEMPORARY RELIEF PROCLAMATION, S. 2—*Scope—Sale in contravention of—If nullity—Omission to invoke aid of section—Waiver.*

It is doubtful if a sale held in contravention of S. 2 of the Proclamation is an absolute nullity. Omission to invoke its aid at the proper stage of the proceedings might amount to waiver of benefit conferred by the section. (*Neelakanta Menon and Narayana Ayyar, JJ.*) PARU *v.* JOSEPH. 5 Coch.L.J. 754.

——S. 3—*Applicability—Collateral proceedings—"Decision."*

The decision referred to in S. 3 is clearly one given in proceedings taken in pursuance of the proclamation and cannot apply where the question arises collaterally in other proceedings between the parties. (*Neelakanta Menon and Narayana Ayyar, JJ.*) PARU *v.* JOSEPH. 5 Coch.L.J. 754.

APPEAL—*New plea—Point not raised in pleadings or issues.*

An appellant should not be allowed to put forward for the first time in appeal a plea not raised in the pleadings; nor made the subject-matter of an issue nor even argued in the trial Court. (*Ouseph, C.J. and Narayana Ayyar, J.*) KASSAM *v.* VARIATH. 5 Coch.L.J. 717.

BENAMI—*Burden of proof.*

The burden of proving the benami nature of a deed is on the person setting it up. (*Ouseph, C.J., Neelakanta Menon and Narayana Ayyar, JJ.*) GANGAVOW *v.* ISMAIL HAJEE ESSA SAIT. 5 Coch.L.J. 734.

——*Test to decide.*

The criterion and test of benami in India is to consider from what source the money comes with which the purchase-money is paid. (*Ouseph, C.J., Neelakanta Menon and Narayana Ayyar, JJ.*) GANGAVOW *v.* ISMAIL HAJEE ESSA SAIT. 5 Coch.L.J. 734.

BURDEN OF PROOF—*Possession—Suit for—Claim to possession based on title—Duty to prove possession within 12 years.*

In a suit for recovery of possession on the basis of title, plaintiff has to make out possession whether direct or constructive within twelve years. (*Ouseph, C.J. and Neelakanta Menon, J.*) RAGHAVA KAMMATHI *v.* GOVINDA SHENOI. 5 Coch L J. 698 = 29 Coch.L.R. 257.

CHRISTIAN LAW—*Succession—Streedhanom paid or promised to be paid at time of marriage—Effect of—Rights of daughters to inherit to father.*

When streedhanom is paid or promised to be paid at the time of marriage, the daughters are not entitled to a share in the father's properties. (*Neelakanta Menon and Narayana Ayyar, JJ.*) MARIAM *v.* LOWRENCE. 5 Coch.L.J. 712 = 29 Coch.L.R. 431.

CIVIL PROCEDURE CODE (XXIX OF 1111), S. 59—*Rateable distribution—Basis of apportionment.*

Properties were sold for Rs. 500 in execution of a decree, the debt being Rs. 1,690. The decree-holder agreed to relinquish the balance of the decree-debt. A rival decree-holder applied for rateable distribution. The lower Court proceeded on the basis that the amount due under the first decree to be taken into account for this purpose was only Rs. 500.

Held, the proportion ought to be on the basis of the whole of the decree debt, *viz.*, Rs. 1,690. (*Ouseph, C. J. and Narayana Ayyar, J.*) ANTHONY *v.* NARAYANAN NAMPOORIPAD. 5 Coch.L.J. 719.

——Ss. 241 and 272—*Applicability—Decree against karnavan of malabar tarwad—Anandravan's objection to execution—Order on—Appeal.*

In the case of a Malabar tarwad, the anandravans questioning the binding character of a decree obtained against the karnavan alone are treated as strangers to the decree, and their objections to execution are enquired into under S. 278 and not S. 241, C. P. Code, no appeal will lie against the order on the objections. (*Ouseph, C.J., Neelakanta Menon and Narayana Ayyar, JJ.*) NARAYANA AYYAR *v.* YASODA ANTHARJANAM. 5 Coch.L.J. 746.

——O. 21, R. 56 (1)—*Belated claim petitions—Opportunity to show cause before dismissal—Duty of Court to give.*

Before a claim petition is rejected on the ground of being belated, an opportunity should be given to the claimant to show that there was no unnecessary delay. (*Ouseph, C.J. and Neelakanta Menon, J.*) GEORGE *v.* RAPHEL. 5 Coch.L.J. 695 = 29 Coch.L.R. 254.

——O. 21, R. 87—*Inadequacy of price—If ground to set aside sale.*

Mere inadequacy of price would not be by itself a sufficient ground for setting aside a Court-sale. (*Ouseph, C.J. and Narayana Iyer, J.*) YASODA AMMA *v.* NARAYANA RAO. 5 Coch.L.J. 700 = 29 Coch.L.R. 259.

——O. 21, R. 87—*Material irregularity—Fraud—Setting aside sale on ground of—Undervaluation—Effect of.*

Where the judgment-debtor seeks to set aside a sale on the ground of fraud, he can succeed only if he is able to prove fraud and not any irregularity, however material it be, which is short of fraud. Undervaluation in itself does not amount to fraud. (*Neelakanta Menon and Narayana Ayyar, JJ.*) PARU *v.* JOSEPH. 5 Coch.L.J. 754.

——O. 38—*Injunction—Delay in applying for—Effect.*

Delay, though it may not amount to proof of acquiescence, may disentitle a suit or to a temporary injunction. (*Neelakanta Menon and Narayana Ayyar, JJ.*) ELIAS SOLOMON PALAK *v.* S.S.J. MADALI. 5 Coch.L.J. 758.

CONTRACT—*Breach—Right of re-sale not exercised within reasonable time—Measure of damages.*

Where the right of re-sale has not been exercised within a reasonable time, that party claiming damages is entitled to damages only on the ordinary basis of the difference between the contract rate and the market rate at the date of the breach. The market rate at the date of the breach is the decisive element and not the market

CONTRACT.

——*Mistake of law—Money paid under—Recoverability.*

A payment made under a mistake of law cannot be recovered. (*Ouseph, C.J. and Narayana Ayyar, J.*) KUNHIKRISHNA MENON *v.* ITTIMANI.

5 Coch.L J. 646

CONTRACT ACT, S. 59—*Applicability—Appropriation of payments—Intention of parties—Surrounding circumstances.*

Where in a suit for arrears of rent as well as for future rent, the defendants paid into Court various amounts at different dates to avoid the appointment of a receiver, and the facts and circumstances connected with the deposits showed that they were intended to be appropriated only towards the rent due for the years subsequent to the filing of the suit, the plaintiff cannot claim to appropriate them towards the past arrears of pattom, S. 59, Contract Act, applies. (*Ouseph, C.J., Neelakanta Menon and Narayana Ayyar, JJ.*) GOVINDA MENON *v.* RAVUNNI MENON.

5 Coch.L.J. 720.

COSTS—*Discretion of Court—Principles.*

It is true that costs are generally in the discretion of the Court. In fact it has been said that it is the only question over which the Court can exercise the largest discretion. But the discretion, though wide, must be judicial discretion with special reference to all the circumstances of the case. In adjudging the question of costs, the Court is entitled to take into consideration not only the conduct of the parties, in the actual litigation itself, but also matters which led up to and were the occasion of that litigation, in other words, to look at the antecedent conduct of the defendants, which led up to the apparent necessity for the plaintiff instituting the suit. "Costs are in the nature of incidental damages

5 Coch L J. 760.

COURT-FEES— *Principal and agent— Property bought by agent in own name—Transfer by agent by way of mortgage to another—Suit by principal for declaration of invalidity of mortgage and for possession —Court fee—Valuation.*

Where a principal sues to recover property bought by his agent in the latter's name instead of in the former's

were no party to the mortgage and decree, relief is only for re assignment of the prop plaintiffs. (*Ouseph, C.J. and Narayana Ayyar, JJ.*) AMMUNNI MENON *v.* APPU MENON.

5 Coch.L J. 620.

COURT-FEES ACT (II OF 1080), S. 4 (ix)—*'Suit'—If includes appeal—Mortgage—Suit for redemption—Appeal—Claim for redemption and recovery of*

the amount decreed as the price of redemption. The second relief must be treated as one in ejectment, and *ad valorem fee must be paid on the value of the properties sought to be recovered* "Suit" in S. 4, Cl. (*ix*) of the Court-Fees Act, 1080, does not include appeals. Court fees in appeals from suits for redemption is governed by Art 1 of Sch. I of the Act, which provides for *ad valorem* fee on the "subject matter in dispute". The subject-matter in dispute is that in the appeal and not in the suit. Principles regarding court-fees in various kinds of redemption suits and appeals are discussed and enunciated (*Neelakanta Menon and Narayana Ayyar, JJ.*) KUNJUNNI PANICKAR *v* SANKARAN.

5 Coch.L J. 637.

——**Sch. I, Art. 1**—Applicability—Appeal in suit for redemption of motgage—Claim for redemption and for possession from third party—Court fee—"Subject-matter in dispute." *See* COURT FEES ACT, S. 4 (*ix*).

5 Coch L J. 637.

CRIMINAL PROCEDURE CODE, S. 344—*Child of tender age—Father's offer to maintain—If to be accepted—Powers of Court.*

Where the child is of tender age and requires the care of the mother and the father is also otherwise unfit to be entrusted with the custody of the child, the Court can disregard the offer of the father to maintain the child and award separate maintenance. (*Neelakanta Menon and Narayana Ayyar, JJ.*) LYLOTH *v.* MARTHA.

5 Coch L.J. 775.

——**S. 344**—*Finding of fact—Interference by Chief Court—Principles.*

It is true that, as a matter of practice, the Chief Court does not, in revision, ordinarily interfere with the conclusions of an appellate Court on questions of fact, but there can be no doubt as to its competency to do so when occasion requires it. Such power of interference is clearly contemplated by statute and has been expressly recognised by rulings of Courts This discretion, like all other judicial discretion, ought, as far as practicable, to be left untramelled and free so as to be fairly exercised according to the exigencies of each case. The Court will not hesitate to interfere when satisfied that the finding is manifestly erroneous and has occasioned a failure or miscarriage of justice. (*Neelakanta Menon and Narayana Ayyar, JJ.*) PYLOTH *v.* SIRKAR.

5 Coch L J. 594.

DEBT CONCILIATION ACT (XXVI OF 1112) S 25—*Applicability—Decree satisfied by Court-sale—Application under S. 25—Maintainability—"Debt."*

After a decree has been satisfied by the sale of the properties in Court-auction, there is no longer any 'debt" subsisting between the parties, and therefore

ESTOPPEL.

JOSEPH. 5 Coch.L.J. 754.

ESTOPPEL—*Acquiescence—Standing by—Effect of.*

Acquiescence is quiescence under such circumstances

while the act is in progress he cannot afterwards (1876) 8 Ch. D. 314, Ref.

EVIDENCE ACT (1872), S. 24.

Neelakanta Menon and Narayana Ayyar, JJ.) GANGAVOW *v.* ISMAIL HAJEE EASA SAIT.
5 Coch.L.J. 734.

EVIDENCE ACT (I OF 1872), S. 24—*'Person in authority'—Meaning of—Member of Village Vigilance Committee—Confession to—Admissibility.*

There is no statutory definition of a 'person in authority', but it seems to be well-settled that the words have reference to a person who has authority to interfere in the matter under enquiry. Generally speaking 'a person in authority' within the meaning of S. 24 of the Evidence Act is one who is engaged in the apprehension, detention or prosecution of the accused or one who is empowered to examine him. A member of a Village Vigilance Committee is not 'a person in authority.' The belief of an accused that the person to whom he made a confession was a 'person in authority' is not sufficient to bring him within the term. (*Ouseph, C. J., Neelakanta Menon and Narayana Ayyar, JJ.*) SIRKAR *v.* KAVI.
5 Coch.L.J. 647.

——**S. 92**—*Scope—Pattom chit—Stipulation for revision of pattom after specified period—Revision assented to by tenant—Oral evidence to prove consent—Admissibility.*

A Pattom chit contained a stipulation for revision of pattom after a specified period. Pattom was accordingly revised and the tenant continued to pay for some time at that rate. In a suit for recovery of arrears at the revised rate, the tenant's consent of the revision was also proved by oral evidence. It was argued that the revision was by virtue of an oral agreement, which varied the terms of the original document and as such offended S. 92 of the Evidence Act.

Held, the provisions for revision in the pattom chit did not require any assent. If such an assent were necessary no useful purpose could be served by a provision of this kind in the document. Even supposing his assent was necessary according to the document, proof of that would not amount to proof of fresh agreement so as to offend S. 92 of the Evidence Act. (*Ouseph, C. J. and Neelakanta Menon, J.*) ISMAIL HAJEE EASA SAIT *v.* PALIAM ESTATE. 5 Coch.L.J. 703 = 29 Coch.L.R. 261.

EXECUTION—*Executing Court—Duty of—Erroneous decree—Proper remedy.*

The executing Court has only to execute the decree according to its terms, even though a mortgage decree which ought to have followed the form prescribed by the C. P. Code erroneously gave at once a personal remedy against the defendant. The proper remedy if at all in a case like this is to get the decree amended so as to bring it in conformity with the form prescribed by the Code. (*Ouseph, C. J., Neelakanta Menon and Narayana Ayyar, JJ.*) RAMA AYYAR *v.* GOVINDANUNNI KARTHA.
5 Coch.L.J. 654.

——*Sale—Decree-holder bidding for decretal amount at instance of Court—Amount really due to decree-holder less than amount stated in sale proclamation—Sale—If to be set aside—Proper course.*

Where the decree-holder at the instance of the Court bid the properties at the Court-auction for the amount due to him under the decree and it afterwards turns out that the amount due to him is something less than that appearing in the sale proclamation, the proper procedure to follow is to direct the decree-holder to refund the amount of excess in the sale proclamation and not to set aside the sale. In such a case the decree-holder cannot be heard to say that the sale must be set aside because he would not have bid for the decretal amount but for the compulsion of the Court. (*Ouseph, C.J., Neelakanta Menon and Narayana Ayyar, JJ.*) GOVINDA MENON *v.* RAVUNNI MENON.
5 Coch.L.J. 720.

GRANT—*Forfeiture—Breach of condition—Right of grantor to resume—Grant of right to Sirkar assessment—Alienation—Effect of.*

Breach of the conditions in a conditional personal grant entails a forfeiture and entitles the Sirkar to resume the grant. When the grant consists only of the right to the Sirkar assessment, the presumption, if any, can affect only the right to such assessment. The holder of such a grant has an alienable interest in the property, but in the hands of the alienee the land will be subject to full assessment. The grantee's interest cannot be said to be inalienable within the meaning of S. 52, C. P. Code. (*Ouseph, C. J., Neelakanta Menon and Narayana Ayyar, JJ.*) NARAYANA AYYAR *v.* YASODA ANTHARJANAM. 5 Coch.L.J. 746.

INCOME-TAX ACT (VIII OF 1108), S. 44 (1)—*"Business connection"—Meaning of—Branches of non-resident Imperial Bank in British Cochin and Trichur having dealings with residents in Cochin—Liability to income-tax—Deducible expenditure—Onus of proof.*

The Imperial Bank of India has a Branch in British Cochin and another Branch at Trichur. The Bank had regular dealings with the residents in Cochin and remitted the deposits and other amounts to its office at Madras. The question arose if the amount so collected by the non-resident Bank was liable to income-tax.

Held, the Bank was liable to pay income-tax. A non-resident may carry on business in the State without having any branch, office or establishment at all within the State. That the Bank had no office here is no relevant circumstance in this case. Under S. 44 (1) of the Cochin Income-tax Act which corresponds to S. 42 (1) of the Indian Act, all profits or gains accruing or arising to the non-resident, whether directly or indirectly, through or from any business connection in Cochin shall be deemed to be income accruing or arising within Cochin, and chargeable to income-tax in the name of the agent or such person, and such agent shall be deemed to be, for all purposes of the Act, the assessee in respect of such income-tax. When a thing is deemed to be something else the meaning is that whereas it is not in reality that something, the Act requires it to be treated as if it were, with the attendant legal consequences. The deciding factor is the existence of a business connection in Cochin through or from which profits have arisen. The expression 'business connection' is, no doubt, vague and elastic and one would probably have desired to see more precise phraseology adopted in a fiscal enactment like the Income-tax Act. The meaning, however, does not admit of much doubt, for the context shows that the tax is levied on such gains or profits of the non-resident which are attributable to the connection he has in Cochin with or through a business. A non-resident assessee may be said to have business connection in Cochin if he has a connection in Cochin and if that connection is on account of business. If there is a business in Cochin and if a non-resident is interested in that business, he has business connection in Cochin. Likewise if he has a business outside Cochin and if he has established a connection in Cochin in the course of and for the purpose of the business, he has business connection in Cochin. The connection is established by a course of dealings with residents in the State. If there are dealings sufficient to establish a connection with the residents in the State, it is immaterial whether these dealings take place within the State or outside the State. In the present case it cannot be denied that the dealings between

INCOME-TAX ACT (1108), S. 44.

the Branch at British Cochin and the residents in the

in the concerns of the customers resident in the State. To say that the connection between them began and ended when the several transactions were entered into or closed at the office of the branch in British India is not a reasonable way of describing the operation of the transactions. The Branch at British Cochin has 'business connection' in Cochin within the meaning of S. 44 (1) of the Act. The onus is on assessee to prove that remittances to Madras did not produce profits. The question whether a particular expenditure is expenditure incurred solely for the purpose of earning income is really one of fact. (*Ouseph, C. J., Neelakanta Menon and Narayana Ayyar, JJ.*) THE IMPERIAL BANK OF INDIA, TRICHUR *v.* SIRKAR. 5 Coch. L J. 679.

INSOLVENCY ACT (VII OF 1098), S. 54—*Construction—3 month's time expiring during holidays—Insolvency petition presented on re-opening day—Maintainability.*

re-

presented. (*Ouseph, C.J. and Narayana* GOVINDA MENON *v.* GOPALA MENON RECEIVER.) 5 Coch. L J. 714 = 29 Coch. L J. 474.

KURI—*Default of Starter—What amounts to—Winding up with consent of majority of subscribers—Effect of.*

It cannot be said that the starter of a kuri is not to be treated as a defaulter simply because the kuri was wound up with the consent of a majority of subscribers (*Ouseph, C.J. and Narayana Ayyar, J.*) RAMAN *v.* SANKARAN. 5 Coch. L.J. 715.

KURIES ACT (VII OF 1107), Ss. 49 and 45—*Retrospective operation—Kuries terminating prior to Act—If affected—Interest.*

J.) VELOOR CHURCH *v.* PORANCHU. 5 Coch. L. J. 711 = 29 Coch. L.R. 298.

——S. 50 (2)—*Subscriber in illegal kuri taking assignment of mortgage right in satisfaction of amounts due—Mortgage right becoming unenforceable—Right of suit for kuri money*

A subscriber to an illegal kuri had taken an assignment of a mortgage right in satisfaction of kuri money due. The mortgage became unenforceable on account

in satisfaction of the kuri amount.

the he *seph, C.J.* I BAPPU- L.J. 696 = 29 Coch. L.R. 255.

LANDLORD AND TENANT—*Rent—Apportionment of—Agricultural lease—Double crop lands—Principle applicable.*

There is no rule of law which says that in the case of an agricultural lease the lessor is absolutely prevented from claiming rent for the reason the lease was terminated and the property surrendered before the expiry of the time stipulated for payment of rent. In the case of

NAIR ACT (1095).

lands on which more crops than one are raised, of 'enant before the surren- has no reference to any apportioned. Scope of indicated. (*Ouseph, C.J. Neelakanta Menon and Narayana Ayyar, JJ.*) GOVINDA MENON *v.* RAVUNNI MENON. 5 Coch. L.J. 720.

LAND TENURES—*Pandaravaka Danom—Nature and incidents of grant.*

Pandaravaka Danom is a grant of the entire proprietorship or jenm of the land. Danom holdings pay only puravaka assessment. They are alienable and are not subject to renewal. (*Ouseph, C.J., Neelakanta Menon and Narayana Ayyar, JJ.*) NARAYANA AYYAR *v.* YASODA ANTHARJANAM. 5 Coch. L J. 746.

LEASE—*Abatement of rent—Acquisition of portion of leased property—Tenant's right to abatement.*

In a suit for rent the defendant contended that he was entitled to a proportionate abatement of rent by reason of the acquisition of a portion of the leased property.

Held, the lessee was not so entitled under the law. (*Neelakanta Menon and Narayana Ayyar, JJ.*)

determined.

A person who is sued as the legal representative of a deceased person can be made liable personally only to the extent of property which has been proved to have come into his possession and has not been duly accounted for by him. The liability may be determined in the suit itself and it is not always necessary to defer the question of the extent of personal liability to the stage of execution. (*Ouseph, C.J. and Neelakanta Menon, J.*) LONA *v.* RAMUNNI NAYAR. 5 Coch. L J. 658.

AW—*Nambudiris—Debt—Bond by ll other adult members—If binds illom necessity.*

ving been executed by a karanavan of a Nambudiri illom in conjunction with all the other adult members of the illom, there is a presumption that it was for purposes binding on the illom. (*Neelakanta Menon and Narayana Ayyar, JJ.*) ARYA ANTHARJANAM *v.* THE IRINJALAKUDA CATHOLIC BANK LTD. 5 Coch. L.J. 601

——*Nambudiris—Debts—Loan by all the members—Presumption of tarwad character—If binds illom—Burden of proof.*

Where all members then living in a Nambudiri illom

NAIR ACT (XIII OF 1095) —*Tarwad—Separation of some members—Effect—Attachment of tarwad property for debt of member—Permissibility.*

It is settled law that the share of an undivided member of a marumakkathayam tarwad in the tarwad property is not liable to be attached until a severance in status has been created. In the absence of indication of any such intention, the members of a marumakkathayam tarwad from whom some others became divided

NAIR ACT (1095), S. 15.

attached for the debt of one, and the other can object to such attachment. (*Ouseph, C.J. and Narayana Ayyar, J.*) MADHAVA MENON *v.* KUNCHI AMMA.

5 Coch. L.J. 643.

——**S. 15**—*Scope of—Applicability to non-nayars.*

S. 15 of the Nayar Act is applicable to all non-Nayars who can validly contract marriages with Nayar ladies. (*Ouseph, C.J. and Neelakanta Menon, J.*) NEELAKANTA MOOSAD *v.* PARVATHI AMMA.

5 Coch. L.J. 733.

PENAL CODE (I OF 1059), S. 357—*Applicability—Penetration between the thighs—Offence.*

Introduction of the male organ between the thighs is against the order of nature and is punishable under S. 357, C. P. Code. (*Ouseph, C.J. and Narayana Ayyar, J.*) ALUVI *v.* SIRKAR. 5 Coch. L.J. 702= 29 Coch. L.R. 268.

PRACTICE—Procedure—Legal representative — Personal liability of for debts of deceased—Determination —Proper stage—Suit or execution. *See* LEGAL REPRESENTATIVE—LIABILITY FOR DECEASED'S DEBTS.

5 Coch. L.J. 658.

——*Revision—Appealable order—Revision—If lies.*

Where an order is appealable, no revision lies. (*Neelakanta Menon and Narayana Ayyar, JJ.*) VARKEY *v.* HAJEE M. SHEIKH ABDUL KARIM & CO.

5 Coch. L.J. 662.

PRINCIPAL AND AGENT—*Trust—Purchase of property by agent in own name—Right of principal as against transferee from agent—Notice of trust—If to be express—Trusts Act, S. 3.*

The law is well settled that where an agent who is employed to purchase a property on behalf of the principal purchases it in his own name or on his own behalf becomes a trustee thereof for the principal. The principle applies whether the fiduciary makes the purchase in repudiation of the principal's right, or whether he makes the purchase with the intention of holding the property for the benefit of his principal. It is also well-settled that in either case the *cestui que* trust can follow and recover the property unless it has gone into the hands of a transferee in good faith for consideration without notice of the trust. Notice may be eit[illegible] [illegible] or constructive and has been defined in S. 3 [illegible] an Trust Act which is nothing but the cod[illegible]

T. P. ACT (1882), S. 56.

Where a tenant executes a lease of property to the landlord Devaswam, and the land is sold for arrears of revenue from the devaswam, the purchaser at such revenue sale is bound by the tenant's lease. Ss. 32 and 47 of the Revenue Recovery Act provide that all engagements entered into by the defaulter with his tenants except certain contracts excluded by S. 32 shall be binding on the purchaser. Consequently the lease is binding on the purchaser as it is on the Devaswam, and the right of the lessee is not affected by the revenue sale. An incumbrance as contemplated by S. 48 is a liability resisting on an estate, but a lease with a premium cannot create a charge. Such a lease is not an incumbrance under S. 48. (*Ouseph, C.J. and Neelakanta Menon, J.*) RAMANKUTTI MENON *v.* MEEMIKUNHI HAJI.

5 Coch. L.J. 655.

REVIEW—*Grounds for—Interests of justice.*

Interests of justice, by itself, cannot be a ground sanctioned under the C. P. Code for a review. (*Ouseph, C.J. and Neelakanta Menon, J.*) YUSUF SAIT *v.* ACHUTHAN. 5 Coch. L.J. 674.

TENANCY ACT (XV OF 1113), S. 2, (d)—*Applicability—Panayam in renewal of Kanom—Right to compulsory renewal.*

A provision for surrender after 12 years is a common feature of ordinary kanom documents. Even where there is a provision in a kanom document for surrender after 12 years, the kanom tenant is entitled to take advantage of the Act and insist on a renewal where the holding is, more than 30 years old. The right of compulsory renewal is not an ordinary incident of every kanom demise, but is one which is conferred by statute in regard to kanoms coming within the purview of Chapter III of the Act. It is the liability to pay a renewal fee on the renewal of the demise, and not the right to get a renewal of the demise, that is described under S. 2 (*d*) of the Act as one of the incidents of a Kanom. A panayam in renewal of a Kanom in respect of a holding over 30 years old must be held to be a Kanom for purposes of S. 2 (*d*). (*Ouseph, C.J. and Narayana Ayyar, J.*) NARAYANA KARTHA *v.* ITTAMAN. 5 Coch. L.J. 635.

TRANSFER OF PROPERTY ACT (1882), S. 55

(*[illegible] equitable lien—If distinct from statutory lien—[illegible] lien for unpaid purchase money—Suit for*

T. P. ACT (1882), S. 56.

from items not sold to him—Sustainability—Plea for rateable contribution—If can be raised in execution.

Where in a mortgage suit the decree holder consents to the rateable contribution by one judgment-debtor mortgagor, the assignee of the mortgage decree, in later execution proceedings, is estopped from claiming full amount from such a debtor. An order made on consent

amount reserved in the sale deed to the mortgagee

between purchasers themselves, the properties in their possession are equally liable to contribute It is a well-established principle of law that, when a mortgagee acquires a part of the mortgaged property, the integrity of his mortgage is broken and he can no longer compel the mortgagor to pay the whole of the mortgage money before redeeming the rest of the mortgaged property. This principle embodied in S 60 of the T. P. Act has been applied to a suit for sale by a mortgagee who has acquired part of the equity of redemption. When the mortgagee buys a portion of the mortgaged

WILL.

property the rights of the mortgagee and the mortgagor as regards the portion purchased become vested in the same person and the result is that a part of the mortgage debt is wiped out by reason of the fusion of interests, and the balance alone is recoverable from the remainder of the property. So much of the debt is held to be discharged as is proportionate to the value of the ... respect of which the confluence of rights has ... There is no difference in principle where ... of part of the mortgaged property subse... quires the rights of the mortgagee under a decree obtained by him for sale of the mortgaged properties. Plea of rateable contribution or partial ... cree can be pleaded even in the ... (*Ouseph, C.J. Neelakanta Menon and ... J.*) RAMAN MENON *v.* RAMAS-

5 Coch. L.J. 663.

... S—Notice—Constructive notice—Sufficiency. *See* PRINCIPAL AND AGENT—TRUST.

5 Coch. L.J. 620.

WILL—*Probate—Necessity—Right of debtor to insist on its production.*

There is no absolute right in a debtor to refuse payment of debt unless probate of will is produced. The question will depend upon the facts and circumstances of each case. (*Ouseph, C.J. and Neelakanta Menon, J.*) OUSEPH ANTHONY *v.* MARIAM.

5 Coch. L.J. 707 = 29 Coch. L.R. 289.

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"THE YEARLY DIGEST"

OF

INDIAN AND SELECT ENGLISH CASES.

I—INDIAN DECISIONS.

ADVERSE POSSESSION — *What constitutes—Hindu in possession of mosque for over 12 years—User inconsistent with the character of the building—*...

...this mosque had been unaware of these acts of user by the Hindu, the fact of ignorance ... abandonment could not be a ... adverse possession. 'It is suffic... be overt and without any atte... that the person against whom he exercises due vigilance, be aware of what is happening'. *Ex hypothesi* any mosque is a building in respect of which the local Mahomedan worshippers are expected to be continuously aware of its conditior ... misuse. If by many years of practical ... they remain unaware of acts of misuse by t... the premises in which the mosque is situat... possible for them to say that by the ex... vigilance they could not be aware of what ... (*Thomas, C.J. and Yorke, J.*) MUSAHEB KHAN *v.* RAJ KUMAR BAKHSHI. 1938 O.A. 722= 1938 O.L.R. 435=1938 O.W.N. 937.

AGRA TENANCY ACT (III OF 1926), S. 44—*Suit under, by a zamindar, one of several co-sharers—Maintainability—Refusal of others to join—Remedy.*

A suit under S. 44 of the Tenancy Act can only be brought by the landholder and the landholder is the entire co parcenary body. So one or more of the co-sharers only cannot bring a suit under S. 44. If a ...

1938 A.W R. (B.R.) 321=1938 R.D. 789.

——Ss. 44 and 99—*Suit by tenant to eject trespasser—Limitation—Starting point.*

Where a tenant sues to eject a person as a trespasser, time for such a suit begins to run only from the time the tenant is ousted from possession either by the zamindar or the trespasser claiming under the zamindar The mere giving of a receipt for rent to the trespasser by the zamindar after the filing of the suit could not amount to an overt act to oust the tenant from possession. (*Bomford, J. M.*) BHAGIRATH TEWARI *v.* ATIRAJI. 1938 A.L J. (Supp.) 77=1938 R.D. 778.

AGRA TENANCY ACT (1926), S. 132.

——S. 45—Fixation of rent—Procedure—If can be done in a suit under S. 132. *See* AGRA TENANCY ACT, ...D 45. 1938 A.W R. (H.C) 634 (2).

...79 and 80—*Ejectment under S. 80—Tenant ...d insolvent during period for which decree ...d—Legality of ejectment—Tenancy, if vests ...—Provincial Insolvency Act* (1920), *S.* 28

An order for ejectment in respect of an unsatisfied ...

v. QAMAR UL-HASSAN KHAN. 1938 R D. 787.

——S. 86—*Ejectment of sub-tenant—Failure to establish sub-tenancy—Effect.*

... 1938 R. D. 783.

——Ss. 86, 92 and 205—Suit under—Stay of Proceedings Act, if apply to. *See* U. P. STAY OF PROCEEDINGS ACT. 1938 R.D. 801.

——S. 95—*Proof of re-admission to tenancy—Mere acceptance of rent—If sufficient.*

The mere acceptance of rent by the zamindar is not necessarily evidence of a contract of tenancy. According to S. 95 of the Tenancy Act the re admission of an ejected tenant should be in writing. (*Darling, S.M. and Mehta, J.M.*) RADHEY MOHAN LAL *v.* RICHHPAL SINGH. 1938 A.W.R. (B R.) 320= 1938 R D. 788.

——Ss 132 and 45—*Suit for arrears of rent—If competent, when rent not settled—Proper procedure.*

A suit for arrears of rent could only be decreed, if the rent was fixed from before. So it is not competent for a Court to fix rent in a suit for arrears. If the rent is unsettled, the proper course is for a plaintiff to have it fixed by a suit under S. 45 of the Tenancy Act and then sue for arrears under S. 132. (*Misra, J.*) KUNDAN *v.* JAWAHAR SINGH. 1938 A.W.R. (H C.) 634 (2)= 1938 R.D. 804.

——Ss. 132 (2) and 216—*Land occupied by tenants—Lessee of tenants' rights—Position of—S. 132 (2) if can be used against such a person.*

AGRA TENANCY ACT (1926), S. 132,

Though a proprietor can give as many leases as he likes, he cannot superimpose a tenant over existing tenants. Where land is already occupied to a great extent by tenants, what purports to be a lease of tenant's rights must be either regarded as void or as a lease of thekadari rights. S. 216 of the Tenancy Act is clear that S. 132 (2) cannot be used as against a thekadar for recovery of arrears of rent in respect of such a lease. (*Darling, S.M. and Bomford, J.M.*) RAM NATH SINGH *v.* SECRETARY OF STATE. **1938 R.D. 796.**

——**Ss. 132 (2) and 252**—*Order by Collector on application under S. 132 (2), for realisation of arrears of rent—If revisable by Board.*

Where a case comes before a Collector because it was filed under S. 132 (2) of the Tenancy Act for realisation of arrears of rent, revision will lie to the Board in respect of any order that may be passed therein. (*Darling, S.M. and Bomford, J.M.*) RAM NATH SINGH *v.* SECRETARY OF STATE. **1938 R. D. 796.**

——**Ss. 224 and 230**—*Suit to recover malikana dues—Forum—Civil or Revenue Court.*

Where by an order of the Settlement officer a certain percentage of the assets was fixed as malikana payable to a superior proprietor by an inferior proprietor, it represents the former's share of the rent payable by the tenants to the landholder and so they come within the words 'rent due to him as such' in S. 224 of the Agra Tenancy Act. S. 230 of the Agra Tenancy Act becomes applicable to such a suit and hence any suit in respect of a malikana would not be cognizable by a Civil Court and can be brought in the Revenue Court. (*Bennet, A.C.J. and Verma, J.*) BHAGWAN SINGH *v.* IMRAT SINGH. **1938 A.W.R. (H.C.) 594= 1938 A.L.J. 936=1938 R.D. 790.**

——**Ss. 248 (3) and 252**—*Stay of execution of decree for ejectment—Appeal, if lies to District Judge —Revision to Board—Competency.*

Where an Assistant Collector stays the execution of a decree of ejectment, the order though one under S. 47, C. P. Code, will not be open to appeal to District Judge by reason of Ss. 248 (3) and 242. Hence it is open to revision by the Board under S. 252. (*Darling S.M. and Mehta, J.M.*) HOLDSWORTH *v.* ZAMINDAR CHAUDHURI. **1938 R.D. 801.**

——**S. 252**—Order on application under S. 132 (2) of the Tenancy Act—If revisable. *See* AGRA TENANCY ACT, SS. 132 (2) AND 252. **1938 R. D. 796.**

——**S. 252**—*Powers of revision—Improper admission of application under S. 132 (2)—Interference.*

The Board has full powers of revision under S. 252, if the Collector has improperly admitted an application under S. 132 (2) of the Act against a Thekadar, notwithstanding the provisions of S. 216 of the same Act. (*Darling, S.M. and Marsh, J.M.*) SECRETARY OF STATE *v.* RAM NATH SINGH. **1938 R.D. 798.**

——**S. 252**—Revision—Competency—Order staying execution of decree for ejectment. *See* AGRA TENANCY ACT. SS. 248 (3) AND 252. **1938 R.D. 801.**

ARBITRATION—*Award—Setting aside of—Submission of specific question of law.*

Where it is alleged that there was a submission of a specific question of law, it must be such that it can be fairly construed to show that the parties intended to give up their rights to resort to the King's Court, and in lieu thereof to submit that question to the final decision of a tribunal of their own. Where circumstances are not such, then the Court is entitled to interfere with the decision of the arbitrator. (*Costello and Lort Williams, JJ.*) GOPINATH *v.* SALIL KUMAR MITTER. **A.I.R. 1938 Cal. 705.**

——*Award—Validity—Absence of an arbitrator at all sittings.*

If any one of the arbitrators was not present at all the sittings, that would affect the validity of the award. (*Niyogi, J.*) RAMDHAR RAM *v.* SANTADAR. **A.I.R. 1938 Nag. 492.**

ARBITRATION ACT (IX OF 1899), S. 15—*Reference to arbitration by company—Decree passed on award and executed by Court without objection—If* ultra vires *—Points decided in such proceedings—If* res judicata.

Where in a reference to arbitration by a limited liability company a decree is passed by a Sub-Judge and is executed without objection by the judgment-debtor, the question whether the decree could be executed in that Court or not does not become *res judicata.* The decree is a nullity in such arbitrations because it is the award which has to be executed. It follows that the Court should ignore the decree and the execution of such decree is *ultra vires. A fortiori* a point decided in such *ultra vires* proceedings cannot become *res judicata.* It is the award which has to be enforced and it can only be enforced by the District Judge and no one else. A.I.R. 1933 Pesh. 66, Rel. on. (*Almond, J.C. and Mir Ahmad, J.*) PEOPLES BANK OF NORTHERN INDIA, LTD. *v.* PADAM LAL. **A.I.R. 1938 Pesh. 54.**

BENAMI—*Proof—Evidence requisite.*

In order that a property may be shown to be benami, it is not only necessary to show that it was purchased by another's money, but it is necessary to show that it was purchased by that other, benami. But circumstances in India are such and the habits of society are such, that evidence which might not be sufficient in England to show that the property was benami would be sufficient in India. (*Davis, J.C. and Mehta, J.*) VIRANBAI *v.* PARMANAND THANGALDAS. **A.I.R. 1938 Sind 206.**

BENGAL LAND REVENUE SALES ACT (XI OF 1859), S. 33—*Revenue sale—Setting aside—Money paid to credit of estate—Misdescription of touzi—Effect of.*

In a suit for a declaration that the sale was a nullity on the ground that there were no arrears, the existence of which alone could authorzie the Collector to hold the sale, it is incumbent upon the plaintiff to establish that the Collector was in possession of money belonging to the plaintiff and indisputably placed to his credit. When the estate has been correctly described and money paid to the credit of the estate, no sale under law is permissible and, it is immaterial that certain erroneous debit entries were made by the Collectorate officers to which the proprietor was not a party. When however there is a misdescription of the touzi and it is not undisputed that money has been placed to the credit of a particular estate, different considerations arise. The Collector may in such cases justly hesitate to credit the amount to one estate rather than to the other. The rules framed by the Revenue Department make detailed provisions, as to the duties of the Collectorate officers who are entrusted with the charge of receiving these payments in such cases. Where there is a violation of these rules by the officers concerned and the proprietor is not given an opportunity to rectify the mistakes, a sale without giving the proprietor such opportunity is without jurisdiction. (*B. K. Mukherjea, J.*) MANODA MOHINI DAS *v.* SAKINA BIBI. **A.I.R. 1938 Cal. 738.**

BENGAL PUBLIC GAMBLING ACT (II OF 1867), S. 11—*Possession of racing guides and notes on horses—Inference from.*

Having racing guides and notes on horses does not necessarily justify the inference that accused were taking

BENG. TENANCY ACT (1885), S. 3.

unauthorized bets' It is not unlawful for men to possess racing guides and notes on horses specially when they are on their way to the racecourse to attend the races. (*M. C. Ghose, J.*) PRAFULLA KUMAR MUKHERJEE v. EMPEROR. A.I.R. 1938 Cal. 713.

BENGAL TENANCY ACT (VIII OF 1885 as amended in 1928) S 3 (17)—*Applicability—Bargadar agreeing to cultivate land and pay half produce to landlord—Suit by landlord for produce for period subsequent to year 1929.*

The question whether a Bargadar in a particular case is a tenant or not is a question to be decided on facts of each case. Certain land formerly belonged to *A*. Subsequently *A* and his co-sharers transferred their raiyati interest to *B* and obtained from him a barga kabuliat by which *A* agreed to cultivate the land and pay half produce to *B*. *B* brought a suit for produce for the period subsequent to the year 1929.

Held, that on facts as well as according to the amendment of S. 3 (17) which applied to the case as the suit was in respect of years subsequent to 1929, the bargadar was not a tenant and this being so, the Court of Small Causes had jurisdiction to ente ... Ghose, J.) SISHU MOHAN K... NATH SARKAR. ...

——**S. 26-F**—*Proceedings under—Nature of—Vendee a minor—Appointment of guardian* ad litem—*If essential.*

Pre emption proceedings under S. 26 F are in the nature of suits. Hence if the vendee be a minor the appointment of a guardian *ad litem* is mandatory and an order passed in a proceeding under S 26-F against a ...

proceedings after giving an opportunity to the appellant of getting the minor properly represented by a guardian. (*Sen, J.*) BIMAL KUMAR HUI v. PURNIMA DASI. A.I.R. 1938 Cal. 736.

BOMBAY CHILDREN ACT (XIII OF 1924), Ss. 3 (a) and (c) and 22—*Conviction of youthful offender—Detention in prison—Certificate—Necessity.*

Where the accused, convicted of the offence of murder, is a child within the meaning of Cl. (*a*) of S. 3, and is a youthful offender within the meaning of Cl. (*c*), the Court can lawfully commit him to prison only under the provisions of S. 22 after it certifies that the boy is so unruly or of so depraved a character that he is not a fit person to be sent to a ce... none of the methods by whic... dealt with is suitable. (*Davi*... EMPEROR v. KAURO MIZARI. ...

BOMBAY CIVIL COURTS ...
S. 8—*Applicability—Suit for ac*... *sub-Court in Bombay—Plaint valued at Rs. 200—Decree for over Rs. 5000—Appeal—Forum.*

In a suit for account filed in the Court of a Second class Subordinate Judge in Bombay, the plaint was valued at Rs. 200, but the decree passed was for over Rs. 5000.

Held, that S. 8 of the B... the law governing appeal, ... appeal lay to the District ... Court. (*Macklin and S*... RAO v. CHIMABAI PRABH...

BOMBAY COURT OF ...
S. 44 A—*Power to call for documents.*

BOM. PREVEN. OF ADULT. ACT (1925), S. 13.

S. 44 A gives the Court of Wards power to call for production of documents for the purposes of the Act referred to in S. 4 and other sections of the Act and not only for the purposes of Ss. 15 and 16; and an enquiry under Ss. 15 and 16 is not a condition precedent for the exercise of the power. So also the mere fact that a claimant to the estate has filed a civil suit against the Court of Wards would not deprive it of the power to call for documents under S. 44 A. (*Davis, J.C. and Mehta J.*) TAKHTRAM TULSIDAS v. EMPEROR. A.I.R. 1938 Sind 217.

BOMBAY HEREDITARY OFFICES (WATAN) ACT, S. 5—*Permanent lease of watan land—Validity.*

A permanent lease of watan lands is expressly prohibited by S. 5 of the Bombay Watan Act. (*Broomfield and Macklin, JJ.*) BABASAHEB APPASAHEB v. LAXMANAPPA RAMAPPA. 40 Bom L R. 1015.

BOMBAY LAND REVENUE CODE (V OF 1879), S. 84—*Notice under—Proper service of—What amounts to—Notice sent by registered post but refused by tenant—Sufficiency.*

All that S. 84 of the Bombay Land Revenue Code ...

held that the notice is properly served. (*Broomfield and Macklin, JJ.*) BABASAHEB APPASAHEB v. LAXMANAPPA RAMAPPA. 40 Bom.L R. 1015.

BOMBAY PREVENTION OF ADULTERATION ACT (V OF 1925), S. 4 (1) (a)—*Applicability—Sale to public officer—Offence.*

An offence under S. 4 (1) (*a*) is committed in respect of adulterated food even though it is purchased by a public officer as such public officer. (*Davis, J.C. and Lobo, J.*) GOBINDRAM JAMIATRAI v. KARACHI MUNICIPAL CORPORATION. A.I.R. 1938 Sind 218.

——**S. 4 (1) (a)**—*Liability of sleeping partner.*

A proprietor of a shop is liable for the sale of adul- ...

——**S. 12 (1)**—*Complaint addressed to Bench of Honorary Magistrates as such—Verification of complaint signed by one Magistrate only—If implies presence of one only.*

In Hyderabad the Magistrates who constitute the 'B' Bench, are Magistrates of the Second Class only when sitting together as a Bench, and when sitting ...

... LALARAM LALAKMAL v. WADHUMAL. A.I.R. 1938 Sind 209.

——**S. 13 (1)**—*Scope—Summons not applied for within 30 days—If fatal.*

S. 13 should be considered separately as regards its ...

BOM. PREVEN. OF ADULT. ACT (1925), S. 13.

——S. 13 (2)—*Scope—If mandatory—Absence of date in summons—If fatal.*

Though it is very desirable indeed that the provisions of S. 13 (2) should be closely followed, that the name of the complainant should be given, the name and place fixed for hearing should be shown, it cannot be held that if for instance the date be omitted from the summons it would be a fatal flaw in the proceedings. All that can be said is that it is an irregularity which can be cured, if necessary, by an issue of amended summons and by the Magistrate allowing such adjournment as the omission of any particular from the summons may seem to require so as to give the accused the notice in the summons to which he is entitled. (*Davis, J.C. and Mehta, J.*) LILARAM LADAKMAL *v.* WADHUMAL.
A.I.R. 1938 Sind 209.

BUDDHIST LAW (Burmese)—*Family living in patriarchal state—All working and living together—Members seeking service and remaining separate—Returning after father's death and continuing father's business—Separate banking account—If separate property.*

Where a family kept together in a kind of patriarchal state all working for the father and after him for the mother, and none having any separate property of their own, only getting their boarding, clothing and pocket-money, and where one member went out and found work and remained apart, but came back on his father's death and continued his father's business and had a separate banking account of his own as distinct from that of the family, *prima facie* his banking account would be his personal property until the contrary is shown. (*Baguley and Shaw, JJ.*) DAW KYIN *v.* MA HLA YI. **176 I.C. 909=11 R.R. 89= A.I.R. 1938 Rang. 71.**

——(**Burmese**)—*Sayadaw—Right to evict monk—Grounds.*

A Sayadaw or presiding monk of a kyaungtaik which is sanghika and not poggalika property is not entitled to evict a monk merely on the ground that the latter challenges the position of the plaintiff to be the poggalika owner of the property, in absence of proof of any misconduct on his part or of such behaviour as would render his eviction from the kyaungtaik desirable. The sanghika property does not belong to any particular person or group or section. It partakes of the nature of public religious property. When a kyaung becomes vacant, there is nothing wrong in a monk who comes peaceably in to dwell in the kyaung. (*Roberts, C.J. and Dunkley, J.*) U EINDAWBATHA *v* U ZANEENDA.
A.I.R. 1938 Rang. 396.

BURDEN OF PROOF—*Suit on mortgage—Plea by defendant that he was a minor on date of mortgage—Onus.*

A defendant pleading that he was a minor on the date of execution of a mortgage deed on which a suit is brought has the onus upon him to prove the same. (*Leach, C.J. and Varadachariar, J.*) DHANAPALA CHETTI *v.* GOVERCHAND SOWCAR.
1938 M.W.N. 938=(1938) 2 M.L.J. 775.

BURMA CO OPERATIVE SOCIETIES ACT (VI OF 1927), S. 50 (2) (f)—*Rules made under—R. 15—Jurisdiction of Civil Courts, if taken away.*

The rules made under the Burma Co-operative Societies Act take away by implication the jurisdiction of the Courts in respect of disputes contemplated under R. 15. (*Roberts, C.J., Dunkley and Braund, J.*) H. C. DEY *v.* BANGALEE YOUNG MEN'S CO-OPERATIVE CREDIT SOCIETY LTD. **A.I.R. 1938 Rang. 392 (F.B.).**

BURMA FERRIES ACT (II OF 1898), S. 12—*Rules under R. 4-A—If* ultra vires.

C. P. LAND REV. ACT (1917), S. 125.

R. 4-A of the rules as framed under S. 12 of the Burma Ferries Act is *ultra vires.* It cannot be said that the rule is one consistent with the Act, framed for carrying out its purposes and objects. (*Baguley and Mosely, JJ.*) SHWE PHONE *v.* CHAIRMAN, DISTRICT COUNCIL, MERGUI. **A.I.R. 1938 Rang. 384.**

——S. 15—*Ply for hire—Meaning—Test.*

A person is said to ply for hire a ferry when he waits or attends on the bank or in the stream regularly (that is to say not uninterruptedly, for it might be done periodically, but regularly in the sense of repeatedly, making a business of it), for hire by the public or by anybody who chooses to employ him to cross the river or convey goods across the river. (*Baguley and Mosely, JJ.*) SHWE PHONE *v.* CHAIRMAN, DISTRICT COUNCIL, MERGUI. **A.I.R. 1938 Rang. 384.**

BURMA GENERAL CLAUSES ACT, S. 16—Scope and effect of. *See* C. P. CODE, O. 40, R. 1 and O. 43, R. 1 (*s*). **A.I.R. 1938 Rang. 387.**

CANTONMENTS ACT (II OF 1924), S. 259—*Remission of tax—Revocation—Claim to recover money due—Nature of.*

Where there is a revocation of certain remission of tax and the Cantonment Board applies under S. 259 of the Cantonments Act for recovery of the amounts due, its claim is only for arrears of taxes. The circumstance that the amount was once remitted does not change the nature of the claim. (*Weston, I. C. S.*) TARA CHAND *v.* CANTONMENT BOARD, NASIRABAD.
1938 A.M.L.J. 106.

——S. 259—*Scope of—If confined to arrears prior to amendment.*

S. 259 of the Cantonments Act is not necessarily confined to arrears of taxes due prior to the amendment. The amendment creates no fresh liability to pay nor does it in any way enlarge the liability. It merely provides a procedure for recovery. (*Weston, I. C. S.*) TARA CHAND *v.* CANTONMENT BOARD, NASIRABAD.
1938 A.M.L.J. 106.

CENTRAL PROVINCES DEBT CONCILIATION ACT (II OF 1933), S.2 (e)—*'Debt' if excludes arrears of rent.*

The definition of 'debt' given in the Central Provinces Debt Conciliation Act does not exclude arrears of rent. (*Niyogi, J.*) CHANDANLAL *v.* SAMBHAJI.
1938 N.L.J. 360.

——**S. 8 (2) and Civil Procedure Code, O. 21, R. 15**—*Joint decree—Application to Debt Conciliation Board—Issue of notice to one of the decree-holders only—Failure to comply with—Discharge under S. 8 (2) of entire debt—Other decree-holder, if can apply for execution of whole decree.*

There was a decree in favour of two persons. Though the debtor applied to the Debt Conciliation Board for the settlement of his debts and mentioned the names of both the decree-holders, notice was issued to only one of the them and on his failing to comply with the notice the entire debt was discharged under S. 8 (2) of the Act. The other decree-holder was held entitled to execute his decree, but only to the extent of his own interest in the decree. Under O. 21, R. 15, C. P. Code, the decree-holder cannot apply for execution of the whole decree when by a special Act part of the decree has been declared satisfied. (*Gruer, J.*) VITHALRAO *v.* LALLOO DOMA. **1938 N.L.J. 361.**

CENTRAL PROVINCES LAND REVENUE ACT (II OF 1917), Ss. 125 and 128—*Sale for arrears of land revenue—Absence of notice to mortgagee not in possession—Sale, if invalid—'Assigns' in S. 125, meaning of.*

C. P. LAND REV. ACT (1917), S. 138.

A sale for non-payment of arrears of land revenue is not bad for failure to conform to the requirements of S. 128 of the C. P. Land Revenue Act, simply because a notice of demand had not been served on the mortgagee of the village as a defaulter. S. 125 in stating who are defaulters has included the 'assigns' of a person with whom the settlement was made, but by an explanation, has made it plain that 'assigns' includes a mortgagee in possession only. *(Pollock and Niyogi, JJ.)* SURAJDEEN *v.* ISHWARI PRASAD. 1938 N.L.J. 342

——**S. 138**—*Sale proclamation in terms of—Sale, if free from encumbrances—Presumption.*

Under S. 138 of the Land Revenue Act, sale [illegible] of encumbrances is the rule and sale subject to enc[illegible] brances is an exception. When a Deputy Commissio[illegible] signs a proclamation in terms of S. 138, it is unne[illegible] sary to pass an express order that the [illegible] of encumbrances *(Pollock and Niyo*[illegible] DEEN *v.* ISHWARI PRASAD. 1[illegible]

——**S. 187**—*Lambardari Rules—R*[illegible] *and* **11 (1) (b) (iii)**—*Scope of.*

The qualifications for lambardarship laid down in Rr. 11 (1) (b) (*ii*) and 11 (1) (b) (*iii*) of the Lambardari Rules are to be only a guide to the Revenue Officers in making the appointment and the rules should not be read as attaching more weight to one consideration than to another. The decision has to be made after taking into account all the considerations. *(Roughton, F.C.)* GHANARAM *v.* DASRATHRAO. 1938 N.L.J. 365.

CENTRAL PROVINCES LAND REVENUE MANUAL VOL. II, Page 48—*Instructions in—If has the force of law.*

The Central Provinces Land Revenue Manual contains mere executive instructions and they have not the force of law. Failure to observe the instructions does not amount to an illegality so as to invalidate a sale. *(Pollock and Niyogi, JJ.)* SURAJDEEN *v.* ISHWARI PRASAD. 1938 N.L.J. 342.

CENTRAL PROVINCES MONEY-LENDERS ACT (XIII OF 1934), S. 9—*Total interest paid, if relevant.*

According to S. 9 of the Central Provinces Money-Lenders Act, no Court shall decree on [illegible] arrears of interest a sum greater than the [illegible] the loan. The fact that the total interest [illegible] date may amount to more than the principal, is quite beside the point. *(Gruer, J.)* RAMCHANDRA *v* MODHORAO. 1938 N.L.J. 364.

CENTRAL PROVINCES MUNICIPALITIES ACT (II OF 1922), S. 66, Rules under, R. 12 (a)—*Non-domestic purpose—Test—Water used by in-patients in doctor's house—Nature of user.*

The true test to determine whether water is used for non-domestic purpose is to see whether the water is directly used for any trade or business. If the trade or business requires for its prosecution the direct use of water, that use is clearly non domestic; but when the business is of a nature where the use of the water is only incidental although it may be necessary so far as the persons connected with the business are concerned, then it does not cease to be a domestic purpose. Thus when a medical practitioner uses a part of his dwelling-house for providing accommodation for the residence of his in-door patients, he does not [illegible] for his business. The water is [illegible] persons for the same purpose for [illegible] it as a part of the amenities of the [illegible] occupied by them. Hence the water used in connexion with the hospital, that is to say by the in-door patients residing in the building, is not used for any purpose other than domestic purpose. The water does not cease to be domestically used, only because it is used by the patients as opposed to the owner or his family or that the part of the dwelling house is used for professional or business purposes. *(Niyogi, J.)* LAXMAN VASUDEO *v.* MUNICIPAL COMMITTEE, NAGPUR. A.I.R. 1938 Nag. 466.

CENTRAL PROVINCES TENANCY ACT (XI OF 1898), S. 41—*Scheme of the section as regards mortgages.*

The scheme of S. 41 of the Central Provinces Tenancy Act so far as mortgages are concerned is to require [illegible] rent, to [illegible] is to give [illegible] ll or will not [illegible] land free of [illegible] charge on the [illegible] t a transfer [illegible] the scheme, [illegible] the tenant or failing him to give the landlord the right to acquire it at a fair market price. If the option is not exercised the transfer is good *(Stone, C. J. and Clarke, J.)* DARYAD SINGH *v.* KUKDAY. 1938 N.L.J. 366.

CIVIL PROCEDURE CODE (V OF 1908), S. 2 (11)—*Executor—When becomes legal representative.*

Ordinarily a grant of probate refers back to the date of the death of the deceased and the executors become the legal representatives from the time of the death. *(Weston, J. C. S.)* KISHAN LAL *v.* KANHAIYA LAL. 1938 A.M.L.J. 91.

——**S. 2 (11)**—"Legal representatives"—Meaning of—Joint Hindu family—Death of manager—Surviving coparceners—If legal representatives. *See* NEGOTIABLE INSTRUMENTS ACT, S. 8. 40 Bom.L.R. 964.

——**S. 9**—*Special tribunal appointed by statute—Civil Court's jurisdiction.*

Where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those [illegible]

——**S. 11**—*Co-defendants*—Res judicata—*Absence of conflict of interests between defendants* inter se.

If there is no conflict of interests between the defendants *inter se*, and therefore no question to be decided between them, in order to give the plaintiff relief in the suit, there can be no *res judicata* between co-defendants. *(Leach, C. J. and Varadachariar, J.)* DHANAPALA CHETTI *v.* GOWR CHAND SOWCAR. 1938 M.W.N. 938 = (1938) 2 M.L.J. 775.

——**S. 11**—*Heard and finally decided—Appeal filed against a decision—Appellate Court deciding suit on a point different from that decided by the lower Court—Refusal to decide any other point—Decision of the trial Court, if* res judicata *in later suit.*

Where a person sued for possession of certain properties as belonging to a Sangat and that he was its representative, and that a document under colour of which the defendant remained in possession was void [illegible] etc., and where the [illegible] point against the [illegible] urd that the deed [illegible] ossession was void owing to undue influence, etc., and the appellate Court decided only the latter point and refrained from deciding the question as to whether the property belonged to the

C. P. CODE (1908), S. 11.

Sangat or not, a later suit by another representative of the Sangat against the same defendant for possession of the properties on the ground that it belonged to the Sangat is not barred by *res judicata* as the decree of the trial Court merged in that of the appellate Court, and as the latter had disposed of the case on a ground totally different from that of the trial Court, the finding of the trial is no bar. (*Ziaul-Hasan and Yorke, JJ.*) HAR KISHAN DAS *v.* SATGUR PRASAD.

1938 O.A. 746=1938 O.W.N. 962.

——S. 11—Insolvency proceedings—Official Receiver's objections as to the fraudulent nature of a transfer of a decree not upheld, and final decree passed—Official Receiver, if can later on apply under S. 53 of Provincial Insolvency Act. *See* PROVINCIAL INSOLVENCY ACT—S. 53 AND C. P. CODE, S. 11. 1938 A.W.R. (H.C.) 536=1938 A.L.J. 878.

——S. 11—*Might and ought—Hindu joint family—Alienee from member of share in one item of family property—Suit for partition—Coparceners impleaded as defendants—Omission to raise pleas usually open in partition suit—Constructive* res judicata—*Rule—Partial partition.*

There can of course be no compulsory partial partition under the Hindu, whether at the instance of a member of a joint family or at the instance of an alienee from a coparcener of one item of family property. Though the proper course for an alienee is to sue for partition of all the family properties, the Coparceners who may be impleaded in his suit are not bound to insist upon an adjudication in that very litigation of all questions which may properly be agitated in a partition suit between the members of the family. There is nothing to compel the Co-parceners either to insist on a division being effected *inter se* between themselves or to have all questions in dispute between them settled once for all in the alienee's suit itself. Even in a suit instituted by a coparcener the other parceners might well be content to continue undivided and leave the only one to separate the plaintiff from them. There is no principle of law which prevents the coparceners defendants in an alienee's suit from restricting the scope of the suit to what may be necessary for the grant of the relief claimed by the plaintiff. Where the alienee only claims a division of the particular item in which he has acquired a share, the coparceners who are impleaded are bound to plead only what would be answer to the claim made by the plaintiff. The fact that they do not raise other pleas which are not necessary in that suit cannot therefore operate as *res judicata* in a subsequent suit by a coparcener for partition. It would also follow that what is actually decided by the decree passed in the suit cannot be reopened at the instance of any of the persons who are parties to that suit or their representatives. A plea of constructive *res judicata* must be determined only with reference to the suit as framed and not with reference to what under the law the suit must have been. (*Varadachariar and Abdur Rahiman, JJ.*) CHIDAMBARAM CHETTIAR *v.* NACHIAPPA CHETTIAR.

48 L.W. 485.

——S. 11, Expl. V—*Maintenance suit—Prayer that it should be charged on property not granted—Subsequent suit for such charge—Subsequent suit—If* res judicata.

Where a widow in her suit for maintenance asks that her maintenance should be made a charge on the property left by her husband and the Judge assesses the amount of maintenance but does not charge it on any property, she cannot subsequently ask the Court to declare that she is entitled to recover from the property in suit her maintenance which has fallen into arrears or that which will fall due in the future as it is tantamount to a request to charge the property with her maintenance. (*Almond, J. C. and Mir Ahmad, J.*) MT. HOWANI BAI *v.* DEVI DIAL.

A.I.R. 1938 Pesh. 68.

——S. 11, Expl. VI—Representative suit—Suit by Hindu father for benefit of himself and sons—Dismissal on oath taken by defendant—Effect on sons—Fresh suit by latter on same cause of action—*Res judicata. See* OATHS ACT, SS. 8 AND 11. 40 Bom.L.R. 1005.

——S. 20 (c)—*Lease—Lands outside Madras City—Lease executed and registered outside—Agreement of lease in Madras and lessor resident in Madras—Place of payment of rent not specified—Intention of parties—Suit in Madras—Maintainability—Contract Act, S. 49.*

If from the circumstances a contract is entered into, it is reasonable to infer that the intention of the parties was that performance was to be in a certain place, that inference should be drawn whether the rule of the English Common Law which requires the debtor to seek the creditor applies or not to India. Under S. 49 of the Contract Act, it is the duty of the promisor when no place is fixed in the contract for the performance of it to apply to the promisee to appoint a reasonable place for performance of the promise and to perform it at such place. Disregard or neglect by him to perform this statutory duty imposed on him cannot better his position. The S. P. G. Mission having its local office in the City of Madras had certain lands in Shiyali taluk in Tanjore District. An agreement for leasing the lands to the defendant was entered into in Madras. The defendant executed a counter-part of lease in favour of the Superintendent of the Mission who resided in Madras and who was described as such in the lease. But the lease deed itself was executed and registered in Shiyali taluk. The rent was fixed in cash. The lease, however, did not fix any specific place where payment was to be made. A suit for rent was instituted in the City Civil Court, Madras, but that Court returned the plaint holding that it had no jurisdiction as the cause of action did not arise in Madras.

Held, that the intention of the parties must have been that the payment of rent was to be made in Madras which was the place where the local office of the Mission was situated and where the Superintendent lived. The cause of action therefore arose wholly or partly in Madras under S. 20 (*c*), C. P. Code, and the City Civil Court had jurisdiction to entertain the suit. (*Pandrang Row, J.*) SOCIETY FOR THE PROPAGATION OF THE GOSPEL *v.* SAMA RAO NAIDU.

1938 M.W.N. 979=48 L.W. 438.

——Ss. 39 and 42—*Transfer for execution—Executing Court—Powers—Relief in excess of sum in certificate—Competency to give.*

A Court executing a decree sent to it, has the same powers in executing it, as if it had been passed by itself. It only executes the decree and not the certificate sent by the Court passing the decree. As such it is not bound by any amount mentioned in it. It is the decree itself which is to be the guide in these matters for the executing Court. It is competent to execute it for the amount due though it may be in excess of that mentioned in the certificate. (*Misra, J.*) MANGAL CHAND *v.* MT. DULARI BIBI. 1938 A.W.R. (H.C.) 667.

——S. 39 (d)—*Small Cause Court transferring execution application to its regular side—Jurisdiction to proceed against immovable property.*

It is a principle of the interpretation of statutes that where a list of certain circumstances in which a particular act can be done is followed by a general clause, that clause must be interpreted as referring to circum-

stances ejusdem generis as those which have been recited in the foregoing clauses. Sub-cl. (*d*) of S. 39 must be interpreted on these principles and it was not intended by the Legislature that this sub clause should be utilized in order that a Court should proceed in execution in a matter which was not otherwise permitted by law. The Legislature has provided in various ways th[illegible] Cause Court shall have no jurisdiction over property. Hence a Small Cause Court transferring execution application to its under S. 39 confer upon itself jurisdiction against the immovable property. (*Almond, J.* [illegible] *Ahmad, JJ.*) SITAL RAM *v.* THAKUR D[illegible]

A.I.R. 1938 Pesh. 70.

[illegible]

URBAN CO-OPERATIVE BANK, LTD. *v.* MAHOMED-SHAH. **A.I.R. 1938 Sind 176.**

——**S. 60 (1) (c) as amended by S. 35 of the Punjab Relief of Indebtedness Act VII of 1934**—*House mortgaged with possession by agriculturist and taken on rent from mortgagee—Liability to a*

Where a house belonging to an agricultur[illegible] [illegible]pted from attachment and sale in execution under S. 60 (1) (*c*), C. P. Code, as amended Relief of Indebtedness Act, the mere fact the

[illegible]

——**S. 64**—*Attachment subject to mortgage—Subsequent agreement by mortgagor to transfer portion of* [illegible]

[illegible]

tion of his reducing the mortgage charge and releasing the rest of the property from the mortgage, is not illegal by reason of S. 64, C. P. Code, more specially so when the mortgagee had already become entitled to possession eve[illegible] KISHAN SIN[illegible]

——**Ss. 73** [illegible] *brought into* [illegible] *the decree-hol*[illegible] *to execute, if* [illegible] *to order—If* [illegible]

Where a decree holder by attachment in execution of his decree brings into Court a sum of money, and another decree-holder who had already put in his execution application, seeks to obtain rateable distribution, a refusal to so rateably distribute the sum is a failure to

exercise a jurisdiction, for the sum is an asset in the hands of the Court and the other requisite is also present, and hence should be set aside. (*Wort, A.C.J. and Manohar Lal, J.*) JAGDEO SAHU *v.* BHIMRAJ BANSIDHAR. **177 I.C. 269 = 4 B.R. 803.**

——**Ss. 73 and 47**—*Rateable distribution—Appeal—*

[illegible]

suit. But where the judgment-debtor is directly or [illegible] C.P. Code, [illegible] is therefore [illegible] *tandi* of the [illegible]

[illegible]

——**Ss 73 and 63**—*Same property of judgment-debtor attached by two Courts of same grade and sold by one—Right of decree-holder in other Court to rateable distribution*

S. 73 is to be read together with S. 63. Where the [illegible]

[illegible]

——**S. 92**—*Applicability—Trust properties—Breach of trust by female trustee—Suit by person claiming to* [illegible] *on ground of*

[illegible] the subject- [illegible] relief on the [illegible] [illegible]ndant trustee [illegible] maintainable unless instituted in conformity with the provisions of S. 92. The fact that the trustee-defendant is a woman and that the plaintiff is a reversioner who has a chance of becoming a trustee in the future, makes no difference

[illegible]

Legal title vesting in him—Obligation to maintain temple—If trust.

Although it would be unreasonable to hold, having regard to the evidence in a particular case, that the properties held by the Mahant of a temple belong to any

C. P. CODE (1908), S. 92.

idol or to the temple, or to the members of the *panth* or to anybody except the Mahant for the time being the fact that the legal title is in the Mahant cannot dispose of the matter. If the general effect of the evidence is that the ownership of the properties is so restricted by the obligation to maintain the institution for purposes which can only be regarded as public charitable purposes it may fairly be said that a suit has been created for such purposes within the meaning of S. 92, C. P. Code. S. 92 is not limited to trusts in the sense defined by the Trusts Act but must certainly include them. (*Broomfield and Sen, JJ.*) DHORIBHAI DADABHAI *v.* PRAGDASJI. **40 Bom.L.R. 1041.**

———S. 92—*Public trust—Temple—Mahant—Properties held by—Dedication—Evidence of.*

Public user for a long period without objection can be relied upon as strong evidence of a public trust. Where properties have been acquired by a Sadhu, *mahant* of a temple and have descended from chela to chela there is a presumption that they have been dedicated to religious uses. (*Broomfield and Sen, JJ.*) DHORIBHAI DADABHAI *v.* PRAGDASJI. **40 Bom.L.R. 1041.**

———S. 100—*Error of law—Test—High Court, if can hear appeal on facts.*

There is an error of law when a Court's finding proceeds upon a misconception of the real nature of the issue in the case, when several facts admitted or proved are not considered in their relation to each other and weighed as whole, when a certain legal consequence which naturally follows from admitted and proved facts is overlooked, or when a material part of admissible evidence which vitally bears on the point at issue is disregarded. A case which involves such an error of law must fall within the ambit of S. 100, C. P. Code. Where therefore lower Court's judgment is based on an error of law it cannot attain finality and High Court sitting in appeal over it can hear it on facts. (*Niyogi, J.*) MT. ANUPA BAI *v.* BHAGWANT SINGH. **A.I.R. 1938 Nag. 470.**

———S. 100—*Finding of fact—Finding as to status of tenant.*

Findings that the tenants are raiyats and they have acquired rights of occupancy are findings of fact. (*S. K. Ghose and Edgley, JJ.*) PRODYOT COOMAR TAGORE *v.* MAYNUDDIN MIA. **A.I.R. 1938 Cal. 724.**

———S. 100—*Interference—Lower Court basing judgment on new case made out for first time in appeal—Failure to adequately consider, more important aspect—Effect of the case.*

Where a Judge sitting in appeal bases his judgment on a new case made out for the first time in appeal, and it is clear that the new case has coloured and influenced his consideration of the facts and his decision on another aspect of the case, which, although treated by the appellate Court as a minor aspect, turns out in fact to be the most important aspect of the case, and it appears that the Court has not adequately considered that aspect and consequently has arrived at a wrong conclusion, his judgment is liable to be set aside in second appeal. (*Davis, J.C. and Mehta, J.*) ARAB JHANGLU *v.* PUNJAL SHAH. **A.I.R. 1938 Sind 198.**

———S. 100—*Point of law—Inferences from fact—Interference.*

While a Court in second appeal will not interfere with findings of fact of the lower appellate Court, whether right legal inferences have been drawn from those facts, whether, for instance, the possession is adverse or not, whether a transfer is made with intent to defeat or delay within the meaning of S. 53, are questions of law, which can be dealt with in second

C. P. CODE (1908), S. 115.

appeal. (*Davis, J. C. and Mehta, J.*) PARMANAND JHANGULDAS *v.* JAIRAMDAS SADHURAM. **A.I.R. 1938 Sind 215.**

———S. 100—*Point of law—Inference from proved facts—Interference.*

Where a Court is dealing with the question as to whether from the facts found the legal inference drawn by the lower Courts is correct in cases such as of adverse possession, or under S. 53, Transfer of Property Act, or S. 82, Trusts Act, it is entitled to consider in second appeal whether the facts found by the lower Court justified the conclusions in law that they have drawn. (*Davis, J.C. and Mehta, J.*) VIRANBAI *v.* PARMANAND JHANGALDAS. **A.I.R. 1938 Sind 206.**

———S. 100—*Point of law—Legal inference from proved facts.*

The proper legal inference to be drawn from the proved facts of a case is a point of law. (*Broomfield and Macklin, JJ.*) BABASAHEB APPASHEB *v.* LAXMANAPPA RAMAPPA. **40 Bom.L.R. 1015.**

———S. 100—*Point of law—Question as to custom.*

Custom is a mixed question of law and fact. (*Broomfield and Macklin, JJ.*) BABASAHEB APPASHEB *v.* LAXMANAPPA RAMAPPA. **40 Bom.L.R. 1015.**

———S. 100—*Question of law—Nature of property—Mosque, if private or public.*

The question whether a building is a private mosque or a public mosque is not question of fact, but a question of law, that is a question of inference from proved facts. (*Thomas, C. J. and Yorke, J.*) MUSAHEB KHAN *v.* RAJKUMAR BAKHSHI. **1938 O.A. 722= 1938 O.L.R. 435=1938 O.W.N. 937.**

———S. 110—*Substantial question of law—Misapplication of well defined legal principles.*

Where the legal principles such as were applied in the case are well defined, a misapplication of such principles does not raise any substantial question of law. (*Stone, C. J. and Niyogi, J.*) GANPATRAO *v.* ISHWAR SINGH. **A.I.R. 1938 Nag. 482.**

———S. 115—Amendment of decree — Substantial amendment—If revisable. *See* C. P. CODE, SS. 152 AND 115. **1938 A.M.L.J. 88.**

———S. 115—*Interlacutory order— Interference—Principles.*

Though an order is interlocutory, if it goes to the root of all subsequent proceedings, the High Court would not decline to consider whether the Court passing the order in question had jurisdiction to pass it. (*Weston, I.C.S.*) KISHEN LAL *v.* MAN MAL. **1938 A.M.L.J. 97.**

———S. 115—Jurisdiction-Failure to exercise—Refusal to order rateable distribution—Interference. *See* C. P. CODE, SS. 73 AND 115. **177 I.C. 269.**

———S. 115—Locus standi *to apply under—One of many decree-holders applying for stay of execution—Dismissal—Judgment-debtor, if can seek to revise that order.*

Where one of many decree-holders applies for stay of execution proceedings against the judgment-debtor, and it is not granted, the person aggrieved by such an order is that decree-holder and if he does not choose to agitate it further the judgment-debtor has no *locus standi* to prefer a revision under S. 115 against that order. (*Wort, A.C.J. and Manohar Lal, J.*) VASISTHA NARAIN SINGH *v.* KANDHAI LAL DURGA PRASAD. **177 I.C. 138=4 B.R. 793.**

———S. 115—Revision—Competency—Order under S. 9, Specific Relief Act. *See* SPECIFIC RELIEF ACT, S. 9.

1938 A.W.R. (H.C.) 588=1938 A.L.J. 864.

C. P. CODE (1908), S. 149.

——**S 149 and O. 33, R. 15**—*Application to sue as pauper dismissed—Court-fee paid beyond limitation but within time granted by Court—Date of institution of suit.*

the pauper application was first made. However, if it is to be regarded as filed when court-fees were paid, then the period during which the applicant was busy in

PAL. **A.I.R. 1938 Cal. 730.**

——**S. 151**—*Abuse of process of Court—Court incorrectly fixing period of grace for payment of a of rent—Payment after date fixed but within time—Ejectment—Power of Court to redress wro*

Where a decree for ejectment wrongly fixe period of grace for payment of the arrears an tenant in ignorance of his remedy kept quiet and paid the arrears after the date but within the proper time allowable under the law, but the landlord nevertheless

Code, is the only section under which the get redress of the wrong done and the remedy the injustice done by reason of the and cancel the decree of ejectment. HARI KISHEN DAS *v.* BADAL SINGH.

1938 R.D. 758 = 1938 O.W.N. 931.

——**S. 151**—*Execution—Stopping of sale—Inherent powers.*

Under S. 151, C. P. Code, the Court has full power to correct *suo motu* defects which it discovers in its proceedings. It cannot be said that a Court is bound to proceed with the sale of propert brought to its notice that by reas attachment, misdescription in the defect any sale held is bound to Court is entitled to pause and r concerned should correct an obvi *I.C.S.*) KISHEN LAL *v.* MAN M

——**S. 151**—*Inherent powers—Security for costs—Revision application to High Court—Security for costs—Order for—Power to make—Civil Procedure Code, O. 25, R. 1 and O. 41, R. 10.*

There is no provision in the C. P. Code or in the Provincial Insolvency Act which specifically empowers the High Court in revisional applications under S. 115, C. P. Code, or S. 75 of the Provincial Insolvency Act to pass an order calling on the applicant to furnish security for costs. But under S. 151, C. P. Code, it is compe

——**S. 151**—*Inherent powers—When to be*

The powers of S. 151 have to be exercise Where there is specific provision of law, procedure provided by law, which has not be by a party, or of which advantage has not been taken by a party, the Court would certainly hesitate before exercising its inherent jurisdiction under S. 151. (*Rangne-*

C. P. CODE (1908), O. 11, R. 14.

kar, J.) HIRALAL RAMSUKH *v.* MONGHIBAI.

40 Bom.L.R. 1025.

——**Ss 152 and 115**—*Decree substantially amended—Remedy—Ground of jurisdiction, if open.*

Where a decree is amended and the amendment is rs the amount declared due on ar as the additional amount is decree from which there is an efore be revised. But in the appellant to challenge the decree on the ground of jurisdiction. (*Weston, I C.S.*) KANAK MAL *v.* MYER NISSIM CO., LTD.

1938 A.M.L.J. 88.

——**O. 6, R. 17**—*Amendment—If in the complete discretion of Court—When obligatory—Pronote forming part of the cause of action found inadmissible—Amendment to permit falling back upon the original debt—If can be allowed.*

Though, O. 6, R. 17, C. P. Code, begins with the

of title deeds, but the pronote was found to be inadmissible in evidence, the plaintiff could be permitted to as to base his cause of action on r which the defective pronote was be no prejudice to the other party

MAMOOJI.

——**O. 9, R. 13**—*Applicability—"*Ex parte *decree"—Defendant directed to file written statement but not filing—Effect—Defendant and pleader not prevented from addressing Court at hearing—Decree—If* ex parte *—Application to set aside—Maintainability.*

Where a defendant is directed to file a written statement by a certain date but fails to do so, and his appli the Court should of written state earing *ex parte* is ound to put in a he is taken to He is, however, submit any argu nstance that the plaint discloses no cause of action, or that the claim is time-barred. If at the hearing the defendant and his pleader are present and are not prevented in any way from addressing the Court, and a decree is passed after hearing the evidence on behalf of the plaintiff, there is no *ex parte* decree which can be set aside on an application under O. 9, R. 13, C. P. Code. (*Beaumont, C.J. and Wassoodew, J.*) VENAYAK SHREEDHAR *v.* CHINTAMAN VAMAN. **40 Bom L R. 972.**

——**O. 11, R. 14**—*Suit against Secretary of State ncil represented by Collector—Petition to produce jaimash registers in his nability.*

a suit filed against the Secretary of of ce he terms of O. 11, R. 14 to produce the registers in original on the ground that he was an agent of the Secretary of State for India in Council, as every document in his

C. P. CODE (1908), O. 20, R. 11

possession cannot be deemed to be in his possession in his capacity as agent of the Secretary of State for India in Council. (*Pandrang Row, J.*) SECRETARY OF STATE *v.* KRISHNASWAMI AYYA.

(1938) 2 M.L.J. 815.

——**O. 20, R. 11 (2)**—*Order under—Application time barred—Legality—Limitation—Matter of procedure.*

An order passed under O. 21, R. 11 (2) postponing the date of payment of the decretal amount on terms, on an application filed after six months of the date of the decree, is not an order passed without jurisdiction. Limitation is a matter of procedure and an order passed on a time barred application is not one without jurisdiction. (*Weston, I.C.S.*) SOHAN RAJ *v.* KESHA.

1938 A.M.L.J. 86.

——**O. 20, Rr. 12 and 18**—*Suit for partition and possession—Preliminary decree silent regarding mesne profits—Award of mesne profits by final decree—Permissibility.*

The C. P. Code has not expressly laid down any procedure in regard to a composite action for partition and possession and in such a case the Court may pass a final decree for mesne profits even if it was not preceded by a preliminary decree relating to them. The mere fact that the preliminary decree for partition was silent as to the claim for mesne profits does not preclude the parties from applying or the Court from awarding mesne profits by its final decree; and this is specially so where the party liable has in the course of the suit undertaken to pay mesne profits to the successful party. (*Venkatasubba Rao and Venkataramana Rao, JJ.*) SWAMINATHA ODAYAR *v.* GOPALASWAMI ODAYAR.

(1938) 2 M.L.J. 704.

——**O. 21, R. 2**—*Adjustment—Statement by decree-holder that understanding has been arrived at with judgment-debtor and that time has been given to complete it—If amounts to.*

Where on the statement of the decree-holder's agent that an understanding had been arrived at with the judgment-debtor and at his request he was being allowed to complete it and that in case of non-completion of the understanding proper application for further proceedings would be presented, the executing Court adjourned the case to a certain date and on that date consigned th e proceedings to the record room.

Held, that the alleged adjustment was merely an inchoate agreement; an adjustment was under consideration and was to be made on the fulfilment of certain conditions; and that it was not an adjustment actually made and completed, based on a future promise; and it did not, therefore, come within the purview of O. 21, R. 2, C. P. Code. (*Addison and Din Mahomed, JJ.*) BHARAT NATIONAL BANK, LTD. *v.* BHAGWAN SINGH.

I.L.R. (1938) Lah. 470.

——**O. 21, R. 58**—*Objection under—If can be made after sale.*

The attachment does not cease when the property is sold in execution; and a valid objection can be made even after sale to the attachment under O. 21, R. 58. (*Niyogi, J.*) RAMCHANDRA JAGANNATH *v.* KAYAM HUSSAIN ABDUL ALI. **A.I.R. 1938 Nag. 475.**

——**O. 21, R. 86**—*Scope—Re-sale—Default in payment of balance of sale price—Duty of Court.*

O. 21, R. 86, C. P. Code, makes it obligatory on the Court to re-sell the property in case default is made in payment of the balance of the purchase money as required by O. 21, R. 85. The discretion vested in the Court is only as regards the forfeiture of the deposit. (*Venkataramana Rao, J.*) MONNI AIDRUZ *v.* SAPPANI MIRA MOHIDEEN. **1938 M.W.N. 1031 = (1938) 2 M.L.J. 833.**

C. P. CODE (1908), O. 32, R. 7.

——**O. 21, R. 90**—*Irregularity—Sale under hammer on 18th but actually sold on 20th—Validity.*

Where a sale was under hammer on the 18th but in fact was held on the 20th, a day which was not fixed for the sale, it is not illegality but only an irregularity. (*Wort, A.C.J. and Manohar Lal, J.*) VASISTHA NARAIN SINGH *v.* KANDHAI LAL DURGA PRASAD.

177 I.C. 138 = 4 B.R. 793.

——**O. 21, R. 93**—*Execution sale confirmed and application by auction-purchaser to be put in possession—Possession not given on account of decree passed in favour of another in regular suit claiming property as his own—Right of auction-purchaser to refund of purchase money.*

An execution sale was confirmed. Subsequent to this a person brought a regular suit claiming the property as his own and obtained a decree. In the meantime the auction-purchaser applied to be put in possession of the property and the decree-holder in the regular suit put in an application objecting to possession being given to the auction-purchaser. It was held that the auction-purchaser could not be given possession in view of the decree in the regular suit and was remarked that the auction-purchaser could apply for refund of purchase money. Accordingly he applied for it.

Held, that the application for refund could not be made under R. 93 as the sale was not set aside under O. 21, R. 92 and that the auction-purchaser was not entitled as of right to get any refund in execution proceedings. (*Almond, J.C. and Mir Ahmad, J.*) MAHOMED RAMZAN *v.* CIVIL EMPLOYEES CO-OPERATIVE SOCIETY LTD. **A.I.R. 1938 Pesh. 66.**

——**O. 23, R. 3 and Sch. II, Para. 20**—*Power to adjust disputes by compromise—If affected by para. 20, Sch. II, C.P.Code.*

The power given by Para. 20 of Sch. II, C. P. Code, cannot override the general power given to parties under O. 23, R. 3, C. P. Code, to adjust their disputes by a lawful compromise at any time after suit. The award is not entertained as an award but as an agreement between the parties disposing of their dispute and it is this agreement which the Court has power under O. 23, R. 3 to record and pass a decree in terms thereof. In principle there is no difference between an agreement of the parties and an award by arbitrators who are appointed by the parties themselves to settle their dispute, because in either case the parties are bound by their own agreement. An award therefore assumes the character of an agreement as soon as it is delivered whether the parties accept it or not. (*Niyogi, J.*) RAMDHAR RAM *v.* SANTADAR.

A.I.R. 1938 Nag. 492.

——**O. 25, R. 1**—Applicability—Revision application—Security for costs—Power to make. *See* C. P. CODE, S. 151. **40 Bom.L.R. 1025.**

——**O. 32, R. 5**—*Representation of minor—Appointment of guardian* ad litem—*Mother, if can act thereafter.*

Where a guardian *ad litem* has once been appointed by the court for a minor, it is only through him that any petition on the minor's behalf should be filed, and not through anybody else. Where a mother of a minor files some objections in execution, without reference to the guardian *ad litem* it is not entertainable. (*Bennet and Verma, JJ.*) HEM RAJ *v.* KHEMCHAND

1938 A.W.R. (H.C.) 657 = 1938 A.L.J. 919.

——**O. 32, R. 7 and O. 21, R 2**—*Managing member—Powers to act on behalf of minor—Limits—Certificate of satisfaction—Leave of Court—Necessity.*

C. P. CODE (1908), O. 32, R. 15.

A managing member of a Joint Hindu family cannot without leave of the Court, do any act which he is debarred from doing as guardian *ad litem*. Where a manager and a minor for whom he was a next friend are joint decree-holders and an application is made by the manager for entering up satisfaction of the decree, O. 21, R. 2 does not empower a Collector executing the decree to certify payment as satisfying the decree as far as the minor was concerned, unless leave of the Court had been obtained according to O. 32, R. 7 and such leave cannot be implied but must be expressly recorded. (*Binney, F. C.*) PUKHRAJ *v.* JAWARIMAL.

1938 N.L.J. 363.

——**O. 32, R. 15**—*Power-of-attorney granted by plaintiff—Plaintiff incapable of protecting his interests—Suit by next friend for the revocation of—Maintainability.*

Where the next friend files a suit alleging that a

plaintiff is mentally deficient and incapable of protecting his interests.

Held, that the next friend is entitled to institute the suit. (*Madhavan Nair, O. C. J. and Stodart, J.*) NARASIMHA BHATTACHARIAR, *In re.*

(1938) 2 M.L.J. 810.

——**O. 33, R. 15**—Application to sue as pauper dismissed—Court fee paid beyond limitation but within time granted by Court—Date of institution of suit. *See* C. P. CODE, S. 149 AND O. 33, R. 15.

A.I.R. 1938 Cal. 730.

——**O. 34, R. 1**—*Necessary parties—Attaching creditor, if one—Mortgaged property purchased by attaching creditor in execution of his money decree—Mortgage decree in the meanwhile—Rights of parties—Attaching creditor, purchaser, if a representative of the mortgagor.*

An attaching creditor is not a necessary party to a suit on a mortgage in respect of the property attached. But where an attaching creditor has purchased the mortgaged property in execution of his own money decree, and a decree on the mortgage also had in the meanwhile been obtained, the rights of the purchaser

OF SIMLA *v.* F. B. POWELL.

1938 A.W.R. (

——**O. 39, R. 1**—*Temporary injunction—*

be granted.

The power of a Court is very wide with respect to the issue of a temporary injunction and the injunction can be issued

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Suit for

Under O 40, R. 1 a receiver cannot be appointed in a suit for sale on a simple mortgage before a preliminary decree has been pa

NANDA *v.* KANHAIYA LAL.

——**O. 40 R. 1 and O. 43,** 1:

dismissing application for r

appealable.

C. P. CODE (1908), O. 41, R. 27.

In view of S. 16 of the Burma General Clauses Act, O. 40, R. 1, must be regarded as giving authority to the Court to remove the receiver; and if an application is made to remove the receiver then the dismissal of that

order passed under

given by O. 43, R.

under O. 40, R. 1.

JL KADER *v.* R. M.

A.I.R. 1938 Rang. 387.

——**O. 40, R. 1 (2)**—*Removal of receiver—Defendants in possession of property struck off—If entitled to discharge of receiver.*

Where two sets of defendants are joined in a suit on a mortgage and the mortgagee gets a receiver appointed to take charge of certain land covered by the mortgage, but subsequently one set of defendants are struck off the record as being not necessary parties to the suit, and the defendants so discharged apply that the receiver

sion of the land at the time the receiver was appointed

A.I.R. 1938 Rang. 387.

——**O. 41, R 10**—Applicability—Revision application—Security for costs—Powers of High Court to order. *See* C.P. CODE, S. 151. **40 Bom.L.R. 1025.**

——**O. 41, R. 11**—*Court hearing appeal under—Courses open to.*

be ordered if the pleader does not appear. Under sub-r. (2) if the appellant does not appear the Court may dismiss for default. But this does not prevent a dismissal on the merits where there is no appearance under sub r. (1). The power of the appellate Court to take these two courses under R. 11 is not taken away when a notice is issued to the respondent and the respondent appears in accordance with that notice. (*Bennet, A C.J. and Varma, J.*) CHIMMAN LAL *v.* ZAHURUDDIN.

1938 A.W.R. (H C.) 561 = 1938 A.L.J. 901 = A.I.R. 1938 All. 548.

——**O. 41, R. 20**—*Applicability—Person not a party to first appeal—If can be added in second appeal.*

——**O. 41, R. 27**—*Additional evidence—Admission*

that the defect may be pointed out by a party or that a party may move the Court to supply the defect but the requirement of the Court upon

evidence as it stands. Conse-

to the appellate Court to admit

appeal even before the appeal is

heard. 61 M. L. J. 489 (P.C.), Rel. on. (*Pandrang*

Rau, J.) BALAGURUMURTHY CHETTIAR *v.* KALINGAM AMBALAGARAM.

1938 M.W.N. 1012=(1938) 2 M.L.J. 646.

———O. 41, R. 27—*Scope—New evidence admitted and relied in contravention of—Effect.*

Where an appellate Court bases its judgment on an entirely new case, raised for the first time in the appeal, and in support of the case admits and relies on evidence, which is improperly admitted, inasmuch as it does not come under O. 41, R. 27, C. P. Code, its judgment cannot be upheld in second appeal and the Court sitting in second appeal will not take into consideration the new case. *(Davis, J.C. and Mehta, J.)* ARAB JHANGLU *v.* PANJALSHAH.

A.I.R. 1938 Sind 198.

———O. 41, R. 27(1)(b)—*Additional evidence—Admission by the Court with the consent of parties—Record of reasons by Court not adequate—Effect of order—Duty of Court—Estoppel of party consenting to admission of evidence.*

Where by consent of parties the appellate Court admitted additional evidence, and the reasons given by it did not strictly comply with the terms of O. 41, R. 27 of the C. P. Code.

Held, that the consent of the parties may be treated as an admission by both parties that the grounds for admitting additional evidence existed. Still the Judge is not absolved from the requirement of satisfying himself as to the necessity for this evidence but the consent may to a large extent cover the defects in the record of the reasons for the order. 17 M.L.J. 347=34 I.A. 115=31 Bom. 381 (P.C.), dist.; 19 M.L.J 435=36 I.A. 221 36 Cal. 833 (P.C.), Rel. on. Even if the reasons recorded by the Court are deemed inadequate, the consent of the party to the admission of further evidence precludes him from questioning the admissibility of that evidence in subsequent proceedings. 55 I.C. 226, Not Foll. *(Wadsworth, J.)* KANDASAMI GOUNDAN *v.* RAMAI GOUNDAN.

48 L.W. 546=(1938) 2 M.L.J. 740.

———O. 41, R. 27 (1) (b)—*Scope of power under—Remand for insufficiency of evidence to prove the case—If justified.*

O. 41, R. 27 (1) (*b*), C. P. Code, confers a limited power on an appellate Court to be used where certain definite evidence is required and it does not entitle a Court to allow a plaintiff to add to his case, evidence which he should have added in the first instance. There cannot be a remand, to allow a plaintiff to produce any additional evidence he wants, on the ground that the evidence on record is not sufficient to prove his case. *(Bennet. A. C. J.)* KALIKA PANDE *v.* RAM AUTAR PANDE. 1938 A.W.R. (H.C.) 617=1938 A.L.J. 930.

———O. 43, R. 1 (s)—Applicability—Order dismissing application for removal of receiver. *See* C.P. CODE, O. 40, R. 1 AND O. 43, R. 1 (S). A.I.R. 1938 Rang. 387.

———O. 45, R. 13 (2) (d)—*Mortgage suit—Preliminary decree against sons of the mortgagor and his step-brother—Appeal to Privy Council by his step-brother—Final decree in the meanwhile—Execution—Application for stay of—Whether maintainable.*

O. 45, R. 13 (2)(*d*) enables the High Court in a proper case, even though no appeal has been filed against the final decree and the appeal pending before the Privy Council, as in this case, is only with respect to the preliminary decree, to pass necessary orders in order to safeguard the rights of an applicant when he asks for stay of execution of the final decree. *(Madhvan Nair, O.C.J. and Krishnaswami Ayyangar, J.)* RAMANATHAN CHETTIAR *v.* VISWANATHAN CHETTIAR.

(1938) 2 M.L.J. 764.

COMPANIES ACT (VII OF 1913), S. 152—*References to arbitration by limited liability companies—Arbitration Act alone—If applies.*

The word 'may' after the words 'a company' in the beginning of S. 152 does not go with the sentence 'in accordance with the Indian Arbitration Act, 1899', but with the words 'refer to arbitration'. Again the existence of the words 'in accordance with the Indian Arbitration Act, 1899' in Cl. (1) of S. 152 is an indication that the Legislature considered it to be *de rigueur* that every reference by a limited liability company to arbitration should be in accordance with the Arbitration Act. Cl. (3) is conclusive on the point that the provisions of the Arbitration Act only apply to arbitrations to which a limited liability company is a party. Limited liability companies cannot refer to arbitration independently of this provision of the law and Sch. II, C. P. Code, has no application. The Arbitration Act alone applies to all references to arbitration made by limited liability companies and hence the award is executable by the District Judge only and not by the Sub-Judge. A. I. R. 1934 Pesh. 107, Foll. *(Almond, J. C. and Mir Ahmad, J.)* PEOPLES BANK OF NORTHERN INDIA, LTD. *v.* PADAM LAL. A.I.R. 1938 Pesh. 54.

———S. 153—*Petition under—Winding up petition filed—Hearing of—If barred—Scheme not placed before shareholders and creditors.*

A petition was presented by the Directors of a Bank under S. 153 of the Companies Act asking the Court to refer a scheme, which they had prepared, to the shareholders and creditors for their consideration, but a winding up petition was filed subsequently by some of the creditors. *Held*, there was no bar to the hearing of the winding up petition, though the scheme was not placed before the shareholders and the creditors by the Court as prayed for. *(Leach, C.J. and Abdur Rahman, J.)* CALICUT BANK, LTD., *In re.* (1938) 2 M.L.J. 812.

———S. 158—*'Contributory'—Holder of fully paid up shares—If included.*

The term 'contributory' as defined in S. 158 of the Companies Act includes a shareholder who holds fully paid up shares only. *(Harries, J.)* PARSHOTTAM DAS *v.* OFFICIAL LIQUIDATOR OF THE GORKHPUR ELECTRIC SUPPLY CO., LTD.

1938 A.W.R. (H.C.) 621=1938 A.L.J. 925.

———S. 171—*Appeal or application for revision arising out of action by company—Leave of Liquidation Court—If necessary.*

An appeal or an application for revision arising out of an action brought by a company does not come within the purview of S. 171 and such appeal or application can be instituted, or proceeded with, without the leave of the Liquidation Court. *(Tek Chand, J.)* SIMLA BANKING AND INDUSTRIAL CO., LTD. *v.* INDO SWISS TRADING CO., LTD. A.I.R. 1938 Lah. 754.

———S. 186 (2)—*Contributory of limited company, if entitled to set off.*

Sub-S. (2) to S. 186 of the Companies Act permits a limited right of set-off to a contributory when the company is unlimited and as no mention whatsoever is made as to his rights where the company is limited, it follows that he has no such right of set-off, if the company be limited. *(Harries, J.)* PARSHOTTAM DAS *v.* OFFICIAL LIQUIDATOR OF THE GORKHPUR ELECTRIC SUPPLY CO., LTD. 1938 A.W.R. (H.C.) 621=1938 A.L.J. 925.

———S. 217—*Sale by liquidator with the consent of the mortgagee—No waiver of security—Liquidation expenses—Priority.*

Where a mortgagee of the machinery of a company agreed to the liquidator selling the machinery, but there

COMPANIES ACT (1913), S. 218.

was no waiver of the security, on a question as to whether the landlord of the premises in which the

liquidation were paid; but as he had invoked the assistance of the liquidator he must bear the expenses incidental to the assistance he had re... was one of such expenses. (*W*... SINGH JI *v.* BALLABH DAS.

——S. 218—*Scope—Creditor's* ... *pulsory winding up where company is in voluntary liquidation—Voluntary liquidator, if can ask for it.*

The present S. 218 of the ... any creditor who would othe... pulsory order for winding u... for such an order though the ... such application in the process of being wound up voluntarily. There is no section in the Act which enables a voluntary liquidator to ask for an order to compulsorily wind up the company. (*Harries, J.*) SHRI GOPAL CHANDRA *v.* NARAIN DAS.

1938 A.W.R (H C.) 576=1938 AL J. 893.

——S. 230 (1) (c) and (2)—*Workmen's wages—Rule of priority as to—Extent.*

Under the provisions of S. 230 (1) (*c*) and (2) of the Companies Act, the wages of workmen have a priority of claim over the claims of ... floating charge created by t... *J. and Verma, J.*) A. V. J...

1938 A.W.R. (H.C.) 691.

CONTEMPT—High Court—Insolvency jurisdiction—Powers to commit persons not parties but aiding insolvent in defying orders passed in insolvency. *See* PRESIDENCY TOWNS INSOLVENCY ACT, S. 58.

48 L.W 462=(1938) 2 M.L.J. 609.

CONTRACT — Ratification — Requirements. *See* HINDU LAW—JOINT FAMILY — ALIENATION — MANAGER. A.I.R. 1938 Nag. 482.

CONTRACT ACT (IX OF 1872)—S. 2 (d)—*Consideration—Original contract between parties a wagering transaction—Forbearance of plaintiff* ... *defendant defaulter—If constitutes* ... *for fresh agreement.*

The forbearance of a plaintiff to sue ... forbearance to declare the defendant a...

A I.R. 1938 Lah. 781.

——S. 16—*Undue influence—Ingredients—Onus of proof.*

In the definition of undue influence there are three ingredients: (1) that the relations subsisting between the parties should be such that one of the parties is in a position to ...

are the three ingredients constituting undue influence, the party who pleads undue influence has in the first in-

CONTRACT ACT (1872), S. 69.

stance to prove only the first and second ingredients. When a person is proved to be in a position to ...

For the purpose of S. 25 (3) of the Contract Act, there must be an express promise as opposed to an un... ...knowledgment involving an implied ... Where the writing relied upon was to ... balance is struck. The said Rupees... found due. The same are payable," and the Gujerati words were "baki nikliya te deva sahi."

Held, that the words could not be interpreted as

——S. 30—*Wagering contract—Speculative transaction—If amounts to.*

Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential. Even if one party to a contract were a speculator who never intended to give delivery, and that fact was known to the other party, yet in the absence of any bargain or understanding, express or implied, that the goods were not to be ... onvert a contract, otherwise ... would the mere fact that as ... goods there was no delivery ... ims, vitiate the transaction.

Where therefore although the transactions between the parties were speculative in their nature, there is no evidence showing that the transactions were to be on differences only, or that there was no intention to take delivery, the contract relating to such transactions cannot be held to be a wagering contract. (*Addison and Din Mahomed, JJ.*) AYA RAM TOLA RAM *v.* SADHU LAL.

A I.R. 1938 Lah. 781.

——S. 49—Duty of promisor under—Failure to apply to fix place—Effect—Right of creditor to demand payment at his own place. *See* C. P. CODE, S. 20 (*c*).

... *rested in the payment* ... *tioner—Payment of* ... *ue sale of estate—*

... tate of the last male ... present interest in the estate left by the deceased owner, yet it is manifest that he is substantially interested in the protection of the estate or its devolution. Consequently a reversioner who pays kandayam due to the Government from the estate in order to prevent it from being sold for non-payment of the kandayam by the limited owner or an ... life estate holder, is entitled under ... act Act to claim reimbursement ... paid by him from the defaulter. ... *Rao and Abdul Ghani, JJ.*) NAGABHUSHANA BHATTA *v.* VISVESWARIAH.

16 Mys L.J. 399.

———Ss. 133, 135 and 139—*Applicability—Surety bond to Court pending suit—Decree—Execution against surety not proceeded with—Appeal from decree—Application for stay of execution—Offer and acceptance of fresh surety in appeal—Effect—Former surety—If discharged.*

Having regard to the definitions in S. 126 of the Contract Act, Ss. 133, 135 and 139 of the Act cannot in terms apply to a surety who executes a surety bond to a Court; there is in such a case no creditor within the meaning of S. 126. But there is no reason why the principles underlying these sections should not be applied *mutatis mutandis*, though the question whether a surety is discharged from the undertaking he has given to the Court depends on the construction of the surety bond. In a suit for possession of immovable property and mesne profits, the plaintiff applied for appointment of a receiver pending the suit, but the defendant agreed to give security for the profits. One *M* was offered and accepted a surety for the mesne profits of the year 1927—1928 and on 23—10—1937, he executed a bond to the Court undertaking that in the event of the defendant failing to satisfy the decree or order that might be passed against him, he, the surety, would personally pay the amount fixed. For the mesne profits of the following year 1928—1929, one *B.S.* was offered and accepted as surety; on 8—11—1928, he also executed a bond to the Court in essentially similar terms. The suit was decreed on 6—3—1929, and the plaintiff on 16-4-1929 took out execution and obtained possession of the properties only on 15—7—1929. The plaintiff filed another darkhast against the defendant and also *M.* and *B. S.* for recovery of the amounts of mesne profits specified in the surety bonds. The defendant in the meanwhile appealed against the decree for possession and applied for stay of execution which was granted on fresh security. One *D* was appointed surety for the total amount of mesne profits for which *M* and *B. S.* the former two sureties were liable, and *D* executed a bond to the appellate Court undertaking to be liable for the amount in case the defendant failed to abide by the final decree or decree that might be passed in the matter. On 23—11—1934 the decree of the trial Court was confirmed. The plaintiff having sought to execute the decree against the former sureties, *M and B. S.*, they pleaded that they were discharged owing to *D* having been accepted as a new surety in their place.

Held, (1) that the Contract Act was not exhaustive; (2) that the general principles of the law of suretyship (and in particular the principle that the rights of a surety are not to be interfered with without his consent) might be applied and ought to be applied even though the provisions of the Contract Act did not govern the case; (3) that the Court itself having been responsible for a change in the situation which materially affected the position of the former sureties and there having been a delay of six years without any justification it must be held that they were discharged from liability. (*Broomfield and Macklin, JJ.*) PARVATI BAI HARIVALLABHDAS *v.* VINAYAK BALOANT. 40 Bom. L.R. 989.

———Ss 187 and 188—*Unauthorised borrowings by agent—Principal's liability—Creditor's right to relief against principal—Equitable rule based on theory of unjust enrichment—If excluded by Contract Act.*

Where the agent's authority is defined in writing, it is doubtful if S. 187 of the Contract Act can be relied upon, for it is well settled that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. The limits of necessary implication are indicated by S. 188 of the Contract Act. Where there is no justification for the borrowing by the agent on the ground of necessity or with reference to the usual course of business the principal cannot be held liable on the footing that in borrowing the agent has acted within the limits of his authority. But there is a well established rule of equity based on the theory of unjust enrichment, namely, where by any wrongful or unauthorized act of the agent the money or property of a third person comes to the hands of the principal or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount or the value of the property. The absence of other funds in the hands of the agent at the time of the borrowing is not a necessary condition of the creditor's right to relief against the principal. This equitable rule is not excluded by the Contract Act. (*Varadachariar and Pandrang Row, JJ.*) GOOLABCHAND *v.* M. J. V. MITTER. 1938 M.W.N 1023=(1938) 2 M.L.J. 688.

———Ss. 230 and 60—*Money paid by judgment-debtor to decree-holder's pleader in part payment of decrees—Pleader, if can be sued alone—Pleader's right of appropriation to any one of decrees.*

Where a judgment-debtor against whom the decree-holder had obtained six decrees paid some money to the decree-holder's pleader in part payment of the decrees and had the execution stayed for a certain period, but on failure of the judgment-debtor to pay the decretal dues in full within that period writs of attachment were executed against him resulting in payment of five of the decrees in full, and the pleader thereafter certified in Court the money paid to him as having satisfied the sixth decree in which the judgment-debtor was only one of two judgment-debtors, in a suit by the judgment-debtor against the pleader for the recovery of the amount paid to him.

Held, (*i*) that the money having been paid to the pleader as agent on behalf of the principal, *viz.*, decree-holder, the suit was not maintainable against the pleader alone; (*ii*) that the money having been paid in part payment of the decrees, the pleader did not act wronglyin appropriating it to the unsatisfied decree. (*M. C. Ghose, J.*) BIDHU BHUSAN SEN *v.* MOFIZUDDIN AHMED. 42 C.W N. 1263.

———S. 239—*Partner—Firm—If can be partner—Death of member of constituent firm—If dissolves main firm.*

A firm as such cannot be a member of a partnership; a firm is not a person as contemplated by S. 239 of the Contract Act. All the members of the firm must be taken to be individual partners in the main frm; and the main firm would be dissolved on the death of any individual member of the constituent firm. (*Broomfield and Macklin, JJ.*) HAKMAJI MEGHAJI *v.* PUNNAJI DEVICHAND. 40 Bom.L.R. 995= A.I.R. 1938 Bom. 453.

———S. 253—Firm consisting of constituent firms—Death of member of constituent firm—If dissolves main partnership. *See* CONTRACT ACT, S. 239. 40 Bom. L.R. 995.

CONTRIBUTION.

CONTRIBUTION—*Co-defendants—Decree for costs—Payment by one—Right to recover if in proportion to interest affected by decree.*

Certain properties were mortgaged to two persons, who had advanced unequal amounts. A decree was obtained thereon and the properties were brought to sale. Thereafter a third person obtained a declaration that half the mortgaged properties were his and that the half was not liable to attachment and sale. The original

CO SHARER.

J.) SHIAM LAL v. NAWAL KISHORE.
1938 A.W.R. (H.C.) 637.

CO SHARER—*Co-sharing—If can be presumed.*

The law requires that co sharing in cultivation must be proved, if a collateral wishes to inherit a holding under the Tenancy Act. It is not a matter which could be presumed. Zamindars have their rights as well as tenants and when a holding has escheated it is not reasonable to invent presumptions to deprive them of their right to take possession. (*Darling, S. M. and Bomford, J. M.*) RAM HARAKH PATHAK v. SHEO NANDAN.
1938 A.L.J. (Supp.) 79 = 1938 R.D. 780.

——*Right to alienate—Some of co-sharers executing mortgage entering into compromise with mortgagee agreeing to deliver some land to him—One of mortgagors not party to it—Compromise, if legal.*

Even before partition, a co-sharer in possession may

whereby they agree to deliver some land to mortgagee in consideration of his reducing the mortgage charge and releasing rest of the property from the mortgage, the co-sharers entering into the compromise are bound by it to the extent of their share and the compromise is not illegal merely because one of the mortgagors is not a party to it. (*Bhide, J*) KISHAN SINGH v. PRITAM SINGH. A.I.R. 1938 L[illegible] 737.

COSTS—Co defendants—Decree for costs Payment by one—Right to contribution. *See* BUTION—CO-DEFENDANTS.
1938 A.W.R. (H[illegible]

COURT-FEES ACT (VII OF 1870), S. 7 (iv) (c)—*Suit falling under—Plaintiff's Valuation—Power of Court to interfere—Limits.*

The Court can interfere with any value put on a relief sought by a plaintiff in a suit falling under [illegible] of the Court-Fees Act, if the valuation arbitrary and unreasonable. But a Co[illegible] endeavour to correct a plaintiff's valuation except in a [illegible]

(*Stone, C. J., Bose and Clarke,* [illegible] RAM v. DAULAT ANYAJI.

——**S. 7 (iv) (c) and Sch.** [illegible] *to declare decree not binding* [illegible] *payable—Test to be applied to decide.*

The question whether a decree sought by a plaintiff is a mere declaratory decree without any consequential relief coming under Art 17 (iii) of the second schedule of the Court-fees Act, or whether it is a decree with consequential relief governed by S. 7 (iv) (c) of the Court-fees Act, depends not on whether or not the plaintiff was a party to the decree which he is seeking to avoid but on whether or not the relief claimed comes under S. 42 of the Specific Relief Act. (*Thomas, C.J. Zia ul-Hasan and Yorke, JJ.*) BEPIN SINGH v. BHAGWAN SINGH. 1938 O A 692 =
1938 O.W.N. 889 = 1938 O L.R. 425 =
A.I.R. 1938 Oudh 201 (F.B.).

COURT-FEES ACT (1870), Sch. II, Art. 17.

[illegible] *suit for dissolu-* [illegible] *Appeal—Court-fee*

[illegible] against a final [illegible] f partnership and [illegible] the amount mentioned in the final decree and not on the provisional valuation put in the plaint by the plaintiff, for the uncertainty about the amount due has ceased to exist after the final decree. (*Gruer, J.*) SHEO KISANDAS v. DANDAS RAMGOPAL. 1938 N L J 341.

——**S. 7 (iv) (f)**—*Suit for accounts—Dismissal—Appeal—Valuation—If to be same as in Lower Court or if may be changed.*

[illegible]

allow the plaintiff to change in appeal the valuation adopted by him in the plaint in the trial Court. (*Leach C.J Varadachariar and Pandrang Row, JJ.*) NARAYANAN CHETTI v. PERIAPPAN. 48 L.W. 454 =
1938 M.W.N. 946 = A.I.R. 1938 Mad. 887 =
(1938) 2 M.L J. 557 (F.B.).

[illegible] **and Sch I, Art. 1**—*Applicability* [illegible] *from tenant—Decree—Award of* [illegible] *improvements—Appeal by plaintiff —Court-fee payable.*

In suit for possession of properties from tenants, if a decree is passed conditional on the plaintiff paying a certain sum of money for value of improvements due to the defendants, the plaintiff appealing against the decree awarding compensation there being no question about possession must pay Court-fee on the value of improvements. The subject of the appeal is the value of [illegible]

——**S. 12**—*Judicial determination of Court fee—Subsequent variation of.*

When a Court has passed a judicial order fixing the correct Court fee payable on a memorandum of appeal, [illegible] ds either [illegible] (1937) [illegible] followed. (*Pandrang Row, J.*) DURGIAH, *In re.*
[illegible]8 L.W. 461 = (1938) 2 M.L.J. 647.

[illegible] **17, (iii)**—*Applicability—Appeal* [illegible] *of claim under S. 11 of the United* [illegible]

[illegible] he United Provinces [illegible] sed according to sub- [illegible] be deemed to be a [illegible] nt jurisdiction. The decree is in the nature of a declaratory one and the claim analogous to a suit under O. 21, R. 63, C. P. Code. An appeal from such a dismissal, is sufficiently stamped by the affixing of 10 Rs. stamps. (*Zia-ul-Hasan and Yorke, JJ.*) HAR GOVIND PRASAD v. MT. MAHRAJ KUNWAR. 1938 O.A. 767.

——**Sch. II Art 17 (vi)**—*Applicability—Suit for removal of* Mutawalli *and rendition of account—Prayer for appointment of plaintiff in the place of the defendant—No prayer for possession.*

Where a plaintiff prays for the removal of *Mutwalli* and his appointment instead, and also prays for the rendition of accounts, but does not ask for posse[illegible] at.

all, the suit is governed by Sch. II, Art. 17 (vi) of the Court-Fees Act and not by S. 7 (v). (*Gruer, J.*) ASALATKHAN *v.* SAMSHERKHAN. **1938 N.L.J. 357.**

CRIMINAL PROCEDURE CODE (V OF 1898), S. 112—*Order under — Contents — Non-mention of substance of information received and amount of security required—Legality.*

Where an order does not set forth the substance of the information received, and the amount of security required, it fails to comply with the requirements of S. 112. Cr. P. Code, and is bad. (*Weston, I.C.S.*) PARAM HANS *v.* EMPEROR. **1938 A. M.L.J. 113.**

——**Ss. 133, 137 and 139-A**—*Issue of conditional order under S. 133—Procedure to be followed thereafter.*

Where a Magistrate has issued a conditional order as required by S. 133, Cr. P. Code and the party to whom notice was issued appeared but did not deny the existence of a public way, it is clearly incumbent on the Magistrate under S. 139-A to question the party and if he denied the right to proceed to enquire into the matter. The first stage is prescribed by S. 139-A and after complying with it only, should the Magistrate commence the second stage of enquiry as provided by S. 137. (*Mulla, J.*) MT. CHUNNI *v.* EMPEROR. **1938 A.W.R. (H.C.) 640.**

——**S. 139-A**—*Scope of enquiry under.*

The law does not contemplate the decision by a Magistrate, making a summary enquiry under Chap X, Cr. P. Code, of any question of title upon weighing evidence produced on both sides. All that he is required to do under S. 139-A, Cr. P. Code, is to hold an enquiry merely to satisfy himself that there is or is not some *prima facie* evidence to support the evidence of the denial of the public right. (*Mulla, J.*) MT. CHUNNI *v.* EMPEROR. **1938 A.W.R. (H.C.) 640.**

——**S. 145**—*Costs—Award of, long after disposal of case—Legality.*

Under S. 145, Cr. P. Code, the award of costs should be either contemporaneous with the decision in the case or made within a reasonable time after the disposal of the case. An award of costs made several months after the disposal of the case cannot be sustained. (*Lakshmana Row, J.*) NARIAH *v.* KRISHNAMURTHI.

1938 M.W.N. 1011 = 48 L.W. 444 (1).

——**S. 162**—*Scope of—If restricted to cases sent up by police.*

Where the police after investigation into a complaint did not take any action and thereafter the complainant preferred a complaint to a Magistrate which was almost identical with the one made to the police and the Magistrate framed charges on lesser offences which were however included in the more serious offences investigated by the police, and where the defence applied under S. 162, Cr. P. Code for copies of statements made by the witnesses in the investigation held by the police which was refused by the magistrate on the ground that defence was entitled to copies only if the case came to the Court as a result of the police investigation, it was *held* that there was nothing in S. 162 restricting it to cases sent up by the police and the defence was entitled to such copies and that there was no reason to deprive the defence of the privilege, because it had happened that charges of non-cognizable offences had been framed. (*Weston, I.C.S.*) MANGLA *v.* JASSI.

1938 A. M.L.J. 108.

——**(as amended in 1923), S. 195**—*Procedure under—Sanction for complaint.*

The old system of sanctions is now abolished. The Court or officer concerned does not sanction a prosecution. The Court or officer concerned makes the complaint direct. Where therefore a complaint in a case is

made by the Sub-Inspector concerned, with the necessary administrative sanction, no judicial sanction is necessary. (*Davis, J.C. and Mehta, J.*) DHARAMDAS HIRANAND *v.* EMPEROR. **A.I.R. 1938 Sind 213.**

——**S. 195 (1) (b)**—*Applicability — Offence not committed in Court—Complaint by Court—Necessity.*

S. 195 (1) (*b*) does not relate to offences under S. 211 generally. It relates to offences under S. 211, I. P. Code, when such offences is alleged to have been committed in or in relation to any proceedings in any Court. Where the offence under S. 211, I. P. Code, is not committed in the Court of Sub-divisional Magistrate, his giving of the "B" summary as an administrative officer cannot be held to have been a proceeding in his Court. Hence his complaint is not necessary. (*Davis, J.C. and Mehta, J.*) DHARAMDAS HIRANAND *v.* EMPEROR. **A I.R. 1938 Sind 213.**

——**S. 200**—*Duty of magistrate—Name or number of Act or section—Mistake in—Procedure.*

It would not be right to say that merely because the complainant, whether in ignorance or inadvertence, mentions the wrong Act or mentions the wrong Section, there is no complaint within the meaning of S. 200. It is true that if such errors occur in the complaint, care must be taken at the proper time to see that the accused is in no way prejudiced. But if the facts are such as to disclose an offence under a particular Section, under a particular Act then existing, then whatever errors there may be in the complaint as regards the number or name of the Act or section, the Magistrate should take cognizance of the complaint for what in substance it is, and even if the Magistrate has repeated in the summons the mistake that occurred in the complaint itself, that mistake is a mistake which can subsequently be rectified. (*Davis, J.C. and Mehta, J.*) LILARAM *v.* WADHUMAL. **A.I.R. 1938 Sind 209.**

——**S. 202**—*Issue of process—Duty of magistrates.*

Persons ought not to be dragged to Court on complaints, without the slightest consideration by Magistrates as to whether there is any substance in the complaint. (*Weston, I.C.S.*) NATHU LAL *v.* MOOLKI.

1938 A. M.L.J. 111.

——**S. 235**—*Joint trial of offences under Ss.* 211 *and* 302 *of the Penal Code—Validity of.*

Where an accused was alleged to have killed a person in order to foist a false case of murder upon his enemies and immediately after committing the murder preferred a false complaint and he was tried at the same trial for offences under Ss. 211 and 302, Indian Penal Code.

Held, that though strictly speaking a joint trial conducted for the two offences was not illegal, they ought not to be tried together, as such joint trial would be very embarrassing to the accused and to the prosecution and might lead to failure of justice. (*Burn and Lakshmana Rao, JJ.*) UPPARA DODDA NARASA, *In re.*

(1938) 2 M.L.J. 771.

——**Ss. 236, 237 and 423**—*Charge under S. 323, I. P. Code, but conviction under S. 452—Legality—Test—Question of prejudice.*

Though it is not illegal to convict a man of an offence under S. 452, I. P. Code, in a case in which he has been charged under S. 323, I. P. Code, because of the wording of Ss. 236 and 237 of the Cr. P. Code yet in each case the question to be decided would be whether the accused has or has not been prejudiced in his trial by the fact that the charge had been framed under the wrong section. Where it is neither shown nor does appear that there was any real cross-examination with a view to ascertain whether the shop in question was a building or not within the meaning S. 442, I. P. Code, the alteration of the charge does

CR. P. CODE (1898), S. 252.

cause injustice to the accused and a District Magistrate cannot in appeal alter the conviction under S. 323, I. P. Code, to one under S. 452, I. P. Code. (*Yorke, J.*) EMPEROR v. SHANKAR DAYAL.

of relevant and admissible evidence ... offence after a certain stage. Ss. 252 and 256, Cr. P. Code, are not intended to prohibit such admission.

LALA v. EMPEROR.

——S. 350 (1), Prov. (a)—*Claim for* de novo *trial—Order resummoning witnesses—Witnesses not examined in chief—Legality of trial—Acquiescence of accused—Effect.*

Where a Magistrate recorded the claim of the accused for a *de novo* trial and directed all the prosecution witnesses to be summoned to appear ... the Magistrate must be deemed ... *de novo* trial (including inquiry). ... to examine the witnesses in chi... Mere acquiescence on the part of ... procedure cannot estop him fr... legality of the trial in appeal or re... PURUSHOTTAMRAO BHANJI v. E...
1938 N.L.J. 309 = A.I.R. 1938 Nag. 493.

——S. 423—Alteration of conviction—Charge under S. 323, I. P. Code, and conviction under S. 452—Legality—Power of appellate Court. See CR. P. CODE, Ss. 236, 237 AND 423.

——S. 423 (1) (b)—*Applicability*

cases of ... Court ar... convictic... against ... appeal ... (*Davis*, ...

——S ... *view of law.*

CR. P. CODE (1898), S. 561-A.

Revision of an order of acquittal may be allowed when the order of acquittal is based on an erroneous view of the law. (*Bhide, J.*) MT. HARBANS KAUR v. LAHARI RAM. A.I.R. 1938 Lah. 739.

RAHIM v. EMPEROR. A.I.R. 1938 Sind 202.

——Ss. 476 and 195 (1) (c)—*Court, if can proceed*

——S. 488 (8)—*"Residence" — Meaning of—If permanent residence.*

Where there is something more than a flying visit, where a man leaves his house and resides for some time in the house of his parents-in-law with his wife, that is a sufficient residence within the meaning of sub-s. (8) of S. 488. Sub-s. (8) does not necessarily refer to permanent ... ers also to temporary residence. The ... of course implies something more ...

be so strictly construed as to deprive the woman, who

A.I.R. 1938 Sind 223.

——S. 533—*Evidence of Magistrate recording confession—When admissible*

unsupported by the evidence on record even as legit...

CR. P. CODE (1898), S. 562.

inference and are wholly unjustified and reflect on the character of the applicant and are likely to affect his future career, it is only fair that they should be directed to be expunged. (*Bhide, J.*) LACHHMAN DAS *v.* JAI GOPAL. **A.I.R. 1938 Lah. 793.**

——**S. 562 (1)**—*Scope of—Offences punishable with fine only, if comes within the purview of.*

It is wrong to think that S. 562 (1), Cr. P. Code, applies only to offences punishable with imprisonment and not to offences punishable with fine only. S. 562 (1) lays down the limit of the gravity of the offence that can be dealt with, in view of the age and the sex of the offenders, under that section, and the mention of certain sentences of imprisonment, etc., does not mean that offences punishable with fine only are not amenable to the provisions of S. 562 (1). (*Zia-ul-Hasan and Yorke, JJ.*) SHITAL PRASAD *v.* EMPEROR. **177 I.C. 386=1938 O.A. 699=1938 A.Cr.C. 98=1938 O.W.N. 919=1938 O.L.R. 421.**

CRIMINAL TRIAL—*Case and counter-case—Prosecution evidence in one treated as defence evidence in the other—Legality—Propriety—Consent of Counsel—If can cure defect.*

Trials in criminal cases are governed by the provisions of Cr. P. Code and the procedure of treating the prosecution evidence in one case as defence evidence in the other and *vice versa* is not warranted by any provisions of that Code. The procedure permissible in civil cases cannot be engrafted on criminal trials. The fact that Counsel on both sides consented to such a procedure, in fact asked for such a procedure to be adopted, cannot make it legal. The Government pleader by assenting to the illegal procedure gives away his legal and necessary right, which in a regular trial he would have of cross-examining the evidence of the defence, as he could not cross-examine the witnesses whom he himself produced for the prosecution in both the cases. (*Zia-ul-Hasan, J.*) SARJU *v.* EMPEROR. **1938 O.A. 717=1938 O L.R. 429=1938 O.W.N. 958.**

——*Confession—Duty of Court to take as a whole—Exculpatory part incredible—When to be rejected.*

It is true that a confession must be accepted or rejected as a whole if it is to be relied on—the part which implicates as well as the part which exculpates, though the part which exculpates may appear inherently incredible because there is no evidence to prove that the part which exculpates is false. But by "evidence" is meant not only direct evidence but circumstantial evidence, and a judge must not leave out of his consideration, when considering the truth or falsity of a confession or its parts, those probabilities and those presumptions which may properly arise from the other evidence on record, regard being had to the common course of natural events and human conduct, because little evidence is necessary to rebut statements which are in themselves inherently incredible, even when made by an accused in a confession. (*Davis, J.C. and Lobo, J.*) JADO RAHIM *v.* EMPEROR. **A.I.R. 1938 Sind 202.**

——*Evidence—Circumstantial evidence — Sufficiency.*

Where circumstantial evidence is relied upon by the prosecution, that evidence must be of such a character that it is compatible only with the guilt of the accused and with no other theory. (*Bennet and Verma, JJ.*) JIT SINGH *v.* EMPEROR. **1938 A.W.R. (H.C.) 649.**

——*Evidence—Interested evidence.*

Interested evidence is not necessarily false. (*Davis, J. C. and Lobo, J.*) JADO RAHIM *v.* EMPEROR. **A.I.R. 1938 Sind 202.**

——*Evidence—Value—Test—Number of witnesses.*

CUSTOM.

Mere numbers cannot be taken into account for determining the value of the evidence. (*Mulla, J.*) PIR BUX *v.* EMPEROR. **1938 A.W.R. (H.C.) 656.**

CROWN—*Prerogative of legislation in case of ceded possession—Territory acquired by voluntary cession by consent of inhabitants—Grant of representative institutions—Effect of.*

The prerogative of the Crown to legislate by Orders in Council and Letters Patent for the government of a possession or ceded territory is not restricted to territories acquired by cession in a limited sense, excluding voluntary cession by the consent of the people. There is no authority for making a distinction between cession from some sovereign power and cession by general consent or desire of the inhabitants. The Crown, by the grant of representative institutions to the inhabitants of an acquired territory, is not immediately and irrevocably deprived of its right to legislate by Letters Patent or Orders in Council unless there is an express reservation of a right to that effect. The true rule is that such a grant, without the reservation of a power of concurrent legislation, precludes the exercise of the prerogative while the legislative institutions continue to exist. (*Lord Maugham.*) SAMMUT *v.* STRICKLAND. **48 L.W. 551 (P.C.).**

CUSTOM—Haqi-i-chaharum—*Liability to pay—If extends to involuntary sales also.*

Where by a custom the Zamindar is entitled in the case of sales of houses to a share of the sale proceeds as *haq-i-chaharam*, the custom extends to voluntary and involuntary sales alike. (*Misra, J.*) MANNI LAL *v.* GAURI SHANKAR. **1938 A.W.R. (H C.) 665.**

——*Jains—Adoption—Husband's authority—Necessity—Onus.*

It was held that a particular custom that a Jain widow could adopt without her husband's authority had not been established by such a long series of judicial decisions, as to make it apply universally to the Jain community; as such a plaintiff relying on such a custom had to prove that it existed in his own community or family. (*Weston, I. C. S.*) CHAND KOER *v.* PEM RAJ. **1938 A.M.L.J. 79.**

——*Pleading and proof—Necessity — Established custom of universal nature.*

If a custom is universal and established by a series of decisions, a stage may be reached when the custom ceases to be a custom in the strict sense of the word and becomes law. It will then not be necessary to plead or prove it in particular cases. (*Weston, I.C.S.*) CHAND KOER *v.* PEM RAJ. **1938 A.M.L.J. 79.**

——*Proof—Judicial recognition of custom repeatedly brought to notice of Court—Special proof—Necessity.*

Where a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Court may hold the custom to be introduced into the law without the necessity of proof in each individual case. (*Broomfield and Macklin, JJ.*) DASO VENKATESH *v.* RAMCHANDRA RANGO. **40 Bom. L.R. 960=A.I.R. 1938 Bom. 456.**

——**(Bombay)**—Deshastha Brahmins of Belgaum District—Adoption of sister's son—Validity of. *See* HINDU LAW—ADOPTION. **40 Bom.L.R. 960=A.I.R. 1938 Bom. 456.**

——*Essentials of validity.*

A local custom need not be immemorial nor necessarily ancient in order that it may be held to be established. But it must be certain, invariable and reasonable, and it must be exercised as of right. (*Broomfield and Macklin, JJ.*) BABASAHEB APPASAHEB *v.* LAXMANAPPA RAMAPPA. **40 Bom.L.R. 1015.**

CUSTOM,

——(N. W. F. P.)—*Alienation — Powers of— Awans.*

The case of each tribe should be decided on its own custom. Awans are governed by Awan Customary law and the mere fact that they live in a village Kukar which is part of Tapa Daudzai does not alter the position. According to the customary law of Awans, the Awans have unrestricted power of making testamentary dispositions of their property and hence a will in favour of sister's sons to the total exclusion of collaterals is valid. (*Almond, J. C. and Mir Ahmac* [illegible]
KHUSHAL *v.* YAKUB MADAD KHAN.
A.I.R. [illegible]

——(Punjab)—*Succession—Daughte* [illegible] *Garhshanker Tahsil..*

Among Rajputs of Tahsil Garhshanker, a daughter succeeds in the presence of heirs and collaterals of any degree to the non ancestral property. (*Addison and Din Mahomed, JJ.*) GHULAM MOHY-UD-DIN KHAN *v.* MT. NIAMAT BIBI. A I.R. 1938 Lah. 785.

DAMAGES—*Claim of—Obstruction to plaintiff's enjoyment of rights by decision of Court in favour of defendant—Liability of defendant in the circumstances.*

It is well established that no action will lie against [illegible]

[illegible] of his wrongful act and that the intervening act of an independent third person bound by law to make a judicial decision breaks the chain of causation. (*Wadsworth, J.*) CHAKRAPANI NAIDU *v.* VENKATARAJU.
48 [illegible]
1938 M.W.N. 982=(1938) 2 [illegible]

DEBTOR AND CREDITOR—*Composit*[illegible] *of—Assignment of debtor's property to trustee—Rights* [illegible]

[illegible] debtor payment of less than the amounts due to them in full satisfaction of the whole of their claims. The consi- [illegible]

[illegible] to and take the benefit of the assignment. Such an assignment operates in effect to place the administration of the debtor's estate in the hands of a trustee for the benefit of the creditors. The assignment is the voluntary act of the arranging debtor, and the trusts to which the assignment is subject are those which the debtor himself creates. The deed becomes operative to release or suspend the operation of creditors' claims by virtue of the assent of the creditors thereto; and it only binds those creditors who in writing or otherwise expressly or im- [illegible]

[illegible] assents to and elects to take the benefit of the arrangement within the proper time is entitled to share in the benefits

EASEMENTS ACT (1882), S. 15.

of the arrangement, although he has not signed the deed; and *in some cases the Courts will allow a creditor to* come in under the arrangement and share in its benefits notwithstanding that the proper time for accession has elapsed. On the other hand, a creditor entitled to the benefit of an arrangement must perform fairly all the conditions of the arrangement which apply to the creditors. If he takes any step which is inconsistent with or opposed to those conditions, as, for instance, by bringing an action against the debtor to recover his [illegible] m the benefit of [illegible] nding not only [illegible] ngement or ex- [illegible] o by their con- [illegible] as if they had executed it. The principle is that if a creditor puts himself in the situation of having the benefit of the deed, he must bear its obligations although he has not literally executed the deed. There is however one benefit to which a secured creditor is entitled. If the composition deed reserves to creditors their rights over securities held by them on the property of the debtor, as by a mortgage charge, the terms of a general release contained in the deed of agreement will not prevent those creditors from realizing or dealing with and obtaining the benefit of [illegible] ebts due to them [illegible] ent of their securi- [illegible] the deed. (*Bhide* [illegible] CHAND.
A.I.R. 1938 Lah. 769.

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), S. 10 A—*Applicability—Suit by* [illegible] *d by* [illegible] *neous*

[illegible] Act applies only to a transaction of such a nature that the [illegible] it are triable [illegible] The special [illegible] agriculturist [illegible] the written [illegible] e provisions [illegible] strictly to suits which fall under Ch. III, and would not be available to parties whose suits do not fall under Ch. III. The provision has to be strictly construed and must be limited to cases which are clearly covered by it. A suit by [illegible]

[illegible] agreement to vary or contradict the terms of the rent note. (*Wadia and Divatia, JJ.*) TARACHAND PIRCHAND *v.* BALA SAKHARAM. 40 Bom.L R. 974.

——S. 15-D—*Suit under—Maintainability—Conditions.*

A suit under S. 15-D of the Dekkhan Agriculturists' Relief Act will only lie on the presumption that there is a mortgage in existence by an agriculturist. Such a suit cannot be entertained when the mortgage has been redeemed by payment of the full amount of the mortgage. [illegible] *J.*) SUBRAYA KUPPA *v.* [illegible]
40 Bom L.R. 1001.

[illegible] OF 1882), S. 15, Expl. II— [illegible] *vendor for less than the* [illegible] *using for 6 years after* [illegible] *ser after purchase not extending to the statutory period—Interruption—Right of easement, if acquired.*

ENGLISH LAW.

Where the plaintiff's father's vendor had used a particular courtyard for the purposes of his business, for a period of about 12 to 15 years and after his death his son had closed down the business and did not use the courtyard for a period of nearly 6 years for his business, and the plaintiff after purchase from the son had used it for a similar business of his own for a period of about 12 years, it could not be said that the plaintiff had acquired a right of easement for there had been an interruption, and an intention to cease to enjoy the right. (*Bennet, A.C.J. and Verma, J.*) FAIZULLAH EBADULLAH *v.* BADRUZZAMAN.

1938 A.W.R. (H.C.) 568=1938 A.L.J. 867= A.I.R. 1938 All. 587.

ENGLISH LAW—*Applicability—Feudal law—If applies to—Malguzar in Central Provinces.*

The principles of English Feudal Law are clearly inapplicable to Malguzar in Central Provinces. (*Stone, C. J. and Clarke, J.*) DARYAO SINGH *v.* KUKDAY.

1938 N.L.J. 366.

ESTOPPEL—*Approbate and reprobate—Party adopting order of Court—Right to object to same afterwards—Principles—Doctrine of election.*

The law is sufficiently clear that a party who seeks the assistance of the Court is not entitled to approbate and reprobate or blow hot and cold. The doctrine of election is not confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. A person who has chosen to adopt an order of Court cannot subsequently be allowed to object to it. (*Burn, J*) SREERAMULU *v.* VENKATANARASIMHAM.

1938 M.W.N. 1013=48 L.W. 476= (1938) 2 M.L.J. 835.

EVIDENCE—*Judgments—Finding of fact in—Binding effect of.*

A finding of fact by one Court in one judgment is not binding upon another Court in another case. (*Davis, J.C. and Mehta, J.*) ARAB JHANGLU *v.* PANJAL SHAH. **A.I.R. 1938 Sind 198.**

EVIDENCE ACT (I OF 1872), S. 13—*Document by party asserting his right to property—Admissibility and value.*

A document by which a party or his predecessor-in-interest had asserted a right to deal with the property in suit is admissible in evidence. But such evidence is usually of little value and a Court should not place exaggerated importance on it, as it is little more than an admission in favour of the person making it and is in this country often manufactured for the purpose of creating evidence for use later on in a claim to ownership. (*Addison and Din Mahomed, JJ.*) MUNICIPAL COMMITTEE, BATALA *v.* WALI MAHOMED.

I.L.R. (1938) Lah. 494=A.I.R. 1938 Lah. 795.

——**S. 80**—*Applicability — Confession in Indian Native States—Admissibility.*

Confessions recorded in Indian Native States can be used in British India under the provisions of S. 80, Evidence Act, and they may be accepted as admissible for prosecution in British India. (*Bennet and Verma, JJ.*) LAL SINGH *v.* EMPEROR.

1938 A.W.R. (H.C.) 642=1938 A.L.J. 943.

——**S. 90**—*Presumption under — Discretion of Court.*

The presumption referred under S. 90 of the Evidence Act is one which the Court is competent to make and notwithstanding the fact that the elements which are mentioned in that section are satisfied the Court may require the document to be proved in the ordinary manner. (*Wazir, J.*) SUKHRAMDAS SHAH *v.* MT. MANDAN. **40 P.L.R. J.&K. 51.**

——**S. 114, Ill. (b)**—*Accomplice—Evidence of—Corroboration by another accomplice—Sufficiency.*

It cannot be laid down absolutely that corroboration of one accomplice by another accomplice is not corroboration at all. The evidence of an approver can be acted upon without corroboration; there can therefore be nothing illegal in acting on the statements of accomplices that has been rendered more credible by agreement between them on the details elicited in cross-examination. The illustrations to S. 114 Evidence Act themselves show that in cases where accomplices corroborate one another, there is much greater reason for accepting their evidence. (*Horwill, J.*) SATTAR KHAN *v.* EMPEROR.

(1938) M.W.N. 962.

EXECUTOR—When becomes legal representative. *See* C. P. CODE, S. 2 (11). **1938 A.M.L.J. 91.**

GOVERNMENT OF INDIA ACT (1919), S. 80-A (3)—*Scope and effect of—Powers of local legislature to make laws—Limits.*

It is wrong to think that Sub-S. (3) of S. 80-A of the Government of India Act (1919), means that if the local legislature of a province has obtained the previous sanction of the Governor-General, it can make laws of the kind mentioned in cls. (a) to (ii) of the sub-section so as to affect rights and properties not only within the boundaries of that province, but also outside those boundaries. The effect of sub-S. (3) is that without the previous sanction of the Governor-General, or at any rate his subsequent assent as mentioned in the proviso to the sub-section, the local legislature of a province cannot validly make any such laws even for its own territories, and the previous sanction, or the subsequent assent, of the Governer-General in Council only makes such laws valid and effective within the territories of the province. (*Bennet and Verma, JJ.*) WAHID-UDDIN *v.* MAKHAN LAL. **1938 A.L.J. 872= 1938 A.W.R. (H.C.) 626=1938 R.D. 782= A.I.R. 1938 All. 564.**

——**(1935), Ss. 205 (1), 224**—*Refusal to interfere under S. 115, C. P. Code and 224 of the Government of India Act with order of a trial Court—Certificate under S. 205 (1), if can be granted.*

Where the High Court refuses to interfere under S. 115. C. P. Code and S. 224 of the Government of India Act, with the order of a trial Court, refusing to decide the question of jurisdiction, as a preliminary issue it is not a fit case to be certified under S. 203 (1) of the Government of India Act, as no question of interpretation of S. 224 was involved. It is not the function of the High Court under S. 224 to interfere with judicial orders of the Subordinate Courts. (*Ismail, J.*) LAKSHMI IRON AND STEAL MANUFACTURING CO., LTD., *v.* RADHEYLAL MANNILAL. **1938 A.L.J. 911= 1938 A.W.R. (H.C.) 624.**

——**S. 224**—Function of the High Court under—If can interfere with judicial orders of subordinate Courts. *See* GOVERNMENT OF INDIA ACT, SS. 205 (1) AND 224. **1938 A.L.J. 911.**

GRANT—*Duration — Permanent tenancy of watan lands—Death of grantor—Status of tenant—Acceptance of rent from latter—Effect of.*

A permanent tenancy of paragana watan lands ceases on the death of the grantor: the grantee thereafter becomes a tenant on sufferance or, on acceptance of rent from him, a tenant from year to year—not a permanent tenant. (*Broomfield and Macklin, JJ.*) BABASAHEB APPASAHEB *v.* LAXMANAPPA RAMAPPA.

40 Bom. L.R. 1015.

GRANT.

——*Inam—Resumability—Presumption as—Rule—Pattamdar service inam—If resumable.*

Inam grants fall under three groups; (1) grants of land on favourable rent burdened with service; (2) ... l future service; ... interest in land ... groups (1) and ... ot resumable by ... to that effect, ... to dispossess persons who have been in possession for several generations has, in the first instance, to establish facts forming a basis for a *prima facie* inference that the grant is one which may be resumed. In the case of post-settlement personal service inams, there is a presumption, to start with, that the grantor has a right to resume and that it is incumbent upon th... the grant to rebut this presumption wher... established that the grant is of this natu... pre-settlement inams, in the absence of clear... to the nature of the grant the question as to... groups in which they fall is a matter on which there is no presumption either way. A Pattamdar service inam ...

GRATUITY—Book debts—Difference. *See* T. P. ACT, S. 6 (A). 1938 Rang. L.R. 542.

HINDU LAW—*Adoption—Sister's son—Validity among Deshasta Brahmins of Belgaum in Bombay—Custom as to.*

There is a well recognised custom prevalent among the Desastha Brahmins in the Belgaum District of the Bombay Presidency, under which the adoption of a sister's son is valid. (*Broomfield and Macklin, JJ.*) DASO VENKATESH *v.* RAMCHANDRA RANGO.

40 Bom.L.R. 960=A.I.R. 1938 Bom. 456.

——*Alienation—Father's alienation — Right to set aside—Sons born subsequently—Right of.*

...

40 Bom. L.R. 1029.

——*Alienation—Father—Sale of joint family property by—Necessity—Proof—Duty of alienee—Recitals as to debts—Effect of—Specification of debts.*

Where the recitals in a deed of sale of family property executed by a Hindu father are o... tion, it is reasonable to require t... have made some inquiries as to... discharging which the sale took ... been careful either to see that the satisfaction of the debts is specifically mentioned in the sale deed or to get entries in the documents evidencing the debts themselves that they have been satisfied. (*Broomfield and Sen, JJ.*) SHANTAYA KOTRAYA *v.* MALLAPPA BASAPPA.

40 Bom. L.R. 1029.

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HINDU LAW.

——*Debts — Father — Avyavaharika — Decree for compensation for causing wrongful loss to one member of the family.*

A Hindu kartha was directed by an award of arbitrators with reference to a partition of the joint family, to file a suit on a certain pro-note. He, out of improper motives, failed to do so and the claim became barred by limitation and thereby he caused wrongful loss to the member to whose share that debt was allotted. That member obtained a decree for damages as compensation and where the question arose as to whether such a decree was binding as against the sons of that kartha who was dead, it was held that the conduct of the kartha was both dishonest and grossly improper and was clearly repugnant to good morals and hence the sons were not liable in respect of that decree debt. (*Bennet* ...

Where a decree for costs is passed against a Hindu father, who resisted a suit for specific performance in ... a man of ordinary ... action of the father ... and hence the sons ... the father's death. ... AM LAL MISIR *v.* ... W.R. (H.C.) 630=

1938 A.L.J. 952=A.I.R. 1938 All. 591.

——*Debts—Father—Speculative transaction—Liability of sons.*

Where speculative debts have been incurred by the father in a joint Hindu family and the other members of the family are his sons, the joint family estate is open to be taken in execution proceedings upon a decree for payment of those debts. 16 Lah. 1077, Rel. on. (*Addison and Din Mahomed, JJ.*) AYA RAM TOLA RAM *v.* SADHU LAL. A.I.R. 1938 Lah 781.

——*Guardianship—De facto guardian—Status of—General recognition by family of minor—Power to give* ...

... a guardian ... previously. ... necessary to wait for a series of transactions in the capacity of guardian in order to clothe that person with authority to represent the estate of the minor. 51 Bom. 1040 and 55 M.L.J. 861, Ref. to. A *de facto* guardian who is validly in charge of the minor's ... for the benefit of that minor, give a good ... respect of a debt due to the minor. ... 37 Mad. 280, Diss. from. (*Wadsworth*, ... MAYAMMA *v.* LAKSHMIDEVAMMA.

1938 M.W.N. 942=
48 L.W. 506=(1938) 2 M.L.J. 632.

——*Joint family—Alienation—Benefit of the estate—Test—Considerations.*

It is impossible to give a precise definition of the expression "benefit of the estate" applicable to all cases. Whether or not a particular transaction is beneficial will depend on the particular circumstances of each case. The purpose of a loan may be necessary; yet the debt may not be necessary if the property was yielding decent income; the alienation would be much less necessary if

HINDU LAW.

——*Partition—Division in status—Suit for partition by minor co-parcener—Date of division—Date of institution of plaint or date of preliminary decree.*

In the case of a suit for partition instituted on behalf of a minor Hindu co parcener, the mere filing of the plaint for partition is not enough to effect a division of the family. The Court has to give its approval to the partition sought. Where the Court makes a preliminary decree for partition, it is on that date and not from the date of plaint that the division in status is effected. (*Reilly, C.J. and Abdul Ghani, J.*) NARASAMMA *v.* AKKAYYAMMA. **16 Mys.L.J. 406.**

——*Partition—Mother—Right to share.*

A Hindu mother is entitled to receive a share equal to that of a son only in the case of a partition between her husband and his sons or between the sons after her husband's death. (*Broomfield and Sen, JJ.*) SHANTAYA KOTRAYA *v.* MALLAPPA BASAPPA.

40 Bom.L.R. 1029.

——Partition — Partial partition — Rule against—Application of—Suit by alienee from one member of share in one item of property—Suit by—Frame of—Pleas open to other co-parceners. *See* S. 11.

——*Reversioner—Estoppel—Alienation Consent of immediate reversioner—His son, if estopped.*

alienated by the widow to their father. 23 C.W.N. 1025, followed. (*Lort Williams, J.*) MANMATHA NATH SETT *v.* GOBINDA LAL. **68 C.L.J. 173.**

——*Widow—Alienation of usufructuary mortgage belonging to the husband's estate—Validity.*

Where an usufructuary mortgage forms part of the estate of a Hindu husband, his widow transfer such mortgagee rights, without (*Bennet, A.C.J., Collister and Mulla,* SINGH *v.* RAGHUBIR SAHAI.

1938 A.W.R. (H.C.) 579 = 193[illegible]
1938 O.W.N. 985 = A.I.R. 1938

——*Widow—Compromise by—Reversio[illegible]*

a

t[illegible]

bona fide for the benefit of the estate, may bind the reversioners, even though they were not parties thereto. They are deemed to be alienati[illegible]

body of reversioners. (*Lort W[illegible]* NATH *v.* GOBINDA LAL.

——*Widow—Maintenance—[illegible]*

Act. A portion of the property might be assigned to her in lieu of maintenance, in which she can only look to the profits and not to the pr[illegible] alienate it for her life time, but ca[illegible] to be maintained out of the prope[illegible] creates a charge in her favour, [illegible] appointed in execution though there is no provision in the decree itself. If she brings the property to sale in

HINDU WIDOWS REMARRIAGE ACT (1856), S. 2.

execution of her decree for maintenance, the charge on the property disappears after the sale and hence the purchaser cannot be made to pay her maintenance after the date of decree for which execution was taken out. (*Bose, J.*) TRIVENI BAI *v.* DEORAO.

1938 N.L.J. 353.

——*Widow—Nature of estate—Powers of alienation.*

A Hindu widow is not a tenant for life, but is owner of the property inherited by her, subject to certain restrictions on alienation, and to devolution of the estate at her death upon the next heir of the last full owner. She has absolute power of disposal over the income of the property during her life. But a valid transfer by her of the corpus of immovable property so inherited, that is to say, a transfer not liable to be set aside at the instance of an actual reversioner, can be made only where it can be shown that (*a*) there was legal necessity, or (*b*) the alienee after enquiry honestly believed that there was necessity, or (*c*) there was such consent of the next reversioners as would raise a presumption that the transaction was a proper one. Such consent must be of

next reversioners, or a transfer of the whole estate to a [illegible] of the next reversioners. The [illegible]ever, loses its probative value. [illegible] lose that their object was to [illegible]ate among the parties during [illegible] (*Lort Williams, J.*) MAN[illegible]A LAL **68 C.L.J. 173.**

——*Widows—Surrender—Validity—Conditions.*

A surrender by a Hindu widow must be of her whole interest in the whole estate in favour of the next reversioner, if only one, or of all the next reversioners, if more than one, at the time of alienation. It must be a *bona fide* surrender, and not a device to divide the estate

[illegible] *guardian—Ratification* [illegible] *ry note—Remarriage* [illegible] *—Widow if necessary party to suit.*

The co parceners of the deceased husband of a Hindu widow settled with her maternal uncle as her guardian

[illegible]y note. After the filing [illegible] and it was contended [illegible]du Widows Remarriage [illegible] forfeited her claim to [illegible]ance due under the promissory note cannot be claimed.

Held, (1) that though the widow was a beneficiary

meaning of S. 2 of the Hindu Widows Remarriage Act. So the defendants could not repudiate the debt, though

INCOME-TAX ACT (1922), S. 4.

the possibility of the remarriage was not actually visualized by them at the time of the arrangement. (*Wadsworth, J.*) ARUNACHALAM CHETTY *v.* SESHIAH CHETTY. 1938 M.W.N. 1006=(1938) 2 M.L.J. 701.

INCOME TAX ACT (XI OF 1922), S. 4—*Construction—Interest on foreign investments — Re-investment abroad—Interest taken into account in determining amount of profits available for distribution as dividend—If to be deemed to be received in British India.*

Where the income derived by a company by way of interest on its investments abroad is again re-invested abroad and retained there without being remitted to British India, and the investments retain their character of interest received abroad, such interest cannot be said to have been received in British India within the meaning of S. 4 of the Income-tax Act. The mere fact that the amount of that income has been brought into account in ascertaining the profits for the year and has been taken into account in determining the amount to be paid in dividend to the shareholders of the company is irrelevant, unless it be proved that this actual income has been received in India and applied in payment of dividends. And when it is shown that the dividend is in fact paid by raising a loan on the security of the reserve fund available for payment of dividend and that in point of fact this sum is not used in payment of dividend though taken into account for the purpose of ascertaining the amount of profits and the sum to be applied in payment of dividend, the foreign income cannot be considered or treated as received in British India for purposes of S. 4. (*Beaumont, C. J. and Kania, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* THE NEW INDIA ASSURANCE CO., LTD.
40 Bom. L.R. 980.

———**S. 28 (1)**—*Imposition of penalty after assessment order—Power of Income-tax Officer.*

Once the Income-tax Officer starts proceedings under sub-s. (1) of S. 28 within the time prescribed there, he is empowered to make an order imposing a penalty under that sub-section, even after the assessment order has been finally made and the tax been paid. (*Addison, Ag. C. J. and Din Mahomed, J.*) VIR BHAN BANSI LAL *v.* COMMISSIONER OF INCOME-TAX, PUNJAB.
A.I.R. 1938 Lah. 749.

———**S. 66 (3)**—*Question of law not raised in application under S. 66 (2)—Right to demand reference in respect of.*

Where an applicant has failed to raise a particular question of law in his application under S. 66 (2), he is not entitled to require the Commissioner under S. 66 (3) to refer to the High Court that particular question of law. (*Derbyshire, C. J. and Costello, J.*) BABULAL RAJGARHIA, *In the matter of.*
177 I.C. 300=A.I.R. 1938 Cal. 168.

INTERPRETATION OF STATUTES—*Harmonious construction—Ambiguity—Construction consonant to other Acts.*

In construing a statute one should endeavour to give it a meaning, in all cases of ambiguity, which will make it consonant to, rather than in disagreement with, other Acts. (*Stone, C. J., Bose and Clarke, JJ.*) MOTIRAM SITARAM *v.* DAULAT ANYAJI.
1938 N.L.J. 327 (F.B.).

JAINS. *See* HINDU LAW—APPLICABILITY.

———Adoption—Husband's authority — Necessity—Custom. *See* CUSTOM—JAINS—ADOPTION.
1938 A.M.L.J. 79.

JAMMU AND KASHMIR CIVIL PROCEDURE CODE, Ss. 72 and 60—*Lands held by Assamis and occupancy tenants—Temporary alienation of—Permissibility.*

LAND TENURE.

Lands held by Assamis and occupancy tenants are exempt from attachment or sale under S. 60 (*i*) (c. 2), C. P. Code, and a temporary alienation thereof under S. 72 of that Code is, therefore, not permissible. (*Kichlu and Wazir, JJ.*) SANTAMAL DUNICHAND *v.* AHMED ALI.
40 P.L.R. J. & K. 53.

JURISDICTION—Special tribunal appointed by statute—Civil Court's jurisdiction. *See* C. P. CODE. S. 9—SPECIAL TRIBUNAL. A.I.R. 1938 Rang. 392.

LAND ACQUISITION ACT (I OF 1894), S. 31—*Scope—Duty of Court—Rival claimants—Decision of claims—If obligatory—Power to refer parties to separate suit.*

Where rival claimants come before the Court on a reference under S. 31 of the Land Acquisition Act, the Court has a duty to decide which of the claimants is entitled to the money deposited in Court. There is no provision in the Act which authorizes the Court to refer the parties to a separate suit. (*Wadsworth, J.*) SWAMINATHA AYYAR *v.* KUPPUSWAMI AYYAR.
1938 M.W.N. 950=48 L.W. 450.

LANDLORD AND TENANT — *Ex-proprietary tenancy—Widow of tenant living in sin—If loses ex-proprietary rights.*

Where a widow of an ex-proprietary tenant is leading a loose life and in fact has given birth to a child after her husband's death, she does not thereby lose her ex-proprietary rights, when no actual re-marriage is proved. (*Darling, S. M. and Mehta, J. M.*) MURTI *v.* JEO.
1938 A.L.J. (Supp.). 96.

———*Holding over by lessee—Terms of relationship.*

When a lessee holds over after the expiry of the term fixed by the lease, the relations between the parties are governed by the same terms as are embodied in the original lease. (*Misra, J.*) BADAL *v.* RAM BHAROSA.
1938 A.W.R. (H.C.) 602=1938 A.L.J. 933.

———*Notice to quit—Necessity—Term in the lease providing for ejectment on failure to pay rent.*

Where a lease contains a provision that the lessor would be entitled to eject the lessee if there was default in the payment of rent in any month, if the lessee has not paid rent for years, he is liable to be ejected without any notice. (*Misra, J.*) BADAL *v.* RAM BHAROSA.
1938 A.W.R. (H.C.) 602=1938 A.L.J. 933.

———*Occupancy holding—Grove—Sale — Vendee's position—Land ceasing to be grove—Liability to ejectment as non-occupancy tenants.*

Where a certain occupancy holding was treated as a grove and was sold, the vendees must have known that they could only be vendees of grove-holders, as occupancy rights cannot be transferred. When the trees disappeared the Zamindar is entitled to sue the vendees as non-occupancy tenants, for ejectment. (*Darling, S.M. and Bomford, J. M.*) ASAD ALI KHAN *v.* LACHMI NARAIN DASS. 1938 A.L.J. (Supp.) 75=
1938 R.D. 777.

———*Occupancy tenant—Absolute occupancy tenancy—Nature and incidents.*

Absolute occupancy tenancy is a special kind, heritable and assignable. It springs out of settlement and statute. It does not amount to proprietorship. In such a case there is either a reverter or the Crown takes by escheat. (*Stone, C.J. and Clarke, J.*) DARYAO SINGH *v.* KUKDAY.
1938 N.L.J. 366.

LAND TENURE—Khata Kul *tenants—If permanent tenants—Land continued in same family for several generations—Separate* Khata *opened in tenant's name in landlord's books—Tenant spending money on improvements—Effect of.*

LEASE.

It cannot be said that *Khata Kul* tenants are permanent tenants. They are no doubt privileged tenants, by the privilege does not extend to permanency of tenure. The fact that a *Khata* is opened in the name of the tenants in the landlord's books is by no means conclusive of the fact that they are permanent tenants. Nor can the fact that the land has remained continuously in the same family and descended from father to son for several generations be made the foundation of a right to hold the land permanently. Further the money by the tenants on developing and land would not be a good ground for hold... tenancy is permanent in law, though it may give rise to a claim for compensation on eviction. (*Broomfield and Macklin, JJ.*) BABASAHEB APPASAHEB *v.* LAXMAN. 40 Bom.L.R. 1015.

created
genera
shall
recover it from the property of the lessee, that under the terms of the lease the landlo. secured creditor and could not claim priority over a mortgagee. (*Weston, I. C. S.*) BIJAI SINGH JI *v.* BALLABH DAS. 1938 A.M.L.J. 100.

——Notice to quit. *See* LANDLORD AND TENANT—NOTICE TO QUIT.

——*Renewal clause—Construction—Perpetual right to renew.*

If the option in a lease does not state the terms of renewal, the new lease will be for the same period and on the same terms as the essential conditio ant for renewal. Wh made it clear that the expiry of the term un instance of the landlo the lease subject to t

Eagley, JJ.) PRODYOT COOMAR ... NUDDIN MIA. A.I.R. 1938 Cal. 724.

——*Renewal clause—Renewal dependent on fresh*

A.I.R. 1938 Cal. 724.

LEGAL PRACTITIONER—*Disciplinary action—Considerations—Conclusion of criminal proceedings—Presumption of correctness.*

When criminal proceedings are taken against a pleader or an advocate and finally concluded, they must be taken to have been rightly decided, and the question to be determined in a subsequent enquiry as to whether the advocate or pleader ought to have disciplinary action taken against him is whether upon a perusal of the facts and circumstances disclosed in the evidence in the criminal proceedings his offence has been one implying a defect of character which unfits him to be a pleader or

LIMITATION ACT (1908), S. 4.

advocate. Such a defect of character normally involves moral turpitude. (*Roberts, C.J. and Dunkley, J.*) U KUN, BARRISTER-AT-LAW, *In the matter of.* A.I.R. 1938 Rang. 394.

——*Disciplinary action—Conviction—Case sent to*

n convicted of a the Bar Council for enquiry to determine if any disciplinary action was

It is not open to it to justify the action of the legal practitioner. (*Roberts, C.J. and Dunkley, J.*) U KUN, BARRISTER-AT-LAW, *In the matter of.* A.I.R. 1938 Rang. 394.

sional misconduct against a pleader. There must be moral delinquency in addition to negligence before a charge of unprofessional conduct can be brought home. Nor is there anything unprofessional in a pleader employing an unregistered clerk. The law allows a pleader to have two registered clerks, but does not insist that any clerk should be registered. (*Leach, C.J., Gentle and Krishnaswami Aiyangar JJ.*) G. S. PLEADER, CHICACOLE, *In re.* (1938) 2 M.L.J. 661 (F.B.).

OFFICIAL ASSIGNEE, MADRAS *v.* SURYAKANTHAMMAL. 48 L.W. 462=(1938) 2 M.L.J. 609.

—Order on time P. CODE, O. 20, 938 A.M.L.J. 86.

—*If exhaustive—affect interpreta-*

haustive Code in provisions unhampered the like. (*Stone, C.J. and Bose, J.*) RAJARAM *v.* PAIKU. 1938 N.L.J. 336.

——Ss. 4 and 20—*Promissory note getting barred during vacation—Endorsement of payment after date of limitation, but during holidays—If gives a fresh start of limitation.*

The endorsement of payment at the back of a promissory note made more than 3 years after its execution but during the close holidays of the Civil Courts does not give a fresh start of limitation under S. 20 and S. 4 of the Limitation Act. (*Bennet, A.C.J. and Verma, J.*) PURAN CHAND *v.* ABDULLAH. 1938 A.W.R. (H.C.) 572.

MINOR.

generally a soft dark blue mud in the upper strata, but becoming harder lower down. In the lower layers as the result of pressure it has assumed a rocky character, but even so it is still friable and without the hardness which characterizes stone or slate.

Held, it did not come within the reservation of mines and minerals, quarries and delfs of flagg, slate or stone. (*Lord Wright.*) ATTORNEY-GENERAL FOR THE ISLE OF MAN *v.* EMILEY MOORE. **176 I.C. 979= 11 R.P.C. 63=A.I.R. 1938 P.C. 238 (P.C.).**

MINOR—De facto *guardian—Who is—Test to decide—Power to give valid discharge for debts due to minor.*

A *de facto* guardian of a Hindu minor who is validly in charge of the minor's affairs may for the benefit of that minor give a good discharge in respect of a debt due to the minor. Once it is established that that person is the rightful guardian though not appointed by any process of law, there is no infirmity of the position of the *de facto* guardian disentitling him to do those acts which a *de jure* guardian can validly do. A *de facto* guardian is one who is already a guardian owing to something which has happened previously circumstances can be conceived in which the first formal act of the *de facto* guardian would be one which the Courts might rightly recognize as binding on the minor. The test is whether in the eyes of the family of the minor and those interested in the welfare of the minor, the person who makes an alienation or receives a payment is, at the time of the transaction impeached, regarded by common consent as the person who is entitled to act on behalf of the minor. If there is such a general recognition, then, when once that person has consented to act as guardian, it would not be necessary to wait for a series of acts or transactions in the capacity of guardian in order to clothe that person with authority to represent the estate of the minor. It is unreasonable to withhold from a person who has reasonably been recognised by the family as entitled to represent the minor, the power to do those acts which are necessary for and beneficial to the minor. Any payment made to such a person of monies due to the minor would be a valid payment. (*Wadsworth, J.*) HANUMAYAMMA *v.* LAKSHMI-DEVAMMA. **1938 M.W.N. 942=48 L.W. 506= (1938) 2 M.L.J. 632.**

MORTGAGE—Co-mortgagors — Rights, as against purchaser from one. *See* LIMITATION ACT, ARTS. 137, 144 AND 148. **176 I.C. 923=A.I.R. 1938 Rang. 65.**

———Receiver—If can be appointed in a suit for sale on simple-mortgage. *See* C. P. CODE, O. 40, R. 1—MORTGAGE SUIT. **1938 A. M.L.J. 90.**

———*Usufructuary mortgagee's interest—Nature of.*

The interest of a usufructuary mortgagee in the mortgage, is immovable property, such interest comprising as it does, a right to enjoy, benefits to arise out of land. (*Bennet, A.C.J., Collister and Mulla, JJ.*) FATEH SINGH *v.* RAGHUBIR SAHAI. **1938 A.W.R. (H.C.) 579=1938 A.L.J. 881= 1938 O.W.N. 985=A.I.R. 1938 All. 577 (F.B.).**

MUTATION—*Evidence—Realisations of rent after date of application—Value.*

When an application for mutation of names is made, in deciding the question of possession, realisations of rent, though genuine, cannot be taken into account, if they had been made after the date of the application for mutation. (*Darling, S.M.*) KALI BUX SINGH *v.* NANAK BAKASH DAS. **1938 R.D. 763.**

MYSORE RAILWAYS ACT (IV OF 1894, as amended in 1919), S. 95—*Scope—Failure to pay amount—If criminal offence—Power of Magistrate under—Nature of liability of defaulter.*

NEG. INSTR. ACT (1881), S. 8.

There is nothing in S. 95 of the Railways Act which makes failure or refusal to pay the railway fare or excess charge a criminal offence punishable by a Criminal Court. Nor can the Magistrate treat the defaulter an "accused" or find him "guilty" or to impose on him a sentence of fine as on conviction. All that the Magistrate is empowered under the section on a report being made to him under sub-S. (1) is to recover from the defaulter the amount payable under the section as if it were a fine. Only the amount claimed can be ordered to be paid and not any larger sum. (*Shankaranarayana Rao, J.*) BORE GOWDA *v.* THE RAILWAY STATION MASTER, MYSORE RAILWAYS. **16 Mys.L.J. 424.**

———**S. 95 (1) and (4)**—*Applicability—Undertaking by passenger to pay fare of fellow passenger—Action under S. 95 (4)—If justified.*

An undertaking by one passenger in the railway to pay or to be responsible for the railway fare of another fellow passenger travelling without a ticket cannot bring him within the ambit of S. 95 (1) of the Railways Act. The offer to pay may, if at all, be a civil liability, but cannot be one arising under S. 95 (1) so as to render the person offering to pay liable to be proceeded against under S. 95 (4). (*Shankaranarayana Rao, J.*) BORE GOWDA *v.* THE RAILWAY STATION MASTER, MYSORE RAILWAYS. **16 Mys.L.J 424.**

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), S. 4—*Applicability—Absence of promise to pay—Mere admission of liability to pay—Promissory note or acknowledgment.*

Where a document merely acknowledges that certain items of money mentioned therein have been borrowed and that the executant has to repay them on demand, it is not a promissory note because it does not contain an unconditional undertaking to pay. There is no promise to pay but only an admission of liability to pay, and hence it is only an acknowledgment. (*Misra, J.*) RATANJI BHAGWANJI *v.* PREM SHANKAR. **1938 A.W.R. (H.C.) 599=1938 A.L.J. 907.**

———**S. 8**—"*Holder*"—*Hindu joint family—Promissory note in favour of manager—Death of manager—Suit by surviving coparceners — Maintainability — Conditions—Succession Certificate Act, S. 214—Production of certificate after suit—Sufficiency—"Legal representative"—C. P. Code, S. 2 (11).*

In the case of a promissory note executed in the name of the manager of a Hindu joint family, the other coparceners are not "holders" of the instrument as defined by S. 8 of the Negotiable Instruments Act, and they cannot therefore sue on the note *qua* coparceners. Although the debt may be coparcenary property, the promissory note is not such and does not devolve by survivorship but by succession. The right of the holder to sue on the note is personal to him, and no other person can be said to have an interest in it merely by birth or by being a member of the coparcenary though the coparceners might sue to recover the debt apart from the promissory note. If the holder dies, a succession certificate may be granted to his heirs, and they may then recover upon the promissory note as his legal representatives. The succession certificate is, however, not a condition precedent to the maintainability of the suit. It is enough if it is produced before the decree is drawn up.

Quære.—Whether the surviving coparceners of a Hindu joint family are the legal representatives of a deceased manager thereof in respect of coparcenary property within the meaning of S. 2 (11), C. P. Code. (*Broomfield and Macklin, JJ.*) SHANTARAM VITHAL *v.* SHANTARAM BHAGWAN. **40 Bom.L.R. 964=A.I.R. 1938 Bom. 451.**

OATHS ACT (X OF 1873), Ss. 8 and 11—*Scope—Special oath—Conclusive character of—Representatives of person offering to be bound by oath—If bound—Suit by Hindu father—Dismissal on oath taken by defendant—Second suit on same cause of action by sons*—Res judicata—*C. P. Code, S. 11, Expl. VI.*

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party acting in a representative capacity ... of fraud or collusion or other vitiating circumstances. ... subsequent suit by the representatives of the original party would therefore be barred under S. 11, Expl. VI, C. P. Code. When a Hindu father files a suit for recovery of certain property for the family for the benefit of himself and all his sons and in a representative ... special oath taken ... taken, the decree ... not only on principles of Hindu Law but also under S. 11, C. P. Code, read with Expl. VI thereto. It is not necessary that in such cases the assent of the major sons to their father representing them in the litigation should be expressly proved. It may be implied from the circumstances. (*Rangnekar, J.*) TULSIRAM *v.* TOTARAM.

40 Bom.L.R. 1005.

OUDH RENT ACT (XX

Applicability—Trespasser ... mise decree. *See* OUDH R... AND 3 (10).

——**Ss. 52, 108 (4) and (10)**—*Compromise of suit under—Inclusion of costs in amount payable—Ejectment on failure of payment of the full amount—Legality—Remedy under S. 108 (10)—If available.*

Where a suit under S. 108 (4) read with S. 52 of the ...

ing costs as agreed, illegal and the remed... ble. (*Mehta, J. M*)

1938 ...

——**Ss. 52 and 108 (10)**—*Deposit within time, in terms of compromise—Mistake in calculation—Ejectment—Legality—Suit under S. 108 (10), if lies.*

... which certainly amounted to more ... time in ... ciency in ... in ejectment under these circumstances is illegal because no occupancy tenant could be ejected from land otherwise than in execution of a decree for *arrears of rent*, and a suit under S. 108 (10) of the Rent Act lies. (*Mehta, J. M.*) MAHARAJA *v.* MAHABIR.

1938 A ...

——**Ss. 52 and 108 (4)**—*Suit under for ejectment with period of grace—... of time—Power of Court.*

Where a suit under S. 108 (4) read ... Oudh Rent Act is compromised and ... for ejectment with a period of grace is passed, on the expiry of that period of grace, the decree for the ejectment of the judgment-debtor becomes operative and no

... It is ... grace ... ring,

S. M.) INDRA BAHADUR SINGH *v.* AJIT PRATAP SINGH. 1938 R.D. 761 (2)=1938 O.W.N. 935.

——**Ss. 53 (2), 54, 127 and 3 (10)**—*Trespasser assessed to rent by compromise decree—If a tenant—Liability to ejectment by notice.*

Where a suit under S. 127 of the Rent Act is com... a certain rent ... respasser has ... f his trespass; ... rent in the ...

of Cl. (2) of S. 53, who can be served with a notice of ejectment under S. 54 of the Act. The trespasser can only be proceeded against after the period agreed, for the rent payable. (*Darling, S. M*) PIRTHWIPAL SINGH *v.* BHABHUTI SINGH. 1938 O.W.N. 980= 1938 R.D. 793.

——**S. 61**—*Right to apply under—Arrears fully realised.*

Though no doubt a landlord is entitled even after ejectment to realise his arrears, he is certainly not entitled, without committing a fraud, to realise the arrears and still come under S. 61 of the Rent Act and lay a claim for ejectment on the ground that the decree had remained unsatisfied. (*Mehta, J. M.*) HARI KISHEN DAS *v.* BADAL SINGH.

1938 R.D. 768=1938 O.W.N. 931.

... treated as ... —*Misdescrip-*

Where a notice of ejectment treated a person as a minor while in fact he was a major and also mentioned his father's name wrongly, the notice is not on that ground bad, if the misdescription had not in fact prejudiced the person concerned, and he had come forward on receipt of the notice and contested it in his own right. (*Darling, S. M.*) MATA PRASAD *v.* JADUNATH KUNWAR. 1938 A.L.J (Supp.) 80= 1938 O.W.N. 999=1938 R.D. 781.

——**S. 108 (8)**—*Suit under—Superimposition of occupancy tenant, over the tenants actually cultivating—Payment of rent to occupancy tenant—Sub-tenants, if can resist ejectment.*

Where an occupancy right is created over the head of the cultivating tenants in possession, and these tenants pay rent to the occupancy tenant, they are liable to be ejected as sub tenants and cannot succeed in a suit to contest the notice of ejectment. (*Darling, S. M.*) MATA PRASAD *v.* JADUNATH KUNWAR.

1938 A.L.J. (Supp.) 80=1938 O.W.N. 999= 1938 R.D. 781.

——**S. 108 (10)**—Illegal ejectment under S. 52 of the Rent Act—Suit under S. 108 (10) if lies. *See* OUDH RENT ACT, Ss. 52 AND 108 (10).

1938 A.L.J. (Supp.) 90.

PARTNERSHIP ACT, (IX OF 1932), Ss. 32, 33 and 45—*Severance of partner—Absence of public notice—Liability of firm for the outgoing partner's transac-*

... RATANJI BHAGWANJI *v.* PREM ...

1938 A.W.R. (H.C.)

PENAL CODE (XLV OF 1860), Ss. 34, 302 and 323—*Common intention—Fight ensuing on mutual exchange of abuse—Intention to commit murder—If can be inferred.*

Where the common intention of the party of the accused appears to have been merely to abuse and possibly to use fists on the opposite party for an alleged insulting behaviour on their part, and there was mutual exchange of abuse before the fight ensued, a common intention to commit a murder cannot be inferred, even though death is caused in course of the fight. The whole affair is one of sudden fight in which each particular individual is responsible only for the individual acts which can be proved against him. The accused cannot in such a case be convicted for any offence other than one under S. 323, I. P. Code. (*Young C. J. and Ram Lall, J.*) MIAN SINGH v. EMPEROR. A.I.R. 1938 Lah. 747.

——S. 100—*Right of private defence—Deceased's party being aggressive.*

Where the deceased persons and their companions come armed with barchis and dangs and drunk and feeling that they have a grievance against the accused, they attack them causing an injury with a sharp edged weapon to one of them, the accused can be said to have reasonable apprehension that grievous hurt with deadly weapons would be caused to them so as to give them the right of private defence. So also where it cannot be said that the reasonable apprehension of danger to the persons of the accused's party had ceased before injuries attributed to the accused were inflicted, it cannot be said that the right of private defence has been exceeded. (*Tek Chand and Ram Lall, JJ.*) EMPEROR v. UJAGAR SINGH. A.I.R. 1938 Lah. 791.

——S. 204—*Applicability—Offence—Essentials of.*

Although a mere refusal to produce documents is not an offence under S. 204, a refusal to produce a document with the intention, otherwise proved of keeping the document secret may well be sufficient evidence to prove a secretion within the meaning of S. 204. An honest refusal to produce a document is not a "secretion" of a document within the meaning of S. 204. Where there is a refusal, coupled with a secret dealing with the document or with a dealing intended to be kept secret it amounts to an offence under S. 204. (*Davis, J. C. and Mehta, J.*) TAKHTRAM TULSIDAS v. EMPEROR. A.I.R. 1938 Sind 217.

——S. 206—*Applicability—Judgment-debtor harvesting attached crops—Absence of fraudulent intent—Judgment-debtor not aware of attachment and harvesting to save crops from destruction—Offence.*

A judgment-debtor who merely harvests his crops which happen to have been attached cannot be held to be guilty under S. 206, I. P. Code, unless it is shown that he does so with the fraudulent intention mentioned in the section. Where there is no intention on his part to remove the crops clandestinely, but on the other hand his action is *bona fide*, done with the object of saving the crops from destruction, he cannot be prosecuted under S. 206, especially when there is nothing to show that he knew of the crops having been attached under the orders of the Court. (*Abdur Rahman, J.*) SHEIK DAWOOD ROWTHER v. ABDUL KADER ROWTHER. 1938 M.W.N. 1009=48 L.W. 441=(1938) 2 M.L.J 843.

——S. 211—"*Be instituted*"—*Meaning and effect of.*

The words "be instituted" in second part of S. 211 do not denote the past tense. The words denote the passive mood. (*Davis, J. C. and Mehta, J.*) DHARAMDAS HIRANAND v. EMPEROR. A.I.R. 1938 Sind 213.

——S. 211—*Institution of criminal proceedings—What amounts to.*

No distinction should be drawn between the first and second parts of S. 211, I. P. Code, between proceedings

before the police and proceedings before the Magistrate. The second part of S. 211 must be read with the first part of S. 211 and the second part of S. 211 refers to "such criminal proceedings"; obviously these criminal proceedings are the criminal proceedings referred to in the first part. Criminal proceedings are just as much instituted within the meaning of the section when first information of a cognizable offence is given to the police under S. 154, Cr. P. Code, as when a complaint is made direct to a Magistrate under S. 200. (*Davis, J. C. and Mehta, J.*) DHARAMDAS HIRANAND v. EMPEROR. A.I.R. 1938 Sind 213.

——S. 302—Sentence—General rule as to—Difference between Ss. 302 and 396. *See* PENAL CODE, SS. 396 AND 302. 1938 A.W.R. (H.C.) 642.

——Ss. 396 and 302—*Sentence of death—Rule as to—Difference between Ss. 396 and 302.*

It is not a general rule that a sentence of death should necessarily follow a conviction under S. 396, I. P. Code, and this section differs from S. 302 in this respect, that the general rule under S. 302 is that a sentence of death should follow unless reasons are shown for giving a lesser sentence. (*Bennet and Verma, JJ.*) LAL SINGH v. EMPEROR. 1938 A.W.R. (H.C.) 642=1938 A.L.J. 943.

——S. 417—*Applicability—Sending bogus insured letter—Offence.*

Whatever offence may be committed when a bogus insured cover is sent through the post, the offence of cheating the addressee within the provisions of S. 417 is not committed. (*Davis, J. C.*) AYODHYA PRASAD SITAL PARSAD v. EMPEROR. A.I.R. 1938 Sind 193.

——S. 417—*Ingredients of offence—Mere deceit or fraudulent act—Sufficiency.*

It is clear from the words of S. 415, that mere deceit of a person is not sufficient. The mere doing of something fraudulently or dishonestly is not sufficient. The deceipt of the fraudulent or dishonst person must induce the person deceived: o deliver some property, or to consent that some property shall be retained, or intentionally induce the person deceived to do or omit to do something which he would not otherwise do or omit to do, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. But when the section says "which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property," it clearly means which act or omission in itself causes or is likely to cause damage or harm to that person in body, mind, reputation or property and that if that damage or harm is dependent upon the future act of some other person, then such damage or harm is too remote to be within the provisions of the section, which contemplates that the act done is in itself likely to cause damage or harm and which is not dependent for damage or harm upon the entirely problematical action of some other person. To use a trite phrase, the act done or omitted to be done must be the *causa causans* of the harm caused or likely to be caused. (*Davis, J. C.*) AYODHYA PRASAD SITAL PARSAD v. EMPEROR. A.I.R. 1938 Sind 193.

——S. 442—*Building—Shop with an awning—If constitutes.*

The erection of an awning does not constitute a shop, a building within the meaning of S. 442, I. P. Code, when the shop in question had neither a wooden, mud or one brick wall. (*Yorke, J.*) EMPEROR v. SHANKAR DAYAL. 1938 O.A. 740=1938 O.L.R. 432=1938 O.W.N. 960.

——S. 499—*Defence—Limits.*

No man can ever be justified in disseminating defamatory matter unless he can bring himself within one of the exceptions to S. 499, I. P. Code, or unless his action is privileged in other respects. Having held that a person did not act in good faith it must be wrong to say that he was justified in acting as he did. (*Roberts, C. J. and Dunkley, J.*) U. KUN BARRISTER-AT-LAW *In the matter of.* A.I.R. 1938 Rang. 394.

POST OFFICE ACT (VI OF 1898), S. 52—*Ingredients of offence—Extraction of contents from parcel.*

It is a necessary ingredient of the offence under S. 52 of the Post Office Act that some contents should be extracted from a parcel and not merely examined. (*Horvill, J.*) SATTAR KHAN *v.* EMPEROR. 1938 M.W.N. 962.

PRACTICE—*Appellate Court—Powers—Fresh period, to make payment, if can be granted.*

The ultimate Court of appeal must have jurisdiction to do that which it is competent for the trial Court to do. Where therefore a trial Court ordered that *A* should pay *B* such and such amount within a certain period on failure of which *A's* suit would stand dismissed and *B* filed an appeal against that order before that period dismissed *A's* suit the decision of the sh period to pay up the amount to *B*. (*Niyogi, J.*) MT. ANUPA BAI *v.* BHAGWANT SINGH. A.I.R. 1938 Nag. 470.

——*New case—Court's power to make out.*

It is not within the judicial duties of a Judge to raise a case not raised by the party himself and to decide it for him. (*Davis, J.C. and Mehta, J.*) ARAB JHANGLU *v.* PANJAL SHAH A.I.R. 1938 Sind 198.

——*Procedure — Party bound to go into witness-box not doing so till late stage—Refusal by Court to allow him to go at late stage—Effect.*

Where a person should have been the first witness to go into the witness-box, but did not do so and desires to go into the witness-box at a late stage, and the Court in its discretion refuses to allow him at that stage, there is no irregularity in the procedure adopted. (*Davis, J.C. and Mehta, J.*) VIRANBAI *v.* PARMANAND JHANGALDAS. A.I.R. 1938 Sind 206.

PRECEDENTS—*Revenue Courts—Preference of later to earlier ruling.*

A later ruling should take precedence of an earlier ruling on the same subject. (*Dobson, F.C.*) SULTAN MAHOMED *v.* KARAM ILAHI. 17 Lah.L.T. 31.

——*Value of—Law quite clear on the question at issue.*

On a question on which the law is clear and unambiguous, it is unprofitable to wander in quest of principles in the wilderness of decided cases, for, when the apply the presented to be seen attract the application of the undisputed and well-recognized principle. (*Niyogi, J.*) MT. ANUPA BAI *v.* BHAGWANT SINGH. A.I.R. 1938 Nag 470.

PRE-EMPTION—*Price—Initial onus—Shifting—Inability to ascertain price paid—Duty of Court—Ascertainment of market value.*

In a suit for pre-emption the initial burden lies on the plaintiff to show that the consideration entered in the sale deed is not the real consideration. When this is once done, the onus lies on the v actual amount of sale consider evidence the Court is unable to finc paid, it has to ascertain the marke perty in suit and give plaintiff a decree

the payment of that amount. (*Iqbal Ahmad, J.*) RAFIQ ZOHRA *v.* NISAR HUSAIN. 1938 A.W.R. (H.C.) 632.

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 8—Aggrieved party—Official Assignee—Application for delivery of property and for committing to prison for contempt wife and son of insolvent—Refusal—Appeal. *See* LETTERS PATENT (MADRAS), CL. 15. 48 L.W. 462= (1938) 2 M.L.J. 609.

——**S. 9 (e)**—*Applicability—Attachment in execution of award—If act of insolvency.*

S. 9 (*e*) must be strictly construed in favour of the debtor to whom the matter of adjudication as an insolvent under the Insolvency law is one of vital importance. Any inconvenience arising out of such a construction is for the Legislature to consider and remedy, if they think proper, by amendment; it is not for the Court to enlarge the meaning of the words used by the Legislature. An attachment in execution of an award is not an attachment in execution of the decree of a Court within the meaning of S. 9 (*e*) for the purpose of creating an act of insolvency. (*Lobo, J.*) GHULAM HUSSAIN *v.* SHAHBAN MOHIB. A.I.R. 1938 Sind 220.

——**S. 58**—*Scope—Powers of Court to commit for contempt—Persons not parties to proceedings aiding insolvent in defying order of Court—Liability of.*

The High Court in insolvency has jurisdiction to commit to prison for contempt not only the insolvent,

they are not parties to the proceedings, can be proceeded

(1938) 2 M.L.J. 609.

PRINCIPAL AND AGENT—*Rights of agent—Delegation of power.*

The maxim *delegatus nonpotest delegare* is clear and debars the agent from delegating his powers beyond the limit prescribed by the principal. (*Almond, J.C. and Mir Ahmad, J.*) PUNJAB NATIONAL BANK, LTD. *v.* HUKAM CHAND SHAH. A.I.R. 1938 Pesh. 63.

——*Rights of agent—Remuneration—If can make profits.*

An agent cannot make profits as against his principal, but there is no law which says that he may not get remuneration from his principal. (*Baguley and Shaw, JJ.*) DAW KYIN *v.* MA HLA YI. 176 I.C. 909 = 11 R.R. 89 = A.I.R. 1938 Rang. 71.

PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 28 (2) and (5)—Property of insolvent—Tenancy, if vests in receiver. *See* AGRA TENANCY ACT, SS. 79 AND 80. 1938 R.D. 787.

——**S. 36**—*Applicability—Stay of insolvency proceedings before Court at Cawnpore by Chief Court of Oudh—Validity—Insolvency Judge at Cawnpore, if bound to stay—If can reopen after he stayed it.*

The Chief Court of Oudh could not pass an order of stay of a case pending before the Court of the Insol- confirmed by the communicated to the Registrar of it was for the

REGISTRATION ACT (1908), S. 17.

An agreement can create a valid charge on or assignment of, the future book debts. Nothing passes under it until the property comes into present existence. Where the assignor becomes an insolvent, the debt remains in the order or disposition of the insolvent within the meaning of S. 52 (2) (*c*) of the Rangoon Insolvency Act, till notice has been given to the debtor. In order to decide whether the book debts are the goods comprise the property of an insolvent or whet belongs to the assignee of the book debts, it has decided firstly whether at the commencement of the insolvency the goods were in the possession, order or disposition of the insolvent in his trade or business; secondly whether they were so by the consent and permission of the true owner; and thirdly whether they were so under such circumstances that the insolvent was the reputed owner thereof. In 1931 a person mortgaged his book debts. On 5th January 1937, the assignee took possess feror's property and in the entrances. No express notice of the charge was despatched to the debtors. On the 6th January, 1937, the transferor was adjudicated insolvent. It was held that the debts due to the insolvent in the course of his trade or business are 'goods' by reason of the first provision to S. 52 of the Rangoon Insolvency Act; that the assignee did not prior to presentation of the insolvency petition, take the steps which were open to him within the time available to terminate the consent by virtue of which the goods remained in the possession, order, or disposition of the insolvent; that what was done, though ineffectual as a withdrawal of consent, inasmuch as no notice was given to the debtors, may amount to determination of the reputed ownership of the insolvent and that at the commencement of the insolvency, the situation of the goods w such as to convey the reputation of own minds of those who chose to make eno subject. (*Roberts, C.J. and Dunkley, J.*) AND SON, LTD. *v.* THE OFFICIAL ASSIG

1938 Ra

REGISTRATION ACT (XVI OF 1908), S. 17 (2), Cl. (6)—*Decree on basis of compromise but not embodying its terms—Compromise, if requires registration.*

Where a compromise entered into by the parties to a suit is embodied in a petition which is presented to the Court and the Court passes an order recording the compromise and also passes a decree on basis of the com-

prom term of th of reference made to the compromise. (*Bhide, J.*) KISHAN SINGH *v.* PRITAN SINGH.

A.I.R. 1938 Lah. 737.

RELIGIOUS ENDOWMENTS ACT (XX 1863), Ss. 14 and 18—*Private wakf—Powers of trict Judge as regards removal of mutawalli accounts.*

Where an office of the mutawalli o vacant, the District Judge is entitled unc cumstances to make an appointment to but he has no general power to remove miscellaneous proceedings on an applica the beneficiaries, his power in this respec and defined by Ss. 18 and 14, Religious Act, 1863 and S. 92, C. P. Code; nor h such proceedings to require the mutawa

SUCCESSION ACT (1925), S. 192.

endowment to render accounts. (*James, J.*) MAHOMED YUSUF *v.* MAHOMED AYUB.

A. I. R. 1938 Pat. 537.

SETTLEMENT RECORDS—*Entry in—Value—Entry of property as 'masjid' in the* khasra *kishtwar of* 1862.

the word but the in the existence of certain constructions on the plot. The *khasra* cannot be regarded as an instrument of title at all. It would come rather under the head of historical materials, and could only be considered along with the other items of evidence. (*Thomas, C. J. and Yorke, J.*) MUSAHEB KHAN *v.* RAJKUMAR BAKHSHI. 1938 O.A. 722 = 1938 O.L.R. 435 = 1938 O.W.N. 937.

1877), S 9—*Decree* *S.* 115, *C. P. Code.* 5, C. P. Code, from any decree or order that may be passed under S. 9 of the Specific Relief Act by any subordinate Court. (*Bennet, A. C. J. and Verma, J.*) BADRULZAMAN *v.* FAIZULLAH ABDULLAH. 1938 A.W.R. (H.C.) 588 = *1938 A.L.J. 864.*

STAMP ACT (II OF 1899), S. 36—*Appellate Court, when precluded from questioning a wrong admission of a document.*

Where a trial Court admits only a part of an insufficiently stamped promissory note, as an acknowledgment, the appellate Court would not be precluded from holding that part of the document is not admissible and that the whole of it should be excluded as being inadmissible: But if it had admitted the document in its entirety and

n doubt as to not after the f the Collector that it is properly conclusive and can- *Thomas, C.J., Zia ul-Hasan and Yorke, J.J.*) SITA RAM *v.* GAYA DIN.

1938 O.A. 765 = 1938 O.W.N. 983 = *A.I.R. 1938 Oudh 226 (F.B.).*

1925), Ss. 57 (c) *S.* 57 (c)—*Person n certificate revoked*

T. P. ACT (1882), S. 53.

Each case under S. 53 of th
decided on its own facts. Whe
have been made orally some time
passed against the donor, that circumstance by itself is sufficient to raise a presumption that the object of the gift was to defeat or at least to delay the creditors. (*Zia-ul Hasan and Yorke, JJ.*) MAHOMED HAIDER KAZMI *v.* SAFDAR JAH ZAHID ALI MIRZA.

1938 O W N. 922=1938 O.A 719=
1938 O L R. 433=A.I R 1938 Oudh 230.

——S. 53—*Transfer—Mere preference of particular creditor.*

Mere preference of one creditor to another
transfer within the meaning of S. 53. There
tinction between transfers in bankruptcy which are bad, because they do in fact prefer one creditor to another, and between transfers which fall under the provisions of S. 53, which are bad because they are sham transactions intended to benefit the debtor and defeat or delay the creditors generally. (*Davis, J.C. and Mehta, J.*) PARMANAND JHANGALDAS *v* JAIRAMDAS SADHURAM.

A.I R 1938 Sind 215.

——S 53 (1), Para. 2—*Applicability—Conditions.*

——S. 55 (1) (g)—*Vendee's right to indemnity—Vendee not properly defending mortgage suit and paying large sum to mortgagee.*

Where the vendors of certain immovable property undertake to indemnify their vendees, if they suffer any

vendors, where it is found the vendees were negligent in their defence of the mortgage suit and did nc
proper pleas available to them and that there was
no cloud on the title of their vendors and with
diligence exercised on the part of tl
that was sought to be cast on the
could have been cleared and the
paid an exorbitant sum to the mortgagees, without even consulting the vendors. (*Addison and Din Mahomed, JJ.*) LOOKMANJI ADAMJI *v.* MANGAL SAIN.

——(as amended in 1929), S
Redeeming co-mortgagor.

S. 92 does not apply in the case
it does apply in the case of a co-
with the rights of a co-mortgagor who redeems property subject to the mortgage. (*Broomfield and Sen, JJ.*) SUBRAYA KUPPA *v.* THIMMANNA SUBRAYA.

40 Bom.L R. 1001.

——(as amended in 1929), S. 92—*Scope—Retrospective operation.*

S. 92 of the T. P. Act as amended in 1929 is retros-
SUBRAYA
R. 1001.
for pay-
ts—Com
ensation.

Where a legal transfer of property has been made to trustees for payment of the debts of the owner trans-

TRUSTS ACT (1882), S. 84.

being neither parties nor privies
do not thereby become *cestui que*
s are mere mandatories. Until the mandate has been acted upon, the owner of the properties, who alone stands towards the trustees in the relation *cestui que trust*, can re call the money and authority at pleasure. It is an arrangement by the debtor for his own convenience only, and there is no privity between the agent and the creditors where, however, the trust in favour of the creditors has been communicated to the creditors—which fact must be clearly proved—if can no
, because the creditors
ght have been thereby
espect of their claims, which they would not otherwise have exercised; and *a fortiori* will this be the case when the deed has been acted upon. The creditor must do some act to testify his acceptance of the deed and not merely stand by and remain passive. (*Madhavan Nair, O C.J. and Stodart, J*) NAGABHUSHANAM RAO *v.* LAKSHMINARASIMHA RAO.

48 L W. 564.

——*Trustee—Co-trustees—Joint status of—Suit by one only without impleading others—Maintainability.*

the number of
form, as it were,
e the duties of
to trust properties
of the trustees
before the Court
lants. (*Venkatasubba Rao and Abdur Rahman, JJ.*) VEDAKANNU NADAR *v.* RANGANATHA MUDALIAR.

1938 M.W.N. 983=(1938) 2 M.L.J. 663.

——*Trustee—Co-trustees—Transfer of right of management by one to another for consideration—*

of a trustee to a co-trustee
being against public policy.
gdar of a chatram to conduct
dowed property cannot be
, although the alienee may
family as the transferor-
trustee. (*Venkatasubba Rao and Abdur Rahman, JJ.*)

on himself
e may sub.
to trustee as
such has no *locus standi* to maintain an action. His position is that of an intermeddler or wrongdoer. A trustee *de facto* is really no other than a trustee *de son*
naintain suit on behalf of
aken to have been instituted
. (*Venkatasubba Rao and*
EDAKANNU NADAR *v.*

1938 M.W.N. 983=(1938) 2 M.L.J. 663.

TRUSTS ACT (II OF 1882), S. 84—*Applicability and scope—Contract with trustee involving fraud on trust—Money paid under—Right to refund.*

It is an accepted rule of law that where property is transferred for an illegal purpose the property can be recovered when the purpose has not been carried out and the persons who transfer repudiates the contract. But S. 84 of the Trusts Act cannot be resorted to for the purpose of compelling a Court to hear and decide a case which is entirely opposed to public policy. Money paid to the trustee of a public trust for the purpose of inducing him to defraud the trust under an arrangement cannot be recovered back, and the Court will not order

U. P. AGRI. RELIEF ACT (1934), S. 2.

refund of money paid under an arrangement which involves a fraud on the trust. (*Leach, C. J. and Krishnaswami Ayyangar, J.*) DESIKACHARI *v.* PRAYAG DASJI VARU. **1938 M.W.N. 999 = (1938) 2 M.L.J. 817.**

UNITED PROVINCES AGRICULTURISTS' RELIEF ACT (XXVII OF 1934) S. (2), Provs. 1 and 2—*Interpretation—Persons mentioned in Prov. 1 if subject to rule contained in Prov. 2.*

A person who is an agriculturist by virtue of the first proviso to S. 2 (2) of the United Provinces Agriculturists' Relief Act is as much subject to the rule contained in proviso 2 as one who is an agriculturist under S. 2 (2) independently of the first proviso (*Thomas, C. J., Zia-ul-Hasan and Hamilton, JJ.*) SHEO RATAN SINGH *v.* DEPUTY COMMISSIONER, FYZABAD.

1938 O.A. 768 = 1938 O.W.N. 1001 (F.B.).

——**S. 2 (10) (a)**—*Loan—If includes money advanced on usufructuary mortgage.*

According to the definition of a mortgage in the T. P. Act, the essence of the transaction is a loan and the fact that in a particular instance it takes the form of a usufructuary mortgage, cannot make the transaction cease to be a loan in its essence. The Legislature has mentioned in S. 2 (10) (*a*) of the United Provinces Agriculturists' Relief Act. Three exceptions as not being 'loans' under the Act. A usufructuary mortgage is not one of them. Mortgage money advanced in such a case is clearly within the definition of 'loan' under the Act. A person borrowing a loan and giving a usufructuary mortgage in lieu thereof, owes money to the mortgagee, and incurs a 'debt' and is a 'debtor' of his mortgagee. (*Bennet and Verma, JJ.*) WAHID-UD-DIN *v.* MAKHAN LAL. **1938 A.W.R. (H.C.) 626 = 1938 R.D. 782 = 1938 A.L.J. 872 = A.I.R. 1938 All. 564.**

——**Ss. 30 and 33**—*Redemption of usufructuary mortgage—Covenant as to no accounting—Account, if could be reopened—Debtor, if can obtain refund of excess of interest paid.*

Where a person applies under the Agriculturists Relief Act for the redemption of a usufructuary mortgage with a covenant that there would be no accounting and alleges that the entire amount has been paid off from out of the usufruct, the accounts could be reopened under S. 33 of the Act though it was a usufructuary mortgage. The opening words of S. 30 clearly imply that accounts can and must be reopened between the mortgagor and mortgagee in spite of the fact that they might have agreed that there shall be no accounting between them. But S. 30 (4) lays down that the debtor cannot claim refund of any part of the interest already paid. (*Misra, J.*) SHEO CHARAN LAL *v.* UMRAO BEGAM. **1938 A.W.R. (H.C.) 619 = 1938 A.L.J. 892 = 1938 R.D. 794.**

——**S. 33**—Applicability—Usufructuary mortgage. *See* UNITED PROVINCES AGRICULTURISTS RELIEF ACT, SS. 30 AND 33. **1938 A.L.J. 892.**

——**S. 33**—*Benefit under — Availability—Person mortgaging properties situated both in United Provinces and Delhi—Single transaction.*

Where a person had mortgaged his properties, some of which were in United Province and some in Delhi in one transaction and in respect of a single advance, he is not entitled to take advantage of the provisions of S. 33 of the United Provinces Agriculturists' Relief Act. The laws made by the local legislature of one Province cannot affect rights in lands situate outside the territories of that Province for the time being. The mortgage is indivisible and no apportionment of the mortgage-money could be made. (*Bennet and Verma, JJ.*) WAHID-UD-DIN *v.* MAKHAN LAL. **1938 A.W.R. (H.C.) 626 = 1938 R.D. 782 = 1938 A.L.J. 872 = A.I.R. 1938 All. 564.**

UNITED PROVINCES ENCUMBERED ESTATES ACT (XXV OF 1934), S. 4—*Application by Karta of joint Hindu family—If recognized—Omission to join others—If fatal.*

The Karta character of a Hindu elder member of the family has not been recognized in the Encumbered Estates Act, which requires that every member should, join in the application. The formalities required by S. 4 are to be scrupulously complied with and the omission of several majors and minors of the family makes the application one, not duly made. (*Darling, S. M. and Mehta, J. M.*) DURGA BUX SINGH *v.* DURGA BUX SINGH. **1938 R.D. 754.**

——**Ss. 6 and 7 (1) (a)**—*Effect of order under S. 6—Failure to appeal against order directing continuance of execution—If can validate subsequent proceedings.*

As soon as an order under S. 6 of the Encumbered Estates Act has been passed, then under S. 7 (1) (*a*) of the Act, all the execution proceedings shall become null and void from the date of the order. The fact that an order directing continuance of execution proceedings was not appealed against, cannot possibly validate such proceedings. (*Darling S. M. and Mehta, J.M.*) SHEO SHANKAR *v.* PANCHAITI AKHARA. **1938 R.D. 751.**

——**S. 11**—Dismissal of claim under—Appeal—Court-fee. *See* COURT-FEES ACT, SCH. II, ART. 17 (III). **1938 O.A. 767.**

UNITED PROVINCES LAND REVENUE ACT (III OF 1901), S. 33—*Correction of errors—Scope of power—Error continuing through three settlements—Proper remedy.*

S. 33 (2) of the United Provinces Land Revenue Act does not contemplate an error which has stood through three settlements from 1870. Rights recorded over a long period of years cannot be modified, much less abrogated through the summary proceedings provided by the correction sections of the Land Revenue Act. A dissatisfied person, is at liberty to seek his redress by a regular suit in the Civil Courts. (*Darling S. M. Mehta, J. M.*) DHARAM SINGH *v.* BANSHI. **1938 A.W.R. (B.R.) 296.**

——**S. 126**—*Partition—Allotment of* sir, *to different co-sharer—Expropriétary rights—Conditions necessary to give rise to—Land let to tenants—If 'held'.*

According to S. 126 of the United Provinces Land Revenue Act, if ex-proprietary rights are to arise in *sir* land which falls in the lot of another co-sharer at a partition, then it is essential that this *sir* land should be actually held by the party claiming ex-proprietary rights and that this party should continue to cultivate it after partition. Land let to tenants cannot be said to be 'held' within the meaning of this section. So long as the tenants are in possession it is not possible for the co-sharer to cultivate this area after partition. (*Darling, S. M.*) MAHOMED HASAN KHAN *v.* MAHOMED AHMAD KHAN. **1938 R.D. 759.**

——**S. 146**—*Applicability—Recovery of arrears of rent in respect of military land.*

All arrears of rent for military land in any cantonment area, are recoverable as arrears of land revenue and may be realized by the Collector under S. 146 of the Land Revenue Act. (*Darling, S. M. and Marsh, J. M.*) SECRETARY OF STATE *v.* RAM NATH SINGH. **1938 R.D. 798.**

——**S. 213**—*Third appeal—Legal point—Necessity.*

To bring a third appeal within the range of S. 213 of the United Provinces Land Revenue Act, it must

U. P. MUNICIP. ACT (1916), S. 116.

involve a legal point. Where in partition proceedings two rival schemes were before the Court and the two of them, there peal would have, IPAL SINGH *v.* MANSA DIN. 1938 R.D. 756.

UNITED PROVINCES MUNICIPALITIES ACT (II OF 1916), S. 116 (b)—*Applicability—Well dedicated to public for specific purposes—If vests in* private waqf in- , it does not amount to a transfer of property to the public and the well does not come under S. 116 (*b*). There is a difference between a public well and a well which has been dedicated to the public. (*Bennet, A. C. J. and Verma, J.*) CHIMMAN LAL *v.* ZAHURUDDIN.

1938 A.W R. (H.C) 561 = 1938 A.L.J. 901 = A.I.R. 1938 All. 518.

——**S. 118** — *Interpretation —'Entrusted to its management'—Trust in existence before constitution of the Municipality—If covered by.*

WORDS AND PHRASES.

It is much too narrow a meaning to give to the words 'property entrusted to its management and control' in S. 118 of the United Provinces Municipalities Act, to hold that it could not apply to a trust or wakf that had been created or made long before the board came into existence. (*Bennet, A.C.J. and Verma, J.*) CHIMMAN LAL *v.* ZAHURUDDIN.

1938 A.W.R. (H.C.) 561 = 1938 A.L.J. 901 = A.I.R. 1938 All. 548.

U. P. STAY OF PROCEEDINGS ACT (1937) Sch. IV, Group B, Serial No. 11—*Applicability—Suit under S. 86/205 of Agra Tenancy Act*

Where a suit for ejectment is brought under S. 86 read with S. 205 of the Agra Tenancy Act, action is taken under S. 92 and, therefore, it falls under Serial, No. 11 of Group B of the IV Sch. of the Stay of Proceedings Act. Hence all execution proceedings in such suit are stayed by the Act. (*Darling, S.M. and Mehta, J.M.*) HOLDSWORTH *v.* ZAMINDAR CHAUDHARI.

1938 R.D. 801.

WORDS AND PHRASES—Saraogis—*Meaning of.*

The word *Saraogis* is only another general word for Jains. (*Weston, I.C.S.*) CHAND KOER *v.* PEM RAJ.

1938 A.M.L.J. 79.

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OF

INDIAN AND SELECT ENGLISH CASES.

I—INDIAN DECISIONS.

ERSE POSSESSION—Interruption—Boundary AGRA TENANCY ACT (1926), S.

IMPORTANT NOTICE

The attention of our Subscribers is invited to the increased rate of postage for sending a copy of the Annual Part of the Yearly Digest since last year. The present rate is annas fifteen a copy. In order to minimise the transmission charges it was suggested last year that three or more copies could be despatched by railway parcel and the copies distributed among the subscribers at a particular place. In actual practice, it meant a lot of confusion and delay. The Yearly Digest 1938 (consolidated part) will be ready in February 1939. Therefore this year, unless otherwise instructed copies will be forwarded by post only and postage extra will be charged.

MANAGER, YEARLY DIGEST

mortgagee's defective title—If

AGRA TENANCY ACT (1926), S. 86.

Where a sub-tenancy is pleaded, but is denied by the other side, the plaintiff has to prove that the sub-tenants was under a direct contract of sub-tenancy, his sub-tenant. When such a sub-tenant is one of 32 years standing, the doubt arises that the sub-tenant is holding direct by some arrangement with the zamindar. (*Mehta, J.M.*) RAM GHULAM *v.* DIWARI LAL.

1938 A.W.R. (B.R.) 352=1938 R.D. 850.

——S. 86—*Suit to eject sub-tenant—Plaintiff declared occupancy tenant at concessional rate—Sub tenants of long standing at concessional rate—If can resist ejectment.*

Where a person was declared to be an occupancy tenant at the time of the revision of records and rent was fixed though it was at a concessional rate and later, in an enhancement suit it was again so decided his suit for ejectment of sub-tenants who though of long standing, could not be resisted. (*Mehta, J. M.*) SHEO NANDAN SINGH *v.* RAJA BRIJENDRA.

1938 A.W.R. (B.R.) 361=1938 R.D. 854 (2).

——S. 121—Suit under—If barred by prior decision under S. 42 of U. P. Land Revenue Act against the landlord. *See* U. P. LAND REVENUE ACT, S. 42.

1938 R.D. 837.

——Ss. 132 and 266—*Sale of proprietary share by a co-sharer—Demarcation of ex-proprietary tenancy and fixation of rent—Right of vendee to sue for arrears of exproprietary rent, independently of other co-sharers—Agency, if can be implied.*

Per *Darling, J.M.*—Where in Khata khewat forming a part of a divided mahal the co-sharers are in possession of their respective shares in the shape of Sir and Khudkasht, and on a sale by one of the co-sharers of his proprietary rights though the vendee gets the ex-proprietary tenancy demarcated and rent fixed, yet he cannot sue alone for the arrears of this rent, as the tenant is the tenant of the whole coparcenary body.

Per *Mehta, J. M.*—The language of S. 266 of the Tenancy Act allows a course of conduct to be set up, being the result of internal mutual arrangement by which an implied agency may be created in favour of some co-sharers or other acting on behalf of the whole coparcenary body under S. 266 (1) or 265 (1). (*Darling, S.M. and Mehta, J.M.*) NATHOO RAM *v.* MIHI LAL.

1938 R.D. 806.

——Ss. 132 and 265 (1)—*Shamilat patti—Right to collect rent—Co-sharers, if can sue separately for arrears of rent—'Usage', what may not amount to.*

Per *Darling, S.M.*—In the case of a shamilat patti, a lambardar is entitled to collect the rents, in the absence of any usage or contract to the contrary. As such, a co-sharer of a solitary statutory holding in the shamilat patti, cannot sue alone for arrears of rent in respect of it. The fact that a particular co-sharer used to collect rent of this holding cannot be said to establish a usage within the meaning of S. 265 (1) of the Tenancy Act.

Per *Mehta, J. M.*—The exact significance of the term 'usage' used in S. 265 (1) is that it is a usage to the contrary to what takes place normally, that is, a lambardar collects rent but a usage may be set up by which, it is not the lambardar who collects rent but somebody else, or by usage, it is not all co-sharers who collect rent, but somebody appointed by them as agent. Where a course of practice has ripened into usage and which has been embodied as a result of a joint declaration of the co-sharers into an entry in the *wajib-ul-arz*, it ought to be respected and individual co-sharers allowed to sue separately for arrears of rent. (*Darling, S. M. and Mehta, J. M.*) BACHAN SINGH *v.* DALEL SINGH. **1938 R.D. 816.**

ATTACHMENT.

——S. 227—*Suit under—Necessity to implead proper properties—Failure to add—Duty and powers of Court.*

In a suit under S. 227 of the Agra Tenancy Act, for the settlement of accounts, it is necessary to implead all the parties who have collected the money. Where there has been an omission to do so, the Court should in the exercise of its wide powers under, O. 1, R. 10, C. P. Code, implead all the necessary parties and not dismiss a suit on that ground. If necessary damages may be awarded to the other party. (*Darling, S. M. and Mehta, J. M.*) RAM BHAROSE *v.* SUNDAR LAL.

1938 R.D. 826.

——Ss. 230 and 123—*Attachment, under decree for arrears, of crops in different zamindari—Distraint by that zamindar—Civil suit to declare distraint fictitious and that rent paid was on basis of* batai—*If barred by S. 230.*

Where a person who had obtained a decree for arrears of rent, attached certain share of standing crop, in a different zamindari, but the other zamindar distrained the whole crop for his own arrears, a civil suit to declare the distraint fictitious and to declare that the rent paid to that zamindar was on the basis of *Batai* is maintainable and is not barred by S. 230 of the Tenancy Act, for the plaintiff not being a landholder with reference to the land in question could not file a suit under S. 123 of the Agra Tenancy Act. (*Bennet and Verma, JJ.*) ALI AHMAD *v.* MEHARBAN ALI. **1938 A.L.J. 1076.**

——S. 242—Appeal against order under S. 144, C.P. Code—If lies. *See* AGRA TENANCY ACT, SS. 3 AND 242. **1938 A.L.J. 988.**

——S. 265—'Usage'—What may not amount to—Significance of the term. *See* AGRA TENANCY ACT, SS. 132 AND 265. **1938 R.D. 816.**

——S. 266—Scope of—Language, if allows agency to be implied. *See* AGRA TENANCY ACT, SS. 132 AND 266. **1938 R.D. 806.**

ARMS ACT (XI OF 1878), Ss. 19 and 20—*Concealment of arms in loin cloth—Attempt to escape when challenged by Police—Offence committed.*

Where the accused who was travelling on horseback at 4-30 in the morning attempted to escape when challenged by two *sowars* of the mounted police, and he was found carrying a spear-head concealed in his loin cloth,

Held, that the offence fell not under S. 19 but under S. 20 of the Arms Act. (*Skemp, J.*) JODH SINGH *v.* EMPEROR. **40 P.L.R. 921.**

ATTACHMENT—*Effect of—Administration suit—Decree—Attachment of money due to debtor by Co-operative Society under R. 22 (6) (a), Madras Co-operative Societies Act—If confers exclusive rights on Society as against other creditors.*

An attachment creates no interest in, or charge on, the property attached in favour of the attaching creditors as against the other creditors. When an administration decree is made in respect of the properties of a debtor, all the creditors standing on the same footing, and a creditor who has attached the property of the debtor is not entitled to priority over the others. There is no distinction in this respect between an attachment by a Civil Court under the C. P. Code and an attachment by a Registrar of Co-operative Societies under R. 22 (6) (*a*) of the Rules made under the Madras Co-operative Societies Act. The attachment of a money debt by the Registrar does not stand on any higher or superior footing than an attachment by the Civil Court of a debt under the C. P. Code. (*Madhavan Nair, J.*) NICHOLSON TOWN BANK, LTD., TANJORE *v.* VARADARAJALU NAIDU. **1938 M.W.N. 1127.**

BANKER AND CUSTOMER—*Liability of banker—Customer having private account and trust account—Transfer of trust funds to private account—Liability of banker for misapplication—Suit by co-trustee against banker and trustee—Limitation—Starting point—Knowledge of breach of trust—Sanction of Advocate-General—Necessity—C. P. Code, S. 92.*

A banker is not entitled to apply what he knows to be trust funds in discharge of or in reduction of a debt of a customer who has two separate accounts, one in respect of his private funds and another in respect of

transferred by the trustee from the trust
his private account in breach of a trust,
going to derive a benefit from the transfer
and designs that he should derive a benefit from it, then the banker is not entitled to transfer the amounts from the trust account without further inquiry into the matter. If he does so, he renders himself liable to make good the trust moneys to the trust. A suit against the banker by a co-trustee to recover such trust moneys wrongly applied by the banker in reduction of the pri
owed by the other co-trustee is governed by
the Limitation Act, and the right to sue acc
the trust funds are wrongly transferred or
But if the plaintiff co-trustee is kept in ignorance of a breach of trust the right to sue does not accrue until the trustee becomes aware of the fact. Such a suit does not fall within the purview of S. 92, C. P. Code, a suit by a co-trustee against the banker to recover trust moneys misapplied by him and against another co-trustee for accounts does not come under S. 92 and may be instituted without the sanction of the Advocate-General. (*Leach, C.J., and Krishnaswami Ayyangar, J.*) NAGAPPA CHETTIAR *v.* O R.M.O.M.S. P. FIRM.

1938 M W.N. 1017 = 48 L.W. 577 = A.I.R. 1938 Mad. 999.

BAR COUNCILS ACT (XXXVIII OF 1926), S. 10—*Professional misconduct—Employment of unregistered clerk—Negligence in not finding out, if plaint was filed—Failure to account for money.*

The advocate
the plaint with
o file the plaint
and thus the suit was not filed. The advocate however did not take care to see whether the suit had been filed by looking into the cause list and thus allowed his clerk to cheat his client. Besides this the advocate did not return or account for the money he had taken from his client for stamps and other incidental purposes.

Held, that the conduct of the advocate amounted to gross misconduct. (*Mya Bu, Offg. C.J., Ba U and Dunkley, JJ.*) O. A BARRISTER-AT-LAW, *In the matter of.* A.I.R. 1938 Rang. 423 (S B.)

BENGAL AGRICULTURAL DEBTORS' ACT (VII OF 1936), S. 34—*Notice issued but not received by Court—Proceedings, if void.*

The expression "give notice" implies not only the issue of notice but also the receipt of notice by the Court. Before the notice for stay is actually received by the Court in which the suit or proceeding is pending, such suit or proceeding cannot be held to be void simply because a notice has been issued by the Board but not actually received by the Court. (*S.K. Ghose and Patterson, JJ.*) AHMAD ALI *v.* FAJARALI RASULI.

A.I.R. 1938 Cal. 869.

BENGAL LAND REVENUE SALES ACT (XI OF 1859)—*Procedure under—Applicability*—Raiyati holding in government khas *Mahal—Sale of, for arrears of revenue.*

A *raiyati* holding in a Government *khas* mahal can properly be sold for arrears of revenue under the same procedure as under Act XI of 1859. (*S. K. Ghose and Patterson, JJ.*) MOHAMMAD ESLAM *v.* ANIMESH CHANDRA SEN. 43 C.W.N. 46.

——S. 34—*Sale of holding for arrears of revenue—Title suit by owner against purchaser—Sale set aside on* . . . *executed within six*

it *khas* mahal was
. XI of 1859. The

under the Act were not served and that caused substantial injury to him. The suit ended in a compromise decree. According to the terms of compromise, the revenue sale was set aside on the ground that the Collector had no jurisdiction to sell a *raiyat* holding under the Act.

nation of the
that the sale
was a nullity,
the compro
mise decree, and that the failure to apply for its execution within six months from the date thereof would make the sale and the right acquired by the purchaser under it stand good. (*S.K. Ghose and Patterson, JJ.*) MOHAMMAD ESLAM *v.* ANIMESH CHANDRA SEN.

43 C.W.N. 46.

BENGAL RENT ACT (X OF 1859)—*Applicability—Jote non-agricultural.*

When a jote in suit is non agricultural in character, provisions of the Bengal Rent Act have no application. (*S.K. Ghose and Patterson, JJ.*) PRASANNADEB RAIKAT *v.* TABIUR RAHAMAN.

A.I.R. 1938 Cal. 866.

——S. 13—*Enhancement — Grounds — Contents of notice.*

An under-tenure-holder is liable to pay at enhanced rate, on grounds which must be intimated to him by the landlord by a notice and which grounds must be fair and equitable on consideration of prevailing customary rates of similar tenures in the neighbourhood. Scheduled Districts Act (14 of 1874) does not in any way affect this privilege of tenure-holders of paying customary rates. (*S. K. Ghose and Patterson, JJ.*) PRASANNADEB RAIKAT *v.* TABIUR RAHAMAN.

A.I.R. 1938 Cal. 866.

BENGAL TENANCY ACT (VIII OF 1885), S. 22 (1)—*'Proprietor'.*

The word 'proprietor' in sub-s. (2) of S. 22 includes the proprietor of a temporarily settled estate. (*[illegible] Mitter and Sen, JJ.*) [illegible] ZAMINDARI [illegible] *v.* SECRETARY OF STATE. A.I.R. 1938 Cal. [illegible]

——Ss. 22 (3)—*[illegible]—[illegible]ing lease.*

A company obtained a settlement from Government of a *khas* mahal. [illegible] ment as a proprietor. [illegible] to be a ryotwari [illegible] was described [illegible] the settlement, [illegible] liable to [illegible] revenue [illegible] default in [illegible] the lease [illegible] Public [illegible]

BENGAL TENANCY ACT (1885), S. 22.

Held, that the use of the word 'revenue' and the provision for realization of dues by procedure under the Public Demands Recovery Act did not signify that the relationship of landlord and tenant was not being created by the settlement. Under the settlement the company became not the farmer of revenue but the farmer of rent or ijardar within the meaning of S. 22 (3). (*R.C. Mitter and Sen, JJ.*) MIDNAPORE ZAMINDARY CO. *v.* SECRETARY OF STATE. A.I.R 1938 Cal. 804.

——(prior to amendment of 1907), S. 22 (3)—*Purchase by ijardar of occupancy holding—Effect of.*

Ordinarily by an amendment, the Legislature must be taken to have intended a change in the law, but it does not necessarily follow that such is the intendment in every case. An amendment may also be intended to clarify matters. The word "acquire" is a word wide enough to connote acquisition by purchase andby inheritance, and the Legislature had not indicated its intention in other parts of the statute as existing before 1907 to cut down the ordinary meaning of that word. Hence S. 22(3) as it stood before 1907 debarred an ijardar from acquiring occupancy right by purchase or otherwise in the land of his ijara, but it did not debar him from acquiring a non-occupancy ryoti interest. The result is that if an ijardar purchases an occupancy holding, he acquires it as a non-occupancy holding. (*R. C. Mitter and Sen, JJ.*) MIDNAPORE ZAMINDARY CO. *v.* SECRETARY OF STATE. A.I.R. 1938 Cal. 804.

——S. 111-A, Proviso—*Suit by ijardar for declaration of title—Sub-tenants, if necessary parties.*

An ijardar purchased occupancy holding. By operation of S. 22 the occupancy rights in those holdings ceased but these holdings were not recorded even as non-occupancy holdings in the Record of Rights. The ijardar brought a suit for declaration that the Record of Rights was incorrect and that he was entitled to possession of the holdings as non-occupancy holdings. The sub-tenants did not deny ijardar's title.

Held, that as the sub-tenants did not deny ijardar's title and as the suit was under Proviso to S. 111-A, the sub-tenants were not necessary parties to the declaratory suit brought by the ijardar. (*R.C. Mitter and Sen, JJ.*) MIDNAPORE ZAMINDARY CO. *v.* SECRETARY OF STATE. A.I.R. 1938 Cal. 804.

BERAR LAND REVENUE CODE (1928), S. 176 —*Sale—If confined to sales as defined in the T. P. Act.*

The word 'sale' in S. 176 of the Berar Land Revenue Code is not to be construed in the narrow sense in which it is used in the T. P. Act. As such it includes an oral sale. (*Bose, J.*) JAINARAYAN *v.* BALWANT. 1938 N.L.J. 379.

BIHAR MONEY-LENDERS' ACT (III OF 1938), S. 16—*Applicability—If confined to executions started after* 15—7—1938 —*Pending executions—Sale—Procedure—If governed by S.* 16—*Amending Act V of* 1938, *S.* 3 (2)—*Scope and effect of.*

The application of S. 16 of the Bihar Money-Lenders Act is not restricted only to execution proceedines started after the Act came into force. The section applies to all pending executions and prescribes the procedure for the sale of the property of the judgment-debtor. Therefore in all execution cases which on 15—7—1938 (the date on which the section came into force) were at a stage when the properties were not sold, the sale must be according to the procedure laid down in S. 16, provided of course that the section is not void or *ultra vires*. S. 3 (2) of the Amending Act III of 1938 makes it clear that S. 16 applies to all pending proceedings whether instituted before or after the section came into force. (*Mahomed Noor and Chatterji, JJ.*) VISHWANATH NARAYAN SINGH *v.* HARIHAR GIR. 19 Pat.L.T. 760=1938 P.W.N. 765.

——S. 16—*Scope if void on the ground of repugnancy to O. 21, R. 66, C.P. Code (Patna Amendment)—Government of India Act*, 1935, *S.* 107.

The effect of S. 107 (1) of the Government of India Act, 1935, is that when a Provincial Legislature enacts any law in respect of any matter enumerated in the concurrent Legislation List which is repugnant to the existing Indian law, it will be void to the extent of that repugnancy, unless the assent of the Governor-General or of His Majesty is given as laid down in sub-S. (2) of S. 107. O. 21, R. 66, C. P. Code, as amended by the Patna High Court is an existing Indian law within the meaning of S. 107 of the Government of India Act, while O. 21, R. 66, as amended, provides that the Court shall not enter any estimate of the value of the property in the sale proclamation other than the value, if any, given by the decree-holder and the judgment-debtor and requires it not to vouch for the correctness of either S. 16 of the Bihar Money-Lenders' Act, read with S. 17, enjoins the Court to estimate the value and mention it in the sale proclamation and to vouch for the absolute correctness of the value as fixed by it. S. 16 which must be read with S. 17 in effect repeals O. 21, R. 66, C. P. Code, and is thus repugnant to O. 21, R. 66, C. P. Code, and therefore void, having been assented to only by the Governor and not having been reserved for the assent of the Governor General or for the signification of the pleasure of His Majesty. (*Mahomed Noor and Chatterji, JJ.*) VISHWANATH NARAYAN SINGH *v.* HARIHAR GIR. 19 Pat L.T. 760= 1938 P.W.N. 765.

BIHAR TENANCY ACT (VIII OF 1885), S. 65—*Rent decree—Execution—Sale of holding subject to arrears of rent subsequent to suit but anterior to sale—Liability for such arrears—Landlord's right to proceed against tenant—Landlord purchaser and stranger purchaser—Distinction.*

A landlord decree-holder who purchases the tenant's holding in execution of his decree for rent subject to the liability for arrears of rent for a period anterior to the date of the sale cannot be heard to say that the tenant is liable for those arrears of rent. It is undisputed that a third party purchaser is liable to pay off the arrears, which are an encumbrance, notified in the proclamation of sale. On principle it is impossible to distinguish between the position of a third party purchaser who purchases subject to the encumbrance and that of the decree-holder landlord who himself purchases under like circumstances. (*Wort, C.J. and Varma and Manohar Lall, JJ.*) NRIPENDRA NATH CHATTERJEE *v.* KULDIP MISRA. 19 Pat.L.T. 723=1938 P.W.N. 720= A.I.R. 1938 Pat. 545 (F.B.).

BOMBAY MOTOR VEHICLES RULES, R. 21—If *ultra vires*. *See* MOTOR VEHICLES ACT, SS. 11 AND 16. 40 Bom L.R. 1099.

BOMBAY PREVENTION OF GAMBLING ACT (IV OF 1887, as amended in 1936), S. 3—*Construction—"Act intended to aid or facilitate, etc."—Meaning of—"Gaming"—Distribution of profits of gaming—When an offence punishable under Act.*

"Gaming", as defined by S. 3 of Act IV of 1887 as amended in 1936, includes various ancillary and accessory acts, among others the carrying or conveying of the winnings of gaming for the purpose of distribution. But it must be noted that gaming is not an offence except as made punishable by certain other sections of the Act, *viz.*, Ss. 4 and 5 and S. 12. Where the Court is concerned with a particular form of gaming made punishable under the Act and the charge is based on one

BOMBAY PREVENTION OF GAMBLING ACT (1887), S. 6.

of the ancillary acts in the definition, some connection ought to be shown between that act and the particular form of gaming which is the subject of the charge. The distribution of the profits of gaming in a public place is a part of that offence and so is any act
same. But if the charge is gaming in
and the only act alleged is one which fa...
tribution of profits of some other kind of gaming, the ancillary act cannot be said to form part of the offence charged unless it is an overt act which itself amounts to gaming in public within the intendment of the section. Though the distribution of the winnings of gaming and

——Ss. 6 and 7 as amended by Bombay Act I of 1936—*In gambling cases as well, corroboration of evidence of approver by other independent evidence is necessary—Amount of evidence required depend... cumstances of each case.*

In a gambling case, as in any other case,
of approvers or accomplices must be corroborated, in the usual manner, by evidence other than that provided by themselves, whereby the Court can be satisfied that they speak the truth not only when they speak to the factum of the crime but when they speak as to the identity of the accused. The purpose of requiring independent evidence corroborating the evidence of the

cumstances of each case. (*Davis, J. C. and Dadiba C. Mehta, J.*) EMPEROR *v.* ALI MOLO.
A.I.R. 1938 Sind 228.

——Ss. 6 and 7, as amended by Bombay Act I of 1936—*Interpretation of.*

——Ss. 6 and 7, as amended by
1 of 1936—*Reason for suspicion—If... mation given by police informant.*

The reason for suspicion which is refe...
of S. 6 includes the information given
mant, for, in many cases it is only upo...
tion that the police can act at all. S...
the seizure of all things, reasonably suspected to have been used or intended for
Cl. (*c*) is concerned, it ca...
police officer must wait for
tion of a writing, otherwise
upon slips of paper on the p...
He must judge and be judg...
circumstances and the information he then possesses. He may particularly, where his information is that the betting is betting in American Futures, have reason to

BOMBAY PREVENTION OF GAMBLING ACT (1887), S. 12.

suspect that when slips of paper with writing upon them are considered of sufficient importance by the suspected person to be kept upon his person, those slips of paper are betting slips used or intended to be used
though the writing is to
e. (*Davis, J.C. and*
...OR *v.* ALI MOLO.
A.I.R. 1938 Sind 228.

——Ss. 6 and 7, as amended by Bombay Act 1 of 1936—*Scope and effect—Presumption of gambling—When to be raised—Duty of Court.*

Ss. 6 and 7, Bombay Prevention of Gambling
The words "which he has
ust be read with the words
r suspecting, which occur in
e that under S. 7 it is the
d that where a thing seized

thing. Where, on the information of a police informant that gambling is going on in a particular house in American Futures, a Sub-Inspector finds a number of

who can give no satisfactory account of their presence and who, when searched, are found to have considerable sums of money upon them, while upon one of them are found slips of paper on which there is a writing not necessarily intelligible to the Sub-Inspector at the time, the Sub-Inspector has every reason to suspect that these slips of papers with the unintelligible writing, so taken

accept, the High Court will not interfere in revision and acquit the accused. (*Davis, J. C. and Dadiba C. Mehta, J.*) EMPEROR *v.* ALI MOLO.
A.I.R. 1938 Sind 228.

——S. 12 (a)—*Construction and scope—Offence—*

of the offence at which the section is aimed, *viz.*, actual

Surat to Anand which is ... Sta... Bhadran
he was arrested at
officer and on being

possession a substantial sum of money which, it was found, represented the proceeds of gaming and which he was taking to another place for the purpose of distribution, there were also found upon him certain chits of the description known as satta chits which were instruments of gaming. The accused was, on these facts, charged under S. 12 (a) of the Bombay Prevention of Gambling Act, with gaming in public place, *viz.*, Anand Station.

Held: that since there was no evidence in the case that what might be called the actual or substantive gaming took place in a common gaming house or in a public place—there being in fact no evidence in the least as to how or where the actual gaming took place—since it could not be said that the money with the accused was the winnings of gaming in a public place, and since the accused obviously did no overt act which in itself amounted to gaming in public, it could not be held that any offence under S. 12 (a) had been committed and the accused could not therefore be convicted under the section. (*Beaumont, C.J. Broomfield and Norman, JJ.*) EMPEROR *v.* SOMABHAI GOVINDBHAI.

40 Bom.L.R. 1032=A.I.R. 1938 Bom. 484 (F.B.).

BURMA MUNICIPAL ACT (III OF 1898), S. 229 (g) and Burma Municipal Rules (1934), Ch. 6, R. 24—*Rule if directory or mandatory—Contract in violation of rule—Validity.*

Per *Roberts, C.J.*—Rule 24 of Ch. 6 of the Burma Municipal Rules framed under S. 229 (*g*), Burma Municipal Act, was made generally for guidance of committees and public officers in all matters connected with the carrying out of the Act, and so it has a directory and not a mandatory significance. Hence a breach of this rule does not make a contract void.

Per *Sharpe, J.*—The rule was either under S. 71 and beyond the powers of the Local Government to make or at least it was only directory if made under S. 229 (*g*) and it could not in any way interfere with the right acquired by third persons under any contract entered into with the Municipality, even though it had been entered into it otherwise than in accordance with the directions given in the rule. (*Roberts, C.J. and Sharpe, J.*) MUNICIPAL COMMITTEE, MYAUNGMYA *v.* PAW HAING. A.I.R. 1938 Rang. 404.

CALCUTTA HIGH COURT CIVIL RULES AND ORDERS, R. 760—*Duty of Sheristadar—Short deposit accepted by him—Party, if can be penalised.*

Under R. 760 of the High Court Civil Rules and Orders, it is the duty of the Sheristadar to ascertain that the amount tendered is correct. If a judgment-debtor seeking to set aside a sale of his property effected in execuion of a rent decree, makes a short deposit of the decretal amount which is accepted by mistake by the Sheristadar as sufficient, he cannot be penalised if he pays the deficit when the mistake is found out, as the short deposit is due to an omission of duty on the part of a Court official. The sale should, therefore, be set aside. (*M. C. Ghose, J.*) SURESH CHANDRA SINGH *v.* JNANENDRA NATH SINGH. 68 C.L.J. 273.

CALCUTTA MUNICIPAL ACT (III OF 1923), S. 359 (6) and (7)—*Particular portion of bustee land declared non-bustee—Bustee standard plan with regard to that land—If nullity.*

Although a particular portion of the bustee may be declared non-bustee, the bustee standard plan with regard to that land is not a nullity, it is for the Corporation then to determine how much, if anything of the standard plan, should be cancelled or varied. The same view applies to streets. Sub-S. (6) of S. 359 applies to such a case. So also, sub-S. (7) has been specifically inserted to meet the case of a street, project-

ed but not actually made, the alignment of which affects the land which under the earlier sub-sections is declared to be non-bustee. When the land is 'de-bustified', *i.e.*, declared a non-bustee land under the earlier sub-sections of S. 359, the practical question arises as to how far, if at all, the alignment of the projected street should be varied. (*Ameer Ali, J.*) KISSORY LALL *v.* CORPORATION OF CALCUTTA. A.I.R. 1938 Cal. 870.

CARRIERS ACT (III OF 1865), S. 10—*Notice under—If a part of the cause of action—Statement as to its issue if can be implied—Sufficient compliance with S. 10—What amounts to.*

In a suit against persons alleged to be common carriers within the meaning of the Carriers Act, for the loss or injury to goods entrusted to them for carriage, it is not necessary for the plaintiff, as in the case of S. 80, C. P. Code, to expressly state in the plaint that he has issued a notice under S. 10, Carriers Act. Such an averment is implied under O. 6, R. 6, C P. Code, and it is for the defendants to deny in their written statement according to O. 8, R. 2, that they are common carriers or to raise the plea of the absence of notice. Where they fail to do so, the onus is on them to prove and to show that they took good care in the carriage of the plaintiff's goods.

Per *Dunkley, J.*—An averment in plaint that demands were made for the amount of damage claimed but to no avail, which is not denied by the defendants, is a sufficient compliance with the provisions of S. 10. Moreover failure to raise in the written statement the plea of the absence of notice amounts to waiver on the part of the defendants of the proof of notice. The notice under S. 10 is not a part of cause of action of the suit but is merely a condition which has to be performed before the suit could be brought and differs in that respect from a notice under S. 80, C. P. Code. (*Roberts, C.J. and Dunkley, J.*) U BA TIN *v.* U TUN ON.

A.I.R. 1938 Rang. 437.

CENTRAL PROVINCES LAND REVENUE ACT (II OF 1917), S. 192—*Lambardar or mukkaddam—Fixing of remuneration under S. 192—Right to claim for period anterior to date of such fixing.*

In a suit for village profits, a lambardar or mukaddam is entitled to claim whether as plaintiff or as defendant, remuneration for his services for such years prior to the year in which his remuneration has been fixed by the Deputy Commissioner under the provisions of S. 192 of the Land Revenue Act as are within the period of limitation. (*Stone, C.J. and Bose, J.*) MAHADEO *v.* JANARDAN. I.L.R. 1938 Nag. 509.

———**Ss. 202 and 220**—*Bar of jurisdiction of Civil Court—Scope and extent.*

S. 220 of the C. P. Land Revenue Act bars a Civil Court from entertaining any suit with reference to any question connected with or arising out of the powers under S. 202. Where a plaintiff seeks to obtain damages for the breaches of certain conditions in a contract with reference to the lease of his forest, it is not a matter which the Revenue authority is empowered to decide under S. 202. The mere fact that the same set of facts give rise to a civil action for damages as well as to revenue proceedings under S. 202 does not confer jurisdiction upon the Revenue authorities to usurp the functions of Civil Courts. (*Bose, J.*) JAMSHED *v.* KUNJILAL. 1938 N.L.J. 392.

CENTRAL PROVINCES LOCAL SELF-GOVERNMENT ACT (IV OF 1920), S. 73 (2)—*Limitation under—Computation of period—Starting point—Suit for damages for wrongful dismissal.*

When an aggrieved party obtains relief at one time but as a result of some proceeding he is deprived of it

and he is relegated to his original position, a new cause of action should be deemed to accrue in his favour. In pursuance of a resolution, the Chairman of a District Council issued an order to an employee informing him that his services were dispensed with. The employee appealed to the Deputy Commissioner who set aside the Chairman's order. The Deputy Commissioner's order was upheld by the Commissioner. The District Council thereupon moved the Local Government for revision of Commissioner's order and the Minister for Local Self-Government revers missioner's order and restored that of t District Council. The employee filed a sui the legality of the order of the Chairman of the Minister for Local Self-Government for damages for wrongful removal from se

Held, that the period of limitation, *viz.* prescribed by S. 73 (2) of the C. P. Local ment Act must be computed from the date of the Minister's order as the cause of action for the suit arose on the day on which the Minister passed his order *which had the effect of making the Chairman's order* final and effective. (*Niyogi, J.*) DISTRICT COUNCIL OF SEONI *v.* NANHARIYARAM SHARMA. A.I.R. 1938 Nag. 499.

CHARITABLE AND RELIGIOUS TRUSTS ACT (XIV OF 1920), S. 3—*Orders under—Revision under S. 115, C. P. Code—If lies.*

Where a Judge passes an or Charitable and Religious Trusts walli to file accounts within a cer said that in law no revision order. (*Zia-ul-Hasan and York* JAITLEY *v.* J. N. JAITLEY. 1938 O.A. 800=193

——**S. 5 (3) and (4)**—*Jurisdiction of District Judge under—Limits—Decision as to nat When justified.*

S. 5 (4) of the Charitable and Religious terms gives the Court of the District Judge to decide, under certain circumstances, whether a trust is one to which the Act ap either its existence or its being a trust to which the Act applies, is denied, and no undertaking as contemplated by sub r. (3) is given, the District Judge is exercising a jurisdiction vested in him, if he decides as to the nature of the trust. (*Zia-ul-Hasan and Yorke, JJ.*) GANGA RAM JAITLEY *v.* J. N. JAITLEY. 1938 O.W.N. 1054=1938 O.A. 800= 1938 A.W.R. (C.C.) 85=1938 O.L.R. 467.

CHILD MARRIAGE RESTRAINT ACT (XIX OF 1929)—*Scope of—District Magistrate—Transfer of case for disposal to Sub-Divisional Magistrate without inquiry—Legality.*

S. 10 of the Child Marriage Restraint Act requires a Court taking cognizance of an offence under the Act either itself to make an inquiry under Code, or to direct a Magistrate of the Ist nate to it to make such an inquiry. A tran case by a District Magistrate to a Sub-Divi rate for disposal without any such inquiry is therefore illegal. (*Lakshmana Rao, J.*) SIVAGAMI AMMAL *v.* MUTHU IYER. 48 L.W. 774.

CIVIL PROCEDURE CODE (V OF 1908), S. 2 (2)—*Decree—Order that cross objection abates—If appealable.*

An order that a suit abates is appealable as a decree. That being so, it would seem that an order that an appeal abates is also appealable as a decree and if so

there is no reason why an order that the cross-objection abates should not be held to be a decree for the same reasons. (*Stone, C.J. and Clarke, J.*) PURUSHOTTAMDAS *v.* DEOKA RAN. 1938 N.L.J. 399.

——**S. 9**—*Bar of suit—Suit of civil nature—Service in temple and prayer—Right to stand in particular position—Suit to declare—Maintainability.*

It is unquestionable that the Civil Courts in India have no ecclesiastical jurisdiction and that they cannot decide questions of ritual except in so far as the decision of such questions is a necessary incident t is well established cular temple is a civil n a religious office to are attached is also

will not, on a mere pretence that a right to worship has been infringed, arrogate to itself a jurisdiction which it does not possess to prescribe forms of prayer, rights to *religious precedence and questions of that nature.* The Civil Courts have neither the prayer nor the duty to attempt to draft a prayer book for a temple. A Civil Court cannot also be required to declare the rights of persons to stand in any particular show of the congregation. (*Wadsworth, J.*) APPADORAI AYYANGAR *v.* ANNANGARACHARIAR. 1938 M.W.N. 1206= 48 L.W. 722.

. *Cause Court—*

rule that the o try the subseourt is a Court any matter on onding on the other Court. An instance of this is a decision by a which it has exclusive Cause Court decides ive jurisdiction, then equent Courts. In a urt has no exclusive of title. Hence the decision of Small Cause Court on title in suit for rent cannot be *res judicata* in the subsequent suit for rent and for ejectment, because the prayer for ejectment takes the suit away from the jurisdiction of the Court of Small Causes. (*Skemp, J.*) HAYAT MOHAMMAD *v.* BAR GAUSHALA, LYALLPUR. A.I.R. 1938 Lah. 811.

——**S. 11**—*Directly and substantially in issue—Suit for rent of land in estate—Plea of rent-free tenure—Finding of rent-free holding—Subsequent suit by purchaser of estate more than 12 years later for rent—*Res Judicata—*Adverse possession—Acquisition of rent-free title.*

In 1903, when the Court of Wards was in charge of an estate, a suit was filed to recover rent from the occu- that the land had been as upheld and there was a was rent-free. In 1932, e estate in Court auction sued the then occupant, a descendant of the prior occupant, for rent.

Held, (1) that the decision in the prior suit operated as *res judicata* on the question of liability to pay rent; (2) that apart from *res judicata*, the judgment was the starting point for adverse possession in favour of the occupant of the land, and he must therefore be deemed to have held the land re the period to establish his rent free

(*Wadsworth, J.*) ADILAKSHMI DEVAMMA GARU *v.* APPA RAO GARU. 1938 M.W.N. 1134= 48 L.W. 701=(1938) 2 M.L.J. 934.

——S. 11—*Execution proceedings — Co-judgment-debtors—Execution against properties of one—Objection by latter—Order overruling—If* res judicata *against others in subsequent execution.*

An order overruling the objections raised by one judgment-debtor whose property is sought to be sold in execution does not operate as *res judicata* so as to preclude the other judgment-debtors from raising a similar objection in a subsequent execution application as against their property. (*Wort, C.J. and Manohar Lall, J.*) BANARSI PRASAD *v.* MAHABIR PRASAD SAHU. 177 I.C. 689=5 B.R. 11=1938 P.W.N. 710.

——S. 11—*Execution proceedings—Order in execution*—Res judicata.

Where a wrong order in execution has become final because an appeal therefrom has been dismissed as time-barred, principles of *res judicata* come into play and that order cannot be set aside in subsequent execution. (*Middleton, J. C. and Mir Ahmad, J.*) AMIR KHAN *v.* KHAIR MOHAMMAD. A.I.R. 1938 Pesh. 77.

——S. 11, Expl. V—Mortgage suit—Preliminary decree—Omission to reserve and provide for personal liability—Subsequent application for personal decree—If barred—*Res judicata*. *See* C. P. CODE, O. 34, R. 6. 48 L.W. 758.

——Ss. 38 and 63—*Relative scope—S. 63, if controlled by S. 38—Property attached by different Courts—Superior Court calling up proceedings from inferior Court Power of superior Court to sell property attached by inferior Court—"Realize such property."*

There is no warrant for holding that S. 63, C. P. Code, does not give jurisdiction to a Court to sell attached property except in execution of its own decree. The jurisdiction of the Court of the highest grade to sell property attached by an inferior Court in execution of a decree, proceedings in which have been called up to the superior Court under S. 63, is necessarily included in the use of the word "realize." "Realize such property" in S. 63 must obviously refer to bringing such property to sale. Nowhere in S. 63 is there any restriction as to how and in what manner and in what petition the Court of highest grade should realize the property; in this respect as in respect of claim petitions S. 68 must be held to override S. 38. S. 38 is after all a general section dealing with execution. It contemplates only one decree-holder and one decree. S. 63 deals with more decree-holders than one and the same property being attached by more Courts than one. Where the facts come within the definition of the situation as given by S. 63, it is obviously S. 63 which must be applied, and S. 63, cannot be controlled or governed by S. 38. (*King and Krishnaswami Ayyangar, JJ.*) VENKATA REDDI *v.* VENKATARATNAM. 1938 M.W.N. 1098= 48 L. W. 664.

——S. 47—*Applicability—Question relating to delivery of possession to auction-purchaser.*

The question relating to the delivery of possession of the property purchased by an auction-purchaser is not a question relating to the execution, discharge or satisfaction, of the decree and hence such a matter does not come under S. 47, C. P. Code. (*Wort, Ag. C. J. and Manohar Lall, J.*) SUGAN MAL BOTHRA *v.* PURAN MALL MARWARI. 177 I.C. 692=5 B.R. 8.

——S. 47—*Objection as to saleability of property—When could be raised.*

An objection by a judgment-debtor as to the saleability of his property in execution could be raised under

S. 47, C. P. Code, at any time prior to sale of the property and even if made later, it would be within time, if made within 30 days from date of sale under Art. 166 of Limitation Act. (*Gruer, J.*) MAROTI *v.* KISANLAL. 1938 N.L.J. 389.

——S. 60—*Implements of husbandry—Motor tractor, if one.*

A motor tractor is not indispensable for agriculture and therefore it cannot be regarded as being essential to it and hence is not exempt from attachment. (*Niyogi, J.*) SHALIGRAM *v.* SHEOPRATAP. 1938 N.L.J. 416.

——S. 60—*Pay of soldier in regular forces governed by Army Act—Attachability.*

The pay of a soldier of His Majesty's regular forces subject to the Army Act of 1881, is not liable to attachment under a decree of the Civil Court. (*Davis, J.C. and Mehta, J.*) PREMIER CLOTHING CO. *v.* FRUSHER. A.I.R. 1938 Sind 237.

——S. 60 (1)—*"Debt"—Attachability—Conditions of—If should have become payable before attachment—Advocate engaged by government to conduct government case—Stipulation of fixed daily fee—Direction to submit bills for payment at end of month—Advocate entering upon duties—Remuneration earned by advocate—Attachability before end of month.*

A debt, in order to be attachable, need not necessarily have become payable. It should not be an uncertain sum; nor merely a right to sue. If it is an existing property vested in the judgment-debtor, though the time of its realisation has not come, it can be attached and sold. Where the Government engages an advocate to conduct a case on behalf of the government in a particular Court, stipulating a certain daily fee payable to him, and directing the advocate to submit his bills for payment of his fees at the end of each month, it must be held that after each day's work the daily fee stipulated becomes due to the advocate from the government, and that all the daily fees of a month become payable to him at the end of the month. The daily fees earned by the advocate become a debt after the day's work, and are therefore liable to be attached and sold in execution of a decree against him, though such fees become payable only at the end of the month. (*Mahomed Noor and Chatterji, JJ.*) BANSI LAL *v.* MAHOMED HAFIZ. 19 Pat.L.T. 768.

——S. 60 (1) (c)—*Construction—'Occupied by'—Meaning of—All occupied houses, if exempt.*

The words 'occupied by' in S. 60 (1) (*c*), C. P. Code mean that it is something more than a dwelling-house. It is a building occupied by him when he is following his avocation of an agriculturist. The use of the word 'houses' make it clear that all houses occupied by him, as such, are exempt. (*Darling, S.M. and Mehta, J.M.*) AMAR SINGH *v.* GANGA PRASAD. 1938 R.D. 840.

——S. 60 (1) (c)—*Object of—'Agriculturist', who is—Test—Burden of proof.*

The object of proviso (*c*) to sub-s. (1) to S. 60, C. P. Code, is to prevent the deprivation of his means of livelihood from an agriculturist by having his house and other buildings taken from him. The word 'agriculturist' means a person who earns his livelihood wholly or principally by cultivating land either personally or through servants. The test is what is the chief source of his livelihood. If it is other than by cultivation of land he is not an agriculturist though he may also cultivate lands. (*Darling, S.M. and Mehta, J.M.*) AMAR SINGH *v.* GANGA PRASAD. 1938 R.D. 840.

——S. 60 (1) (h) and (i)—*"Salary"—If includes daily wages or fees of temporary employee.*

The word "salary" in Cls. (*h*) and (*i*) of S. 60 (1), C. P. Code, before the Amendment Act IX of 1937, cannot

be construed as being restricted to an emolument which is payable monthly or to a man who holds a permanent or semi-permanent employment. The remuneration of a temporary employee engaged on daily fee is "salary" within the meaning of Cls. (*h*) and (*i*) of S. 60 (1). (*Mahomed Noor and Chatterji, JJ.*) BANSI LAL *v.* MAHOMED HAFIZ. 19 Pat.L.T. 768.

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arising out a suit instituted before the first day of June, 1937. (*Mahomed Noor and Chatterji, JJ.*) BANSI LAL *v.* MAHOMED HAFIZ. 19 Pat L.T. 768.

—— S. 60 (1) (i) —*Construction and scope—Salary—If restricted to salary of officers entitled to allowance under Cl.* (h).

There is no reason to restrict the scope of Cl. (*i*) of

been exempted. It does not follow that their salary for the period for which they are on duty is not covered by Cl. (*i*), sub-S. (1). (*Mahomed Noor and Chatterji, JJ.*) BANSI LAL *v.* MAHOMED HAFIZ.

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by Govern

officer.

Conduct of a suit on behalf of the Government by an advocate for the recovery o

public duty which the advc

who is appointed by the Government as a lawyer to conduct a suit on its behalf is an officer and a public officer within the meaning of S. 60 (1) (*i*), C. P. Code. (*Mahome.*

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interest"

wife for

—Interest of children—Attachability during lifetime of parents.

A testator by his will directed that the residue of his estate should be divided into sixteen shares, and he be-

interest of *P* one of the sons of *A* and *W* in the three-sixteenths shares in the testator's residuary estate.

Held, that the interest of *P* under the codicil was, during the joint lives of *A* and *W*, unquestionably contingent both as to the income and as to the corpus, and that it was exempt from attachment and sale under S. 60 (1) (*m*), C. P. Code. (*Lord Romer.*) PESTONJI BHICAJEE *v.* ANDERSON. (1938) 2 M L.J. 906 (P.C.).

—— S. 63—Scope—If controlled by S. 38—"Realize such property"—Superior Court calling up proceedings from inferior Court—Jurisdiction to sell property attached by inferior Court. *See* C. P. CODE, SS. 38 AND 63. 48 L.W. 664.

—— S. 73—*Appeal—Order between rival decree-holders.*

If an order is made under S. 73 it is an order in execution

rival de

judgme

(*Ram Lall, J.*) FATEH DIN *v.* DIWAN CHAND. A.I.R. 1938 Lah. 801.

—— . 73 and 115 and O. 22, rr. 8 and 12 and al Insolvency Act, S. 28—*Application for distribution of assets—Maintainability—Interference in revision when other remedies open—Jurisdiction.*

Where an insolvent after adjudication and before discharge presented an application for rateable distribution in execution of a decree obtained by him prior to the insolvency, on the question as to the maintainability of the application by him.

68 M.L.J.

Court. 49

ef. (*Abdur*

v. YEGNA-

LAKSHMI AMMAL. M.L J. 1001.

—— Ss. 73 and O. 38, R. 11—*Rateable distribution—Procedure—Application for execution—Necessity before judgment and decree thereafter.*

ecree-holder had already obtained an attachment before judgment of certain money in the hands *of a third person belonging to the judgment debtor*

after obtaining his

ainst the same judg-

d, the same money, before judgment, applied after obtaining his decree to direct the said third person to pay the attached amount

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as

circumstances whatever. It only says that upon an application for execution re attachment of the property need not be applied for if it has already been attached

J.) R. N. PANDAY *v.* 1938 Rang L.R. 565.

held by Sub-Judge, First,

b-Judge to call for them to

ly distributed amongst decree-

S. 73. (*Ram Lall, J.*) FATEH A.I R. 1938 Lah. 801.

—— S. 73—*'Same judgment debtor'—Several judgment debtors—Some of them only common.*

For rateable distribution it makes no difference in law that the parties are two in one case and three in the other so long as the same share of the two parties, who are common in both decrees, is sought to be attached. Hence where there is a decree by a decree holder against three persons and another decree holder obtains a decree against two of them and a sale is held in execution of his decree, former decree-holder is entitled to rateable distribution in the sale (*Ram Lall, J.*)

FATEH DIN *v.* DIWAN

C. P. CODE (1908), S. 80.

——S. 80—*Strict compliance with—Necessity—Notice to Registrar, Co-operative Societies—Proper service—Test.*

The provisions of S. 80, C. P. Code, are imperative and must be strictly complied with. Where a notice to the Registrar of Co-operative Societies was sent by post through the Secretary of the Central Co-operative Bank, unless it is proved that it was as a matter of fact conveyed to the Registrar, it cannot be taken to be a proper service of the notice. (*James, J.*) REGISTRAR, CO-OPERATIVE SOCIETIES *v.* RAMKISHUN MANDAR.

177 I.C. 709=5 B.R. 13.

——S. 92—Applicability—Trust funds deposited with banker by trustee—Misapplication to private account of trustee—Suit by co-trustee against banker and trustee—Sanction of Advocate-General—Necessity. *See* BANKER AND CUSTOMER—LIABILITY OF BANKER.

48 L.W. 577=A.I.R. 1938 Mad. 999.

——S. 92—*Scope—Public charitable trust—Management vested in members of family—Dispute among parties—Reference to arbitration—Award dealing with management and laying down scheme for future management—Suit to make award decree of Court—If falls under S. 92.*

Where an arbitrator is required to investigate the nature of the management of various charitable trusts by the parties in management thereof and is also asked to lay down a scheme for the future management of the institutions, that cannot be regarded as a matter arising out of the private rights of any particular individual. The fact that the disputing parties belong to the family or families in which the management of the institutions is vested will not of itself take the case out of the purview of S. 92, C. P. Code, if the object of the proceeding is to safeguard the interests of the institutions or obtain directions for their proper management. A suit to have such an award made a decree of Court cannot lie when the procedure prescribed by S. 92 has not been complied with. (*Varadachariar and Pandrang Row, JJ.*) LAKSHMIKANTHAM *v.* RAMALINGAYYA.

1938 M.W.N. 1176=48 L.W. 742=(1938) 2 M.L.J. 972.

——S. 99—Scope—Decree when could not be attacked on ground of irregularities. *See* C. P. CODE, O. 26, R. 9 AND S. 99. **1938 N.L.J. 392.**

——S. 100—Finding of fact—Finality — Finding based on inadmissible materials and achieved by unjustifiable procedure—If binding in second appeal. *See* C. P. CODE, O. 18, R. 18. **48 L.W. 595.**

——S. 100—*Jurisdiction—Incompetence of lower Court—Interference in second appeal.*

Where a District Judge assumes a jurisdiction which he does not possess, any order which he passes on such assumption can be set aside by the HighCourt in second appeal. (*Misra, J.*) SHEO NANDAN SINGH *v.* SURAJ PRASAD SINGH. **1938 A.L.J. 988=1938 A.W.R. (H.C.) 682=1938 R.D. 829.**

——S. 100—*Question of law—Question of onus.*

A question of law does not arise every time an inference is made from a set of proved facts. It can only arise if the ultimate inference is itself a question of law and not one of fact. Where the onus is used as the determining factor in the whole case because the tribunal finds the evidence pro and con so evenly balanced or so equally worthless that it can come to no sure conclusion, then the question of onus becomes one of law and not one of fact as it would otherwise be. (*Bose, J.*) BHAGIRATH BIRDI CHAND *v.* VISHWASRAO PANDALIK.

A.I.R. 1938 Nag. 522.

——S. 109 (c)—"*Fit case*"—*Question of jurisdiction of Civil Court—Question as to bar under Sea*

C. P. CODE (1908), S. 151.

Customs Act—Appeal to Privy Council—Grant of certificate.

In a suit in which the amount claimed was more than Rs. 20,000, an objection was taken to the jurisdiction of the Court on the ground that the suit was barred by the Sea Customs Act. The lower Court tried the issue as a preliminary issue, upheld the objection and dismissed the suit. In appeal, the High Court held that the Civil Court was not deprived of jurisdiction in the matter by the Sea Customs Act, and demanded the suit for trial on the merits. This question of jurisdiction was awaiting decision in other suits pending in the province, and there were also other claims of the same kind in which notice of suit had been given and some litigations were pending in other provinces.

Held, that in view of these facts and the fact that the question of jurisdiction was a substantial question of law and one general importance, the case was a fit case to be certified under Cl. (*c*) of S. 109, C. P. Code. (*Varadachariar and Pandrang Row, JJ.*) SECRETARY OF STATE FOR INDIA *v.* MASK & CO.

1938 M.W.N. 1132=(1938) 2 M.L.J. 904.

——Ss. 110 and 109 (c)—*S. 110 if to be construed widely—Questions of law involved though valuation less than* 10,000 *Rs.—Leave, if can be granted.*

'It must always be kept in view that no real mischief can arise from not allowing a very wide construction of S. 110 because such cases, if worthy of being tried by a higher tribunal, can always be dealt with under sub-S. (*c*) of S. 109. 52 C. 650, (P.C.). Where the value of the subject-matter in dispute on appeal to His Majesty in Council was not upwards of Rs. 10,000 but the value was shown to be about Rs. 9750 and there were questions of law involved.

Held, leave ought to be granted under S. 109, sub-S. (*c*). (*Roberts, C.J. and Dunkley, J.*) DAWSONS BANK LTD. *v.* MAUNG MYA THWIN.

A.I.R. 1938 Rang. 415.

——S. 115—Miscellaneous proceedings — Orders under S. 3 Charitable and Religious Trusts Act—If revisable. *See* CHARITABLE AND RELIGIOUS TRUSTS ACT, S. 3. **1938 O.W.N. 1054.**

——S. 115—Revision—Refusal to consolidate suits—Interference. *See* PRACTICE—CONSOLIDATION OF SUITS. **177 I.C. 799.**

——S. 144—*Appeal—Application under on Original Side of High Court—Long delay—Order thereon—Appealability.*

An application on the Original Side of the High Court under S. 144, C.P. Code for restitution in execution proceedings made long after the suit has been determined and the rights of the parties fully settled by a final judgment is not an application in a suit at all nor is the order made on it a judgment. It is not a final judgment, such a judgment having been already delivered; it cannot be said to be either preliminary or interlocutory judgment. It is merely an order and not a judgment under the Letters Patent and is not appealable. Even if the order be regarded as a decree, there would be no right of appeal, the matter being governed by the Letters Patent and not by C. P. Code. (*Roberts, C.J. and Braund, J.*) VISUVASAM *v.* NADAR MAHAJANA CO-OPERATIVE CREDIT SOCIETY LTD.

A.I.R. 1938 Rang. 446.

——S. 151—*Appeal—Objection to passing of final decree on mortgage—Claim for payment made—Dismissal for default—Refusal to restore—If appealable.*

Where an objection to the passing of a final decree on a mortgage is raised on the ground that certain payment made after the preliminary decree has not been given credit to, but the objections are dismissed owing to

default in appearance, a refusal to restore such application is not appealable, for it is an order passed on an application to exercise the Court's inherent jurisdiction under S. 151, C. P. Code. (*Mulla, J.*) MUNNI SINGH *v.* COLLECTOR OF BENARES.

1938 A.W.R. (H.C.) 711 = 1938 A.L.J. 1055.

——S. 151—*Other remedy not availed of—Inherent*

Court to obtain that remedy. Hence where a party has not applied under O. 21, Rr. 89, 90 or R. 91 it is not open to him to seek the inherent power of the Court to set aside the sale. (*Mya Bu and Mackney, JJ.*) ARUMUGAM CHETTIAR *v.* RAMANATHAN CHETTIAR.

A.I.R. 1938 Rang. 433.

——S. 151—Scope—A
Power of Court to pass
CODE, O. 20, R. 13.

——Ss. 151 and 154—
order made by Court—Inte

It is perfectly competent
prior order. The provisions of Ss. 151 and 154, C. P. Code, are wide enough to allow this being done. Where the Court feels that it is necessary in the interests of justice to vacate a previous order made by it, it can do so, and such an order vacating a prior wrong order cannot be said to be improper or without jurisdiction. (*Macklin and Sen, JJ.*) HASAN *v.* ISAP.

40 Bom.L.R. 1180.

——S. 152—*Scope of power under—Alteration of decree on the strength of accounts filed—If justified.*

Where after the passing of a decree, an application for its amendment on the strength of certain accounts newly filed, is allowed, and the decree amount is reduced, the

...ified by the powers of the Court under S. 152, C.P. Code. (*Mulla, J.*) BALCHAND *v.* NARAIN DASS. 1938 A.L.J. 1080.

——O. 2, R. 2—*Mortgage by conditional sale—Suit for foreclosure and mesne profits—No prayer for possession—Decree—Subsequent suit for future mesne profits—If maintainable.*

Where a mortgagee who is entitled to sue both for

1938 A.W.R. (H.C.) 728.

——O. 7, R. 1—*Particulars in plaint—Suit for breach of conditions in contract—Particulars as to the conditions and manner in which they had been violated—Necessity to give.*

A defendant is entitled to know exactly what case he has to meet and he must have an opportunity to investigate the details of the claim, with a view tc
the materials for his defence. Where the
certain conditions of an agreement forms the
matter of the plaintiff's complaint, the defendant is entitled to know, the conditions and the exact manner in which they have been violated. (*Bose, J.*) JAMSHED *v.* KUNJILAL. 1938 N.L.J. 392.

——O. 8, Rr. 3 and 5—*Plaint allegations as to*

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o the
rms of the lease were not specifically denied as requir-
by C. P. Code, O. 8, Rr. 3 and 5, the effect is that
suit could be decreed as on an admission. (*Yorke,*
) MRS. J. H. MATHEWS *v.* MIRZA ISMAIL BEG.

1938 O.A. 785 = 1938 O.W.N. 1080.

——O. 9, R. 13, Proviso—*Suit against firm through* G—Ex parte *decree against firm and* G—*Application to set it aside by* G—*Decree, if can be set aside against firm only.*

A suit was instituted against a firm through one *G* in which *G* was also made a defendant. On *G's* failure to

Held, that the order of the District Judge was illegal and the decree ought to be set aside both against the firm and *G*. (*Din Mohammad, J.*) CHANDU LAL *v.* SARASWATI SUGAR SYNDICATE.

A.I.R. 1938 Lah. 823.

——O. 18, R. 18—*Local inspection—Object of—Procedure—Judge making inquiries of people present at inspection and basing decision thereon—Propriety of—Finding of fact—Finality in second appeal.*

It is a quite unobjectionable procedure for a Judge to make a local inspection; in fact O. 18, R. 18, C.P. Code, expressly provides for it. But it is not a justifiable procedure for a Judge at such local inspection to welcome

the result of these enquiries as evidence in the case, there is an end of all judicial procedure. A judgment must be based on evidence which is admissible in law. There is no objection to a Judge viewing the locality in dispute in order to enable him to visualise the same and to appreciate the evidence before him. But there is no warrant for the procedure whereby the Judge converts himself into an unofficial investigator and inquires of all

——O. 20, R. 13—*Administration suit—Decree in—Consequences of—Power of Court to pass order staying or restraining execution by creditor of his decree—C. P. Code, S. 151 and O. 39, Rr. 1 and 2—Application of.*

Though an administration suit is filed only by one creditor, the decree passed in the suit is in favour of all the creditors of the deceased debtor. No one should

decree has jurisdiction to ... to
prevent the execution of ... by ...ular
creditor, so that the
estate for the benefit of

after the preliminary decree should be considered as having become parties to the suit. It can pass orders staying execution by a creditor of his decree, or an order, in the nature of injunction restraining him from executing his decree. Such orders are consequential orders and have to be passed to give full effect to the decree in the suit. It is unnecessary to invoke S. 151 or O. 39, Rr. 1 and 2, C. P. Code, for the purpose of passing such orders. An applicant for such order need only invoke the decree in the suit in their aid. (*Madhavan Nair, J.*) NICHOLSON TOWN BANK, LTD., TANJORE *v.* VARADARAJALU NAIDU.

1938 M.W.N. 1127.

——**O. 21, R. 2 and Limitation Act (IX of 1908), Art. 174**—*Payment of decree amount—Decree-holder applying to record satisfaction of decree—Absence at the time of enquiry—Dismissal of application—Subsequent application by judgment-debtor to enter satisfaction—Dismissal of it as being time barred—If sustainable—Proper procedure.*

A decree-holder was alleged to have received the decree amount. Within 30 days of the alleged payment he himself applied to record satisfaction of the decree. A third party who had attached the decree raised objection and an enquiry was held in that connection. Then the decree-holder denied the payment but was absent from the enquiry and his vakil reported no instructions. The Court struck off the decree holder's petition but reserved the judgment-debtor's right to claim full satisfaction in proper proceedings. The judgment-debtor accordingly applied for satisfaction of the decree being recorded. The lower Court dismissed the application as being time barred.

Held, on revision, that the application if treated as an independent application was not saved by S. 5 or S. 14 of the Limitation Act; but the lower Court was not justified in striking off the application of the decree-holder. At any rate at the later stage, the Court ought to have proceeded with the original application of the decree-holder, treating the application of the judgment-debtor only as an application to continue the former proceeding. (1918) 35 M.L.J. 253, Foll. (*Varadachariar, J.*) KAILASA PADAYACHI *v.* DURAIAPPA KACHIRAYAR. **(1938) 2 M.L.J. 936.**

——**O. 21, R. 13 (7)**—*Property attached specified as owned by judgment-debtors—Share of each judgment-debtor—If should be mentioned.*

A decree-holder asked the Court to bring to sale certain properties described as a half-share belonging to the judgment debtors in certain specified holdings. What was the exact interest of each of the judgment debtors individually in the property was not specified. It was stated that the whole of this half-share belonged to the judgment-debtors. The sale was challenged on the ground that it had not been specified exactly what share each of the different judgment-debtors possessed.

Held, that it was not necessary that this should be done. The decree-holder held a decree against each of the judgment-debtors. He had brought this property to sale because it was the property of one or other or all the judgment-debtors and that was sufficient for his purpose. What the Court sells is the right, title and interest of the judgment-debtors in this property. It is no part of the Court's duty to enter into an enquiry as to the exact proportion of each of the judgment-debtor's interest in this property. (*Mya Bu and Mackney, JJ.*) ARUMUGAM CHETTIAR *v.* RAMANATHAN CHETTIAR.

A.I.R. 1938 Rang. 433.

——**O. 21, R. 22**—*Scope—Compliance—Minor judgment-debtor attaining majority—Notice issued to him as minor—Decree-holder and Court unaware of true age*

of judgment-debtor—Sale—If nullity—Irregularity—If ground for setting aside sale.

The issue of a notice to a major judgment-debtor as if he were a minor is not necessarily fatal to further proceedings in execution, and a sale in execution cannot be held to be null and void on that ground. If no notice of any kind is issued to a judgment-debtor, there is a refusal to carry out the plain duty imposed upon the Court by O. 21, R. 22, C. P. Code, and the Court has no jurisdiction to conduct the sale subsequently. But there is a very clear distinction between a case in which no notice is issued at all to a particular defendant and a case in which notice is issued to him as if he were still a minor. Where notice of execution of a decree against a father and his son is issued to the son as minor represented by his guardian, the father, after he has become a major, the reason for issuing such notice being that both the decree-holder and the Court are aware of the true age of that defendant, there is sufficient compliance with the provisions of O. 21, R. 22 and no question of jurisdiction arises, if the facts subsequently show that the defendant was not a minor but a major, the issuing of the notice might amount to an irregularity, which, if it results in substantial loss, would be a ground for setting aside of the sale. (*King and Krishnaswami Aiyangar, JJ.*) KODANDARAMA REDDIAR *v.* PARTHASARATHY AYYANGAR. **1938 M.W.N. 1061 = 48 L.W. 586.**

——**O. 21, Rr. 58 and 63**—*Applicability—Sale of mortgaged property in execution — Application by mortgagee under O. 21, R. 58 as against purchaser—Dismissal—Suit by mortgagee on mortgage beyond one year—Maintainability—Limitation.*

Where a mortgagee makes an application under O. 21, R. 58, C. P. Code, in respect of the mortgaged property as against the purchaser of that property in execution, and that application is dismissed, whether for default or not, the mortgagee must bring a suit on his mortgage within one year. A suit by him on the mortgage more than one year after the disposal of his application under O. 21, R. 58, is barred and must fail as against the purchaser on the ground of the effluxion of time. O. 21, R. 58, is not inapplicable to the case of relationship of mortgagee and the purchaser, either of the equity of redemption or of the security. It may be unnecessary for a purchaser or a mortgagee to make an application under O. 21, R. 58, but R. 62 of O. 21 contemplates the possibility of such an application being made. If an application is made and is unsuccessful, as regards those parties, O. 21, R. 63 would apply. (*Wort A.C.J. and Manohar Lall, J.*) RAGHUBIR PRASAD *v.* RAMNATH SINGH. **177 I.C. 702 = 5 B.R. 9 = 19 Pat.L.T. 746 = 1938 P.W.N. 752.**

——**O. 21, R. 66 (Patna), Proviso**—Scope—If repealed by Bihar Money-Lenders' Act, S. 16—Repugnancy—Latter section—If void on ground of repugnancy to O. 21, R. 66. *See* BIHAR MONEY-LENDERS' ACT, S. 16. **19 Pat.L.T. 760.**

——**O. 21, Rr. 82-92** — *Execution sale—Setting aside of—Power of Court.*

A sale in execution can only be set aside if the ground mentioned in Rr. 89, 90 or R. 91 of O. 21, C. P. Code, be established as the case may be. If no such application is made, the Court has no option but to confirm the sale. If any such application is made and the ground mentioned in those Rules be not established, the onus being on him who applies for reversal of the sale, the Court has no option but to confirm the sale under O. 21, R. 92. (*R.C. Mitter and Sen, JJ.*) NERODE CHANDRA *v.* OFFICIAL TRUSTEE OF BENGAL.

A.I.R. 1938 Cal. 798.

C. P. CODE (1908), O. 21, R. 90.

——O. 21, R. 90—*Applicability—Objection as to*

questions of saleability of the property concerned. (*Gruer, J.*) MAROTI *v.* KISANLAL. 1938 N.L.J. 389.

——O. 21, R. 90—Irregularity—Notice under O. 21, R. 22 issued to major defendant as minor represented by guardian—Effect of—Sale—If to be set aside. *See* C. P. CODE, O. 21, R. 22. 48 L.W. 586.

——O. 21, R. 90—*Suit on mortgage—Decree—Sale in execution—Judgment debtor's application to set aside sale—Later mortgages by judgment-debtor over some properties—If possibility of no surplus to judgment-debtor a ground to hold judgment-debtor is not affected by the sale—Reduction of upset price without notice—If irregularity.*

In a suit on a mortgage the decree-holders purchased

District Judge as not maintainable as he held that they could not come under Cls. 1 and 2,
cl. 3 of O. 21, R. 90 because they
"affected by the sale" inasmuch a
debtors had executed three other late
very large amounts and could not therefore get any su
plus available to them even if a fresh sale should
held. He did not make any enquiry into the fac
Certain attaching decree-holders of the equity of redemption also applied to set aside the sales. These petitions were also dismissed.

Held, that the petitions by the judgment debtor and the attaching decree-holder were maintainable as they are persons whose interests are *prima facie* affected by

conduct of the sale without notice to the judgment debtor is not an irregularity which could possibly affect the sale.

Held further, that a mere allegation in the pleadings that there has been no publication, no proclamation and

of the Court to carry out its duties is not s
to sustain the petition. (*King and*
RAJARAM RAJA SAHEB *v.* BHAWA
JOSHI. (1938)

——O. 21, Rr. 91 and 92—*Auction sold turning out to be not the property of the judgment-debtor—Purchaser if can sue to recover price paid, from decree holder—Decree holder purchaser if in a different position—Right to execute decree after confirmation of sale and satisfaction of decree.*

There is at present no right either in law or in equity

P. Code, O. 21, Rr. 91

confirmed that becomes res judicata ... the judgment-debtor and hence he cannot reopen the matter by an application for further execution or by any other means unless he can get the order confirming the sale set aside. (*Bennet, A.C.J. Harries, Collister Ismail and Verma, JJ.*) AMAR NATH *v.* FIRM CHOTEY LAL

C. P. CODE (1908), O. 32, R. 15.

DURGA PRASAD. 1938 A.L.J. 955 = 1938 A.W.R. (H.C.) 668 = 1938 O.W.N. 1021 = A.I.R. 1938 All 593 (F.B.).

——O. 22, R. 4—*Legal representative already on record—Application, if necessary—Procedure*

necessary. It is enough if the fact is brought to the notice of the Court and is recorded. (*Thomas, C.J.*) BISHUNATH PRASAD *v.* LALA JAMUNA DAS. 177 I.C. 979 = 1938 O.A. 791 = 1938 O.L.R. 463 = 1938 O.W.N. 1013.

——O. 22, R. 4 (3)—*Suit for partition against brothers—Appeal against order passed in execution—Death of one brother pending appeal—Effect—If whole appeal abates.*

A suit for partition and proceeding in execution of

is brought against an order passed in execution and

simple device of an
has died gave up
order in execution
appealed against was passed. (*Davis, J.C. and Mehta, J.*) MT. AMAN KHATUN *v.* ABDUL RASOOL. A.I.R. 1938 Sind 239.

——O. 22, R. 12—*Applicability—Appeal from order in execution.*

Rule 12 of O. 22, C. P. Code, is not intended to apply
execution. (*Davis,*
KHATUN *v.* ABDUL
A.I.R. 1938 Sind 239.

on commission—Ad-
jurisdiction of Court—
Consent of party, if necessary.

Where the witness who is examined on commission, is beyond the jurisdiction of the Court, the consent of the party is not necessary to make it admissible. Even if a party objects, it is of no use. (*Bose, J.*) JAMSHED
1938 N.L.J. 392.

commission—
to give notice—

could not be varied or reversed because of an irregularity in the proceedings which does not affect either the merits of the case or the jurisdiction of the Court. If there has been no prejudice, the decree could not be attacked. (*Bose, J.*) JAMSHED *v.* KUNJILAL. 1938 N.L.J. 392.

——O. 30, R. 1—*Suit against firm—Addition of names of partners—If obligatory.*

property
division

CHANDU LAL *v.* SARASWATI SUGAR
A.I.R.

——O. 32, R. 15—*Scope—*
—Effect—Defendant
of leaving of suit—

C. P. CODE (1908), O. 33, R. 10.

mind not raised and tried—Finding on written statement subsequently filed and without taking evidence—Binding character of—Decree—Liability to be set aside.

Where an allegation is made before the Court that the defendant in a suit is of unsound mind or weak intellect and incapable of managing his affairs, that allegation is one which, by O. 32, R. 15, C. P. Code, is placed on the same footing as an allegation of minority and requires similar treatment. The Court is not justified in rejecting it forthwith, but must try that issue like any material issue in the case by placing the particular under a (provisional) guardian *ad litem* or curator; and the course to be followed subsequently would then depend on what is established at the inquiry into the mental condition of that defendant who is alleged to be unsound mind or weak intellect. The fact that the question arises in the midst of the hearing of the case does not absolve the Court from holding the inquiry or in to put away its doubts and come to a conclusion or no evidence. If the Court without any inquiry calls upon a defendant in this condition to prove his case after adopting a written statement filed subsequently on his behalf on some one else, no finding arrived at in such circumstances against that defendant can be held to be finding on him. Such a procedure is irregular and must necessarily affect the trial of the case on the merits. The decree passed in the case is therefore liable to be set aside on appeal. (*Dhavle and Agarwala, JJ.*) BAI JU LAL PATHAK *v.* SRIMATHI MAINA DAI. **1938 P.W.N. 705.**

———**O. 33, Rr. 10, 12, O. 44, R. 1**—*Order in terms of O. 33, R. 10 passed by trial Court—No such order made by Appellate Court in appeal—Application by Government for such order—If competent.*

Where a pauper suit instituted under O. 33 is disposed of, the Court is at liberty, whether the Government is represented before it at the time or not, to make an order in favour of the Government for the payment of court-fees and in making such order the Court is entitled in the exercise of its discretion, which it has in the matter, to direct which of the parties shall be liable for the payment of such court-fees. Where therefore although an order in the terms of O. 33, R. 10 had been made by the trial Court when it passed the decree, no such order was made by the Appellate Court on appeal the Government is entitled to obtain such an order by making an application under O. 33, R. 12. Such an application is competent and the Government's right to obtain an order for the recovery of the court fees is not lost merely because there was no such order incorporated in the decree of the Appellate Court (*Biswas and Edgley, JJ.*) PROVINCE OF BENGAL *v.* NOOR AHMADE. **A.I.R. 1938 Cal. 776.**

———**O. 34, R. 6**—*Right to apply under—Preliminary decree not providing for personal decree—Application for personal decree after sale—If barred*—Res judicata.

The omission to provide for a personal decree in the preliminary decree in a mortgage suit does not operate as *res judicata*, and the omission therefore, to reserve personal liability of the defendants in the preliminary decree does not preclude the plaintiff mortgagor from applying for relief under O. 34, R. 6, C. P. Code, if the sale proceeds are not sufficient to satisfy the decree amount. (*Varadachariar and Pandrang Row, JJ.*) NILAKANTA PRABHU *v.* APPU NAICKA. **1938 M.W.N. 1185=48 L.W. 758=(1938) 2 M.L.J. 999.**

———**O. 38, R. 9**—*Suit dismissed but subsequently restored to file—Attachment—If revives—Alienation of property in the meanwhile—Effect.*

There is no authority for the contention that an attachment before judgment which has come to an end with the dismissal of the suit, is restored when the suit is restored to file, in spite of an alienation of the property in the meanwhile. (*Burn, J.*) BASAPPA *v.* RUDRAPPA. **48 L.W. 763.**

———**O. 38, R. 11**—Scope—If excuses an application for execution. *See* C. P. CODE, S. 73 AND O. 38, R. 11. **1938 Rang.L.R. 565.**

———**O. 39, Rr. 1 and 2**—Applicability—Administration suit—Decree—Order restraining execution of decree by creditor—Power of Court to pass. *See* C. P. CODE, O. 20, R. 13. **1938 M.W.N. 1127.**

———**O. 39, R. 7**—*Applicability—Application for leave to sue as pauper—If 'suit'—Application for appointment of commissioner to take inventory—Maintainability.*

An application for leave to institute a suit in *forma pauperis* is a suit for purposes of O. 39, R. 7, C. P. Code, and the parties in a contemplated pauper suit who have petitioned to have their suit admitted under O. 33, C. P. Code, are therefore entitled to the relief of appointment of a commissioner or receiver for the purpose of taking an inventory of properties. (*Gentle, J.*) CHIDAMBARAM *v.* NATARAJA MUDALIAR. **48 L.W. 688.**

———**O. 41, Rr. 4 and 33**—*Relief to persons not before Court—Exercise of discretion—Principles.*

Ordinarily when a person submits to a decree it is no part of the Court's duty to interfere and give that person gratuitously a relief which he has not prayed for and which possibly he may not want. The general principle of law is that when there is no appeal or motion the decree will stand. This principle should be adhered to unless it is found that such adherence will hamper the Court in doing complete justice. To meet this contingency O. 41, Rr. 4 and 33, C. P. Code, have been enacted. These provisions give the Court a wide discretion to grant relief to persons who are not before the Court either as Appellants or Respondents. These discretionary powers, however, should be cautiously used and the exercise of these powers, when it is not necessary, would constitute an error of law and procedure justifying an interference by the High Court. (*Sen, J.*) FAZAL RAHAMAN *v.* ABDUL RASHID. **43 C.W.N. 15.**

———**O. 41, R. 22 (4)**- *Scope of—Abatement of appeal—Cross objection—Effect on.*

Cross objection is part of an appeal and when an appeal goes out for any extraneous reasons as abatement, it follows that the cross objection should ordinarily go out with it. The only exceptions are those mentioned in O. 41, R. 22 (4), C. P. Code. (*Stone, C. J. and Clarke, J.*) PURUSHOTTAMDAS *v.* DEOKARAN. **1938 N.L.J. 399.**

———**O. 41, Rr. 33 and 4**—Relief to persons not before Court—Exercise of discretion—Principles. *See* C. P. CODE, O. 41, RR. 4 AND 33. **43 C.W.N. 15.**

———**O. 43, R. 1 (a)**—*Plaint filed in Court to which directed—Right to appeal—If lost.*

A plaintiff is not precluded from prosecuting his appeal against the order returning his plaint for presentation to proper Court, if in compliance with that order he presents the plaint to another Court in order to save limitation in case his appeal is dismissed. (*Bhide, J.*) NANU MAL *v.* SHIBBA MAL NAND KISHORE. **40 P.L.R. 975.**

———**O. 45, R. 15**— *Application under— Form—Specific prayer for transmission to Court concerned, if necessary—Procedure adopted by Chief Court, Oudh with reference to such applications.*

When an application under O. 45, R. 15, C.P. Code prays that the memo of costs be prepared, it includes also a prayer for transmission of the order to the Court

C. P. CODE (1908), O. 45, R. 15.

concerned. The usual practice adopted by the Chief Court of Oudh with reference to such applications is to send them to the office for necessary action. It is the office that then prepares the memo of costs and transmits it to the Court concerned without any further directions or orders of the Court. (*Thomas, C. J. and Yorke, J.*) SURAJ KUER *v.* DEO SINGH.

1938 O.W.N. 1045.

cularly so, when they are not asked for. (*Thomas, C. J. and Yorke, J.*) SURAJ KUER *v.* DEO SINGH.

1938 O.W.N. 1045.

——O. 47, R. 1—*New evidence—Proof required.*

An applicant for review on the ground of discover new evidence should show that (*i*) such evidence

able care and diligence

the time of the decree.

JJ.) KUNJA BEHARY C

DHONE MAJUMDAR.

——Sch. II, Para. 1—

ceedings.

Sch.

Ahmad,

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tion, which is embodied in the statement made by the parties counsel, was not supported by the consent of several parties who were interested, the reference is invalid and could not give the Court jurisdiction to refer the matter to arbitration. (*Mulla, J.*) ABDUL WAHEED KHAN *v.* RAM BUX.

1938 A.W.R. H.C. 691=1938 A.L.J. 1044.

——Sch. II, Para 17—*Agreement to refer to arbitration—Some of the matters within jurisdiction of Revenue Court—Agreement, if can be filed.*

An agreement for reference to arbitration cannot be filed in a civil Court under Para. 17, Sch. II, C. P. Code, if some of the matters included therein are within the jurisdiction of the Revenue Court only and there are actually suits pending in such C

of them. (*Addison, Ag. C. J.*

LACHHMANDAS *v.* CHANAN M

COMPANY—*Directors — P*

Procedure.

The assets of a company cannot be disposed of by a

passed by the Board of Dire

rizing one of their member

company for satisfaction of

a transfer of property effecte

solution is ineffectual to pass any title to the transferee so as to entitle him to bring a suit under O. 21, R. 63, C. P. Code, more so when the formalities in respect of the deed of transfer provided by the Articles of Association of the company have not been observe

transfer has been effected not by the Director

rized but by his agent whose authority to

company is not proved. (*Mosely and Dun*

U BA DIN *v.* JANKI DEVI. A.I.R. 1938 Rang. 447.

COMPROMISE.

COMPANIES ACT (VII OF 1913), S. 4—*Applicability—Joint family business concern.*

A trading association to be within S. 4 of the Companies Act must be one formed on the basis of contract between its members. A joint family business concern, however, which by its nature descends from father to son, in which interests are acquired by the succeeding generations not by an act of party but by the law of inheritance,

persons in this sense, and does

within the scope of that section.

——S. 4—*Association consisting of less than maximum number at formation—Number exceeding maximum later on—Need for registration.*

S. 4 of the Companies Act on its true construction

, any,

An

al at

its formation, if the original members be not more than ten in number, in the case of a banking business and

, but if the number increases

maximum allowable, the asso-

——S. 4—*Unregistered association—Beneficial interest of members.*

The members of a partnership or company or association hit by S. 4 of the Companies Act can have beneficial interest in property. (*Mitter and Biswas, JJ.*) NIBARAN CHANDRA SHAHA *v.* LALIT MOHAN BRINDABAN SHAHA. I.L.R. (1938) 2 Cal. 368.

——S. 152—*One of parties to agreement, a company—No specific reference to Arbitration Act—Latter, if applies.*

A company under the Companies Act stands in the Punjab on no different footing than a private individual governed by Punjab Act I of 1911. Therefore if an

which one is a com-

o the Arbitration Act,

ply to the arbitration

Bhide, J.) CHANDU

A.I.R. 1938 Lah. 827.

—If can be continued

the Companies Act

(*Harris, J.*) OFFICIAL LIQUIDATORS *v.* JUGAL KISHORE.

1938 A.L.J. 1002= 1938 A.W.R. (H.C.) 711.

COMPROMISE — *Enforceability by separate suit—*

not incorpo-

mise and

hout In-

corporating the

suit could be founded on compromise as it had not become merged in the decree passed. (*Spargo, J.*) U LAT *v.* U PON GAUNG. **177 I.C. 601=11 R.R. 148=A.I.R. 1938 Rang. 145.**

CONTRACT—*Concluded agreement—Mandi contract with pacca ahrti of Bombay.*

One *A* at Delhi placed with *B* a pacca ahrti of Bombay through his agent at Delhi an order for a forward transaction of 100 bales of Broach cotton asking *B* "to debit the amount of the 'mandi' in his khata," and undertaking "to pay the amount thereof as soon as a telegram was received." He also agreed to pay brokerage. The transaction was of the nature of what are called 'mandi' contracts in the Bombay market. The agent at once communicated by wire the contents of the order to *B* at Bombay, who entered into a forward contract of April-May delivery at the current market rate, and the next day he wired back to the agent, that the order had been placed at Rs. 208-12-0 per candy at a (mandi) premium of Rs. 7-8-0. Three days later, the agent communicated this to *A* who failed to pay the amount of the 'mandi' as agreed upon, in spite of demand by *B*. The rate varied to the disadvantage of *A* and he repudiated the contract, whereupon *B* sold the transaction to another party at a loss.

Held, that there was no question of an "offer" by *A* and its "acceptance" by *B*. There was a completed contract between the parties and *A* was liable to pay the amount of the 'mandi' and he was also liable to pay *B* the loss which the latter had suffered in the transaction, together with brokerage at the stipulated rate. (*Tek Chand, J.*) LAKSHMI NARAIN *v.* BALA PARSHAD. **A.I.R. 1938 Lah. 825.**

CONTRACT ACT (IX OF 1872), S. 23—*Stifling prosecution—Test—Motive and object of agreement—Distinction.*

It is against public policy to make a trade of felony or attempt to secure benefit by stifling a prosecution or compounding an offence which is not compoundable in Law. The principle is that no Court of law can countenance or give effect to an agreement which attempts to take the administration of law out of the hands of the Judges, and put it in the hands of private individuals. The test to be applied in all such cases is, as to whether it was an express or implied term of the bargain between the parties, that a non-compoundable criminal case should not be proceeded with. If the *quid pro quo* or consideration for a bond in contract is the withdrawal of a criminal prosecution, obviously it is hit by S. 23, Contract Act. But the fact that prosecution was actually withdrawn as a result of the execution of the bond by the accused in favour of the prosecution does not necessarily show that the object or consideration of the bond was the stifling of the criminal case. A distinction has always been drawn between the motive to a transaction and its object or consideration and it is not enough that the motive which impelled the party who executed the bond was that the criminal case against him might be dropped. To bring a case within the purview of S. 23, Contract Act, it is necessary to show that the object or consideration of the agreement is unlawful. When there is a just and *bona fide* debt owing by the accused, against whom a non-compoundable criminal case is proceeding, and he gives a security to his creditor, the entire consideration for which is the pre-existing debt, and no part of it is referable to the withdrawal of the criminal case, the transaction would be a perfectly good transaction. There, as between the debtor and the creditor there is no trading on felony, which public policy condemns and the law attempts at preventing. The creditor gets just what he was entitled to, and there is no advantage or emolument coming to him for withdrawing the prosecution against his debtor. When security is given by an outsider, who is under no existing obligation, the consideration could be nothing else but withdrawing of the criminal case, and as such the security is not entertainable in law. The position is that if the pre-existing liability of the debtor was the sole consideration for the security which he gives, the transaction will be protected, even if it were given under threat of criminal proceedings; but if the dropping of prosecution was also a matter of bargain between the parties, and constituted a part of the consideration apart from the pre-existing debt, the security cannot be enforced in law. (*Derbyshire C.J. and Mukerjea, J.*) SUDHINDRA KUMAR *v.* GANESH CHANDRA. **A.I.R. 1938 Cal. 840.**

——**S. 30**—*Mandi contracts—Validity.*

'Mandi' contracts cannot be held to be wagers merely on their apparent nature and characteristic, without proof of the facts that the common intention of the contracting parties at the time of entering into the particular contract in question was to deal only in differences and in no circumstances to call for, or give, delivery. (*Tek Chand, J.*) LAKSHMI NARAIN *v.* BALA PRASHAD. **A.I.R. 1938 Lah. 825.**

——**S. 65**—*Transfer void owing to provision of law—Recovery of money advanced—Cause of action—Starting point.*

When a transfer is void owing to a provision of law, so that a cause of action to recover the consideration under S. 65, Contract Act arises, time runs, ordinarily, from the date of the agreement. (*Stone, C. J. and Clarke, J.*) GULAM HUSSEIN *v.* MIR JAKIRALI. **1938 N.L.J. 409.**

COURT-FEES—Administration suit by a creditor—Other creditors impleaded as defendants before preliminary decree—Court granting not whole of their claim but only dividends at certain percentage of it—Court-fee payable by them. *See* COURT-FEES ACT, S. 11. **43 C.W.N. 52=A.I.R. 1938 Cal. 785.**

COURT-FEES ACT (VII OF 1870), S. 11—*Applicability—Administration suit by a creditor—Other creditors impleaded as defendants before preliminary decree—Court granting not whole of their claim but only dividends at certain percentage of it—Court-fee payable by them.*

The Court-Fees Act is a fiscal statute and must be construed strictly and S. 11 of the Act, therefore, cannot be applied by analogy. In an administration suit by a creditor, till the decree is passed it is the plaintiff who is the *dominus litis* and has the carriage and conduct of the proceedings. Other creditors impleaded as defendants cannot be said to occupy the position of a plaintiff up to that stage at any rate. Though administration suit is analogous to an account suit up to a certain stage, the two are not identical for all purposes, at least, so far as the ultimate decision of the Court is concerned. Hence where in a suit by a creditor for administration of the estate of a deceased debtor, other creditors are impleaded as party defendants before the preliminary decree and they set out in their written statements their claims against the estate of the deceased aggregating to certain amount, but the Court has allowed certain dividends to be paid to the creditors on a basis of certain per cent. upon the amounts found to have been due to them, those creditors cannot be ordered to pay court-fees upon the entire amount of their claims, irrespective of what are being actually paid to them as dividends. (*M.C. Ghose and Mukherjea, JJ.*) NISHI KANTA *v.* PRAMATH NATH. **43 C.W.N. 52=A.I.R. 1938 Cal. 785.**

COURT-FEES ACT (1870), S. 19-D.

——**S. 19-D**—*Applicability — Hindu coparcener holding undivided share in joint family property—If trustee for other coparceners—Death of coparceners—Application by survivors for Letters of Administration—Liability to pay court-fee—Claim to exemption as trust property—Sustainability—Sch. I, Art. 11.*

When a person chooses to apply for Letters of Administration, whether the Letters are absolutely necessary or not and they are granted, he must pay the proper court-fee according to Art. 11, Sch. I of the Court-Fees Act. S. 19-D of the Court-Fees Act does not in any way exempt from payment of court-fee letters obtained by a coparcener of a Hindu joint family in respect of property which he takes by survivorship, and not by inheritance as heir. A co-sharer member of a joint Hindu family interested to the extent of an undivided share in the whole of the joint family property cannot be held to be "trustee" for the other co-sharers within the meaning of S. 19-D. Whether an applica-

family—Death of
for Letters of Adm
interest of deceasec
COURT-FEES ACT

CRIMINAL LA...
OF 1932), S. 7—*If stands repealed by* ...
Amending Act of 1937—General Clauses ...
1936), S. 6-A—Effect of.

The Criminal Law Amendment Act of ... been repealed in its entirety by the ... Amending Act (XX of 1937). The effect ... latter Act and S. 6-A of the General Clauses Act (XIX of 1936), is to leave the Criminal Law Amendment Act of 1932 intact so far as S. 7 is concerned. (*Leach, C.J. and Abdur Rahman, J.*) ARUNAGIRINATHAR *v.* EMPEROR. **1938 M.W.N. 1105 (2)= (1938) 2 M.L.J. 863.**

——**S. 7**-
able. *See* ...

——**S. 7** ...
public official.

There is no justification for the content ... offence contemplated by S. 7 (1) (*a*) of ... Law Amendment Act of 1932 should go ... when it is committed in respect of a pu ... (*Leach, C.J. and Abdur Rahman, J.*) ARUNAGIRINATHAR *v.* EMPEROR. **1938 M.W.N. 1105 (2)= (1938) 2 M.L.J. 863.**

CRIMINAL PROCEDURE CODE (V OF 1898), S. 1 (2)—Scope and effect—Village police patel—Prose-
...

called upon—Revision — Interference—Order spending itself out—If bar to revision.

Cl. 4 of S. 144, Cr. P. Code, contemplates only a change in the nature of the order made and not a change in the party against whom it is made. The order can be absolved only against the party who is

CR. P. CODE (1898), S. 162.

called upon to show. It is no doubt open to a superior Magistrate under S. 144 (4) to rescind an order made by a Subordinate Magistrate against a party who was called upon to show cause, but it is not open to him to alter the order into one against the other party who was never called upon to show cause. Such an order is mainfestly prejudicial to such party who has never been called upon to show and is liable to be set aside in revision. The fact that the order has spent itself does not preclude interference in revision, when the order is illegal and may affect the future rights of the parties. (*Varma, J.*) PANCHKESAR KUAR *v.* MADHO SINGH. **1938 P.W.N. 709=19 Pat L.T. 796.**

——**S. 145**—*Procedure to be followed—Magistrate when can refuse to take action—Report as to danger of breach of peace—Use of evidence given in another case—Legality—Dismissal under S. 203—If proper.*

The only case in which a Magistrate can refuse to take action under S. 145, Cr.P. Code, is when he is not satis- ... ach of peace. But ... ntrary and if he is ... notices to the par- ... (4). Where the ... ven in another case ... gh the other case is

... b-S. (4) to S. 145, ... ub-section makes it ... in the proviso is not ... chooses to act under ... as to which of the ... of the order made under sub-S. (1), it is not necessary for him to see whether or not any of the parties has been despossessed within two months next before the date of the order. *Zia-ul-Hasan and Yorke, JJ.*) HAR GOVIND PRASAD *v.* MAHARAJ KUNWAR. **177 I.C. 974= 1938 O.L.R. 459=1938 O.A. 778= 1938 O.W.N. 1018 (2).**

... **162**—*Admissibility—Statement of witnesses* ...

1938 A.W.R. (P.C.) 83.

——**S. 162**—*Police diary—Use of—Cross-examination of investigating officer as to previous statement of witness—Desirability of having police diary before Court to explain evidence of investigating officer—Duty*
...

certain witness did not state such and such a fact to him during investigation, really gives a picture of what the witness in fact had stated. If not, the fact should be borne in mind and the Court should watch whether the matter is cleared up in re-examination. It is the duty of the Public Prosecutor to see that the negative

answer of the investigating officer in respect of the statement of a witness does not create a wrong impression of what the witness stated before the police. He must in these cases bring about other statements to explain the matter referred to in cross-examination. If the Public Prosecutor fails to do so, it is the duty of the Court in fairness to the case and to the witness to bring about facts which will clear up the negative answer. That will be legitimate use of the police diary and one of the modes of taking aid from it in the trial. (*Noor and Rowland, JJ.*) YUSUF MIA *v.* EMPEROR.

1938 P.W.N. 727 = A.I.R. 1938 Pat. 579.

——**S. 164**—*Statement of witnesses—Right of accused to inspect.*

A Judge should not decline to allow the pleaders for the defence to see the records of statements made by the prosecution witnesses to a Magistrate under the provisions of S. 164, Cr. P. Code, or to cross-examine the witnesses thereon, because it is an elementary principle of natural justice that an accused person shall have free access at any time during the trial to all the records which are before the Court. The same considerations apply to the refusal to permit reference in cross-examination to the contents of charge sheet, for this also forms part of the committal record. (*Roberts, C.J. and Dunkley, J.*) BRAHMAYA *v.* KING.

A.I.R. 1938 Rang. 442.

——**S. 177**—*Transfer of place of offence after cognisance by Magistrate and before commitment—Jurisdiction of Magistrate and Sessions Court.*

Under S. 177, Cr. P. Code, a Magistrate has jurisdiction to take cognisance of an offence committed within the local limits of his jurisdiction, and to try the case or to commit it to sessions. The fact that the locality in which the offence was committed is transferred to another district after the cognisance of the offence by the Magistrate and before commitment, does not oust the jurisdiction of either the Magistrate or the Sessions Court. (*Jack and Khundkar, JJ.*) EMPEROR *v.* SAYER UDDIN PRAMANIK. **I.L.R. (1938) 2 Cal. 357.**

——**S. 179**—*Applicability—'Consequence', meaning of—Arrest on charge of cheating—Acquittal—Complaint for defamation on ground of deliberate falsity of charge—Jurisdiction—Arrest, if an essental part of charge of defamation.*

The 'consequence' referred to in S. 179, Cr. P. Code, must be a part of the offence with which the accused person is being charged. Hence that section can apply only to a case where a person is charged with an offence not only by reason of some act committed by him, but also by reason of some consequence which has ensued from the Act. In the absence of any one of these two ingredients, the section would be wholly inapplicable. The section would have no application if the consequence is such that even if it had not taken [illegible] the offence would have been complete. On [illegible] for [illegible]

——**S. 197**—*Applicability—"Judge"—Village police patel—Offence by in the course of duties while trying case—Prosecution—Sanction of Local Government—Necessity—S. 1 (2)—Scope and effect of.*

A village police patel trying and disposing of a case in exercise of his powers under S. 14 of the Village Police Act of 1867 is a Judge within the meaning of S. 19, I. P. Code, for purposes of S. 197, Cr. P. Code and therefore comes within the protection afforded to Judges and public servants under S. 197, Cr. P. Code, sanction of the Local Government must therefore be obtained to a prosecution of the village police patel for an offence alleged to have been committed by him while acting as Judge. S. 1 (2) of the Cr. P. Code, does not prevent the application of S. 197 to the village police patel. All that S. 1 (2) means is that the procedure to be followed by the village police patel is not to be governed by the Cr. P. Code. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* SHANKAR SAYAJI DALVI.

40 Bom.L.R. 1106 = A.I.R. 1938 Bom. 489.

——**Ss. 222, 233, 234, 235 and 239**—*Relative scope of—Joinder of charges—Rule as to—Charge of conspiracy—Acts done in pursuance of conspiracy—Separate charge and punishment for—When justified.*

Ss. 235 and 239, Cr. P. Code, are not controlled by the latter part of S. 233 or by S. 234. If offences are committed in the course of the same transaction they may be tried together, although they are more than three in number and extending over a period of more than a year. But there is nothing in S. 235 or 239 to suggest that they are not governed by S. 222 or the first part of S. 233. On the contrary, it is clear from the illustrations to S. 235 that when different offences are tried together, they must be separately charged. When an offence of conspiracy is charged under S. 120-B, I. P. Code, it is always open to the prosecution to charge further that the illegal acts which were the object of the conspiracy having been carried out, because the punishment for the offence of conspiracy depends upon whether the illegal acts have or have not been carried out. But acts done in pursuance of the conspiracy cannot be separately punished unless these acts are separately charged and particularised as required by the Code. S. 239 (4) does not justify omnibus charges relating to an indefinite number of offences alleged to have been committed within the period stated without anything to specify time, place or circumstances or even which of the accused persons are supposed to have committed any particular offence. (*Broomfield and Norman, JJ.*) EMPEROR *v.* KARAMALLI GULAMALLI.

40 Bom.L.R. 1092 = A.I.R. 1938 Bom. 481.

——**S. 223**—*Cheating—Consequence by which deception becomes offence—If should be set out.*

The term 'manner' in S. 223, Cr. P. Code, includes, with reference to an offence of cheating, every ingredient by virtue of which the act ceases to become one of mere non-criminal de[illegible]tion and becomes one of cheating within the [illegible] S. 415, I. P. C. and the effect

CR. P. CODE (1898), S. 235,

by only some of them. The charges of rape were drawn in a peculiar manner. Each of them specified an offence of rape committed either on an indefinite date or between periods extending from six weeks

the time covered being from September

1937. The charge under S. 377 specifi

committed between end of December 19[illegible] and June 1937. The charges found were either so vague and general as to be bad in law or were in the alternative absurd. Neither of the offences was a continuing offence. The whole story was vague in details and corroboration, which might have been expected, had not been given. The Judge did not deal with the evidence in a satisfactory way. Instead of putting the evidence, which was marked with suspicious features, before the jury and leaving them to decide whether they were prepared to believe it, he went out of his way by special pleading to ask the jury to believe the whole of it.

Held, that the multiplicity of the charges tried together in the trial must have operated to the prejudice of the accused. That corroboration of the complainant in respect of the offences alleged was a practical impossibility in absence of definite averments as to the time of their occurrence. That the verdict of the jury was vitiated by misdirections. That it was not a case in which retrial should be ordered. (*Bartley and Henderson, JJ.*) ALI HYDER *v.* EMPEROR.

68 C.L.J. 238 = A.I.R. 1938 Cal. 769.

——**S. 235**—Scope—If controlled by Ss. 222, 233 and 234. *See* CR.P. CODE, SS. 222, 233, 234, 235 AND 239. **40 Bom L.R. 1092.**

——**Ss. 239 and 342**—*Scope—Charge of same offence against several persons—Separate trial of one in order to enable him to give evidence against other—If justified—Discretion of Magistrate—Accused separately tried—If competent witness against co accused tried separately from him—"Accused"—Meaning of.*

S. 239, Cr. P. Code, is an enabling section. The

rate trial of one of several persons alleged to have committed the same offence, simply in order that his

the others is not accused for purposes of S. 342, Cr. P. Code, so far as the trial of the other accused persons is concerned and he is a competent witness in the case against them. "Accused" in S. 342 means the accused then under trial and under examination by the Court, and

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Omnibus charge in respect of [illegible] CR. P. CODE, SS. 222, 233, 234, 235 AND 239.

40 Bom L.R. 1092.

——**Ss. 257 (2) and 544**—*Summoning of witnesses—Order as to deposit for expenses—Powers of Magistrate.*

CR. P. CODE (1898), S. 297.

The Cr. P. Code gives a Magistrate a discretion to pass an order under S. 257 (2) and his discretion is subject to S. 544 and rules framed thereunder. Where an

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how they were necessary,

a Magistrate is fully justified in passing an order under S. 257 (2) directing the deposit of the reasonable expenses of the witnesses as a condition precedent to their being summoned. (*Bennet, A.C.J. and Verma, J.*) EMPEROR *v.* MAHTAB SINGH.

1938 A.L.J 1082.

——**S. 286 (2)**—*Calling of witnesses—Witness examined in committal Court—Duty of Public Prosecutor—Judge if can only advise or also direct.*

Where a witness had been examined as a witness in the committal Court, it is not the duty of the Public Prosecutor to call him unless it is thought that he can give material information in connexion with the offence charged; nor is it his duty to tender him for cross examination. If a Judge advises the Public Prosecutor as to how the latter should exercise his discretion, no exception can be taken to it; but if the Judge goes further and instructs the Public Prosecutor not to call the witness, this is going too far. (*Roberts, C.J. and Dunkley, J.*) BRAHMAYA *v.* KING.

A.I.R. 1938 Rang. 442.

——**Ss. 297 and 298**—*Duty of Judge—Differences between statements of witnesses in committing Court and statements in Sessions Court—Direction to jury to treat them lightly on ground that committing Magistrate is only concerned with inquiry and not with making detailed record of evidence—Propriety.*

the matter with which he is charged and of the evidence by which the prosecutor seeks to prove the case. It is not therefore proper for the Sessions Judge in his charge to the jury to invite them to treat very lightly any differ-

with making a detailed record of the statements of the witnesses. (*Noor and Rowland, JJ.*) YUSUF MIA *v.* EMPEROR. **1938 P.W.N. 727 = A.I.R. 1938 Pat. 579.**

Language may be used too broadly or not happy in its expression. The essential point for consideration is

tinguish the cases of accused wl evi-
dence is not of the same the
Judge omits to do this, the

CR. P. CODE (1898), S. 297.

said to meet the necessary requirements of justice, and the High Court will interfere in appeal and set aside the verdict. (*Noor and Rowland, JJ.*) YUSUF MIA *v.* EMPEROR. **1938 P.W.N. 727 = A.I.R. 1938 Pat. 579.**

——S. 297 and 298—*Duty of Judge—Statement to police—Omission of names of accused in—Effect of—Judge's duty in charging jury—Judge merely citing observations from old decision—Propriety of.*

The giving of advice to the jury to treat all kinds of statements to the police as of one level of unrealiability should be deprecated. If it is the prosecution case that the police-officer's notes in any particular instance are unreliable, that should be brought out in the course of the evidence of the particular officer or it may appear on the face of the facts themselves. What the witnesses according to the notes have actually said should be brought on record. Only by reference to them can it be understood what is really meant by the answers elicited from the witnesses or the police-officer in cross-examination. Whether a discrepancy or omission is effective to contradict a witness in any particular case depends on the nature of the fact in question as well as the fullness with which the statement has been recorded. An omission may amount to contradiction if the matter omitted is one which the witness would be expected to mention and the police-officer to make a note in the ordinary course. Every detail is not expected to be noted, but the names of the accused persons are among the most important of such matter which any police-officer who knows his work would not fail to take down from the lips of the witness. The jury must be properly directed in dealing with an omission of this kind. Their attention should be drawn to the distinction between important and immaterial omissions and they must be invited to apply it. The Judge's duty is not properly discharged by merely citing certain observations about the unreliability of statements recorded by police contained in an old decision given very many years ago with reference to methods of investigation then prevailing in another province. (*Noor and Rowland, JJ.*) YUSUF MIA *v.* EMPEROR.
1938 P.W.N. 727 = A.I.R. 1938 Pat. 579.

——S. 342—"Accused"—Meaning of—Co-accused charged with same offence—One tried separately from the rest—Competency as witness against the latter. *See* CR. P. CODE, SS. 239 AND 342. **40 Bom.L.R. 1092.**

——S. 342—*New witness examined after further cross-examination of prosecution witnesses—Second examination of accused—If obligatory.*

Under S. 342, Cr. P. Code, it is incumbent on the trying Magistrate to question the accused again where after the further cross-examination of the prosecution witnesses a medical witness is newly examined for the prosecutien. The omission to do so vitiates the proceedings. (*Skemp, J.*) JHANDU *v.* EMPEROR.
40 P.L.R. 902.

——Ss. 349 and 367—*Reference to superior Magistrate—Duty of such Magistrate to form independent judgment—Judgment according to S. 367, if necessary.*

Where a case has been referred to a superior Magistrate under S. 349, Cr. P. Code, it is not sufficient for such Magistrate to merely accept the findings of the inferior Magistrate making the reference. He should form his own independent judgment and write a judgment conforming to the requirements of S. 367, Cr. P. Code. (*Zia-ul-Hasan, J.*) LALLU RAM *v.* EMPEROR.
1938 O.W.N. 1051 = 1938 O.A. 802 = 1938 A.W.R. (C.C.) 87 = 1938 O.L.R. 468.

——Ss. 353 and 537—*Cross-cases—Witness's answer about his statement in cross-case, recorded—Statement in cross-case not brought on record—Procedure, if regular—If curable under S. 537.*

CR. P. CODE (1898), S. 401.

Where a witness's answer as to whether he made a statement in a cross-case is alone recorded, but a copy of the statement in the cross-case is not brought on record, the procedure adopted is improper and irregular being in contravention of S. 353, Cr. P. Code. Where it cannot be said to have caused prejudice, the irregularity can be cured by the application of S. 537. (*Yorke, J.*) TAQI MOHAMMAD *v.* MOHAMMAD JAN.
1938 O.W.N. 1064 = 1938 O.A. 819 = 1938 A.W.R. (C.C.) 96 = 1938 O.L.R. 465.

——S. 366 (3)—*Signing of judgment—If amounts to its delivery.*

As soon as a Magistrate signs his judgment in the absence of the accused, he delivers it within the meaning of S. 366 (3), Cr. P. Code, and the trial is then over. (*Blacker, J.*) GIAN SINGH *v.* AMAR SINGH.
I.L.R. 1938 Lah. 567.

——S. 367—Judgment—Contents—Case referred to superior Magistrate under S. 349. *See* CR. P. CODE, SS. 349 AND 367. **1938 O.W.N. 1051.**

——S. 401—*Order of remission—Effect.*

The effect of an order of remission is to wipe out the remitted portion of the sentence altogether and not merely to suspend its operation. (*Stone, C. J., Gruer and Bose, JJ.*) VENKATESH YESHWANT DESHPANDE *v.* EMPEROR. **1938 N.L.J. 423 = A.I.R. 1938 Nag. 513 (F.B.).**

——S. 401—*Order under—Nature explained.*

Though an order under S. 401, Cr. P. Code, passed by the Local Government is in the name of the Governor, because that is the constitutional form it has to take, it is in reality an order of the Provincial Government. (*Stone, C. J., Gruer and Bose, JJ.*) VENKATESH YESHWANT DESHPANDE *v.* EMPEROR.
1938 N.L.J. 423 = A.I.R. 1938 Nag. 513 (F.B.).

——S. 401—*Scope of power of Local Government.*

Per *Bose, J.*—Executive Government has not got unfettered and unqualified freedom of action in the matter of suspension and remission of sentence. Its powers in this respect are in a sense derived from a statutory delegation of the Royal Prerogative of pardon; not co-extensive with it, and not superior to it. That being so, the rights of the Executive cannot be greater than those of His Majesty himself except and unless and only in so far as they are specifically enlarged by statute. Even if it be supposed that the Executive Government has power to cancel an order remitting sentence, the Government must be prepared to substantiate and justify its action and that means that it must give reasons first to the person concerned and then, if the matter reaches Court, to that tribunal. (*Stone, C.J., Gruer and Bose, JJ.*) VENKATESH YESHWANT DESHPANDE *v.* EMPEROR.
1938 N.L.J. 423 = A.I.R. 1938 Nag. 513 (F.B.).

——S. 401—*Unconditional remission of sentence—Government, if can subsequently restore sentence.*

It is not open to Government, after remitting a sentence unconditionally, and in absence of fraud or mistake to cancel the order and restore the sentence. Even assuming that the Government has such power, an order remitting sentence which has been acted upon to the extent of informing the Legislature of the remission, cannot be amended or cancelled or suspended by the Assistant Legal Remembrancer writing to the Superintendent of Central Jail a memorandum telling the Superintendent to keep a prisoner in custody until he is told to let him go. That is not the way that orders are amended. When the amending order is passed some days after an application under S. 491 for writ of *habeas corpus* had been launched and after the prisoner was

entitled to be released under the order of remission, any possible *locus paenitentiae* is clearly at an end. (*Stone, C. J., Gruer and Bose, JJ.*) VENKATESH YESHWANT DESHPANDE *v.* EMPEROR. 1938 N.L.J. 423= A.I.R. 1938 Nag. 513 (F.B.).

——S. 401 (1)—*Scope of.*

Viewing sub S. (1) as a whole it is clear, that the intention of the Legislature is to confer a 'power' to suspend or remit a sentence. (*Stone, C. J., Gruer and Bose, JJ.*) VENKATESH YESHWANT DESHPANDE *v.* EMPEROR. 1938 N.L.J. 423= A.I.R. 1938 Nag. 513 (F.B.).

——S. 403—*Offence of conspiracy—Second trial for fresh entry into same conspiracy—If ba...*

The gist of the offence of conspiracy ... or entering into the conspiracy. What ... Code, lays ... considered- ... particular e... already bee... again for a... (*Costello, Jack and M. C. Ghose, JJ.*) PURNANANDA DAS GUPTA *v.* EMPEROR. 68 C.L.J. 206.

——S. 403—*Principle of section—Extension—Permissibility.*

S. 403, Cr. P. Code, requires that the Court of the first instance should have been competent to ... charge put forward at the second trial. The ... underlying the English Common Law pleas of *convict* and *autrefois acquit* have been embodied so far as this country is concerned within the limit... narrow they may be or have been stated to ... language of the Statute itself. It would be ... and, indeed, might result in great injustice t... munity at large if Courts were to endeavour ... the language or extend the principles laid down in S. 403. (*Costello, Jack and M. C. Ghose, JJ.*) PURNANANDA DAS GUPTA *v.* EMPEROR. 68 C.L.J. 206.

——S. 403 (1) second part—*Applicability—Test.*

In deciding whether a subsequent trial comes under ...

68 C.L.J. 206.

——S. 417—*Acquittal—Interference by High Court—Failure to draw correct and clear inference from proved facts—If ground of interference.*

In a case in which the result depends upon the appre- ...

Court will interfere and set aside the order of acquittal in appeal. (*Pandrang Row, J.*) PUBLIC PROSECUTOR *v.* KONDALRAO. 48 L.W. 754= 1938 M.W.N. 1121.

——S. 421—*Dismissal of appeal after hearing appellant's pleader—Non-issue of notice to Crown—If a ...*

be made a ground of complaint because it was thought unnecessary to call upon the Crown to reply. (*James, J.*) SONU KURMI *v.* EMPEROR. 177 I.C. 697= 5 B.R. 12.

——S. 423 (1) (b)—*Order of remand—Propriety—* ...

accused should be acquitted, and no order for remand for the purpose of allowing the prosecution to supply deficiencies in their original case should be passed. (*Bartley and Kundkar, JJ.*) SURESH CHANDRA DE *v.* EMPEROR. A.I.R. 1938 Cal. 782.

——S. 428—*Prosecution Witnesses not cross-examined at trial—Jurisdiction of appellate Court to direct Magistrate to record that evidence and certify and resubmit it.*

Where the prosecution witnesses have not been cross- ... aving been ... being con- ... additional ...

... *and Henderson, JJ.*) MUNSHI *v* MUZAFFAR. A.I.R. 1938 Cal. 781.

——Ss. 435 and 440—*Exercise of powers under S. 435—Discretion—Accused not surrendering to his bail bond—Right to be heard in revision.*

... of his con- ... ed at large ... High Court would not be justified in exercising its discretionary ... mmediately ... order of the ... not have a ... L *v.* EMPEROR. ... (H.C.) 690= 1938 A.L.J. 1022.

——S. 439—*Acquittal — Interference—Grounds—Misreading evidence of a witness.*

A single mistake on the part of an appellate Magistrate of misreading the evidence of a particular witness, would not justify the use of the extraordinary powers ... in revision of setting aside an ... *J.*) RAGHO SINGH *v.* RAM ... 177 I.C. 999.

... rder under S. 144—Revision ... self—Interference—Powers of High Court. *See* CR. P. CODE, S. 144 (4). 1938 P.W.N. 709=19 Pat. L.T. 796.

——S. 439 (1)—*Powers of High Court—Reversal of finding and sentence and ordering retrial—Failure to charge under S. 75, Penal Code.*

... s charged and convicted under S. 380, ... ough he had six prior convictions and ... e to charge him under S. 75, I. P. ... Court has powers under S. 439 (1) to ... and sentence and order retrial by a proper Court. (*Yorke, J.*) EMPEROR *v.* MAHADEO. 1938 O.W.N. 1062=1938 O.A. 805= 1938 A.W.R. (O.C.) 92 (1)=1938 O.L.R. 472.

——S. 440—Right of audience—Accused not surrendering to his bail bond. *See* CR. P. CODE, SS. 435 AND 440. 1938 A.W.R. (H.C.) 690= 1938 A.L.J. 1022.

——S. 488—*Jurisdiction—Claim by wife against hus... maintenance—Existence of decree of Civil ... rding maintenance—If bars jurisdiction of ...*

The mere existence of a decree of a Civil Court awarding maintenance to a wife against her husband does not oust the jurisdiction of a Magistrate, in a proper case, to make an order under S. 488, Cr. P. Code, in

CR. P. CODE (1898), S. 522

favour of the wife on an application by her under the section, although the existence of such a decree is relevant when the Magistrate is considering what form of order he should make. (*Beaumont, C.J. and Sen, J.*) TARALAKSHMI MANUPRASAD, *In re.*
40 Bom. L.R. 1103=A.I.R. 1938 Bom. 499.

——**S. 522**—*Accused entering possession of complainant's house by breaking lock—Order of restoration of possession—Power of Court to pass.*

Where the accused persons broke open the lock of the house of the complainant in his absence and entered into possession thereof and when the complainant reached the spot, the accused were standing there armed with *kulharis* and sticks,

Held, that the accused used criminal force to the lock which they broke, criminal because it involved the crime of mischief and that, therefore, an order under S. 522, Cr. P. Code, directing restoration of possession of the house to the complainant was competent on conviction of the accused under S. 448, I. P. Code. A.I.R. 1934 Lah. 454, Diss. from. (*Skemp, J.*) RODA *v.* AUTAR SINGH. **40 P.L.R. 923.**

——**S. 522 (3)**—*Order under—Limitation.*

S. 522 (3), Cr. P. Code, imposes no period of limitation on a Court of appeal or revision. Such a Court can, therefore, pass an order restoring the property to the complainant even after the expiry of one month from the original conviction. (*Skemp, J.*) RODA *v.* AUTAR SINGH. **40 P.L.R. 923.**

——**S. 526**—*Grounds for transfer—Irregular procedure.*

During the course of the trial the evidence of the police investigating officer was interpolated during the cross-examination of a prosecution witness. Complaint was made of this in the affidavits supporting the petition for transfer.

Held, that although Judge might better have waited till the investigating officer came to be called, he was entirely within his rights in putting this witness in the box. This course could not be said to have prejudiced accused. (*Roberts, C.J. and Dunkley, J.*) BRAHMAYA *v.* KING. **A.I.R. 1938 Rang. 442.**

——**S. 526**—*Grounds for transfer—Reasonable apprehension in mind of accused.*

In a trial the Judge declined to allow the pleaders for the accused to see the record of the statements made by prosecution witnesses under S. 164, Cr. P. Code, or to cross-examine the witnesses thereon. Further in the cross-examination of a witness the Judge disallowed a question which was most material to the accused. Moreover reference in the cross-examination to the contents of the charge sheet was refused.

Held, that these things created an apprenhension in the mind of the accused that he would not have a fair and impartial trial and hence the case should be transferred to another Magistrate for trial. (*Roberts, C.J. and Dunkley, J.*) BRAHMAYA *v.* KING.
A.I.R. 1938 Rang. 442

——**S. 526**—*Procedure—Explanation of judge concerned—Desirability.*

As a matter of practice the better course to adopt is that when an application for transfer is made, the Judge from whose Court the transfer is sought to be obtained, should be given an opportunity of instructing the Government Advocate on the matters raised in the affidavits. Any formal explanation which is subsequently incorporated in the proceedings is not desirable. (*Roberts, C.J. and Dunkley, J.*) BRAHMAYA *v.* KING.
A.I.R. 1938 Rang. 442.

——**S. 526 (8)**—*Transfer—Intimation of intention—When to be made.*

CRIMINAL TRIAL.

Under S. 526 (8), Cr. P. Code, the intimation of an intention to make an application for transfer must be made before the defence closes its case. A trial Magistrate is not, therefore, bound to adjourn a case if such intimation is made not only after the defence had closed its case but after the judgment had been written and signed. (*Blacker, J.*) GIAN SINGH *v.* AMAR SINGH.
I.L.R. 1938 Lah. 567.

——**S. 531**—*Applicability—Order of commitment.*

An order of commitment by a Magistrate is an order within the meaning of S. 531, Cr. P. Code, and it is certainly made in the course of a proceeding, *i.e.*, the enquiry preliminary to the commitment. Therefore, even if the committing Magistrate had no territorial jurisdiction at the time of the commitment and on that account had no jurisdiction to make the commitment, such want of jurisdiction would not be a good ground for setting aside the order of commitment, when it has not occasioned any failure of justice. (*Jack and Khundkar, JJ.*) EMPEROR *v.* SAYER UDDIN PRAMANIK.
I.L.R. (1938) 2 Cal. 357.

——**S. 537**—Procedure in contravention of S. 353—If curable. *See* CR. P. CODE, Ss. 353 AND 537.
1938 O.W.N. 1064.

CRIMINAL TRIAL—*Civil dispute—Duty of Criminal Court.*

Parties should not be encouraged to resort to the Criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a Civil Court. Criminal Courts should be on their guard not to lend their aid in cases of this kind. (*Din Mohammad, J.*) BHAGWAN SWARUP *v.* CROWN.
40 P.L.R. 967.

——*Evidence—Admissibility—Investigating officer's statement as to facts—Hearsay.*

Where a police officer makes statements as to the facts which are the result of his investigation they are entirely hearsay and hence inadmissible in evidence. (*Zia-ul-Hasan, J.*) EMPEROR *v.* SAMIULLAH.
1938 O.W.N. 1048=1938 O.A. 797=1938 A.W.R. (C.C.) 83.

——*Evidence—Witness—Duty of prosecution and of Court to call—Omission to call witnesses—Effect of and inference to be drawn from—Considerations—Duty of Judge to tell jury.*

When the prosecution have produced sufficient evidence and the best evidence, it is not always incumbent on them to produce all possible evidence on less important facts. It cannot be laid down as a general proposition of law that the prosecution is or is not obliged to examine persons as prosecution witnesses as to whom the prosecution have reason to believe that they will not help the prosecution case, or that the Court is not bound to examine any person as a Court witness unless the witness appears to be essential to the just decision of the case. The effect of, and the inference to be drawn or not to be drawn from, the absence of relevant witnesses from the witness-box are matters to be considered with reference to the circumstances of each particular case and the facts which the witnesses, if called, would have been required to prove. The jury should be asked by the Judge to consider the same in the light of those circumstances and those facts. The Judge should give assistance to the jury in deciding whether to draw any inference from the failure of the prosecution to call certain witnesses. (*Noor and Rowland, JJ.*) YUSUF MIA *v.* EMPEROR. **1938 P.W.N. 727=A.I.R. 1938 Pat. 579.**

——Evidence—Witnesses examined in committal Court—Duty of Public Prosecutor. *See* CR P. CODE, S. 286 (2). **A.I.R. 1938 Rang. 442.**

CRIMINAL TRIAL.

——*Procedure—Charge—Dropping of—Rule—Accused committed on several charges—Sessions Judge framing new charge and trying only under that charge—Absence of any order or trial in respect of other charges—Legality.*

It is better to have too many charges than too few, and once a charge has been framed, it should not be dropped until the conclusion of the trial unless on the face of it, it is wholly inappropriate or t
to attack on the ground of misjoinder
ness of charges. Where an accused is cor
to the Sessions Court on a number of charges, it is open to the Sessions Judge to cancel some of them or to frame a new charge or to stay the trial of some charges or allow them to be withdrawn on conviction being had on the main charge. But he ought not to leave some of the charges in the air without either cancelling them or trying the accused under them or recording some order in respect of the same. (*Noor and Rowland, JJ.*) EMPEROR *v.* SADASIBO MAJHI. **1938 P.W.N. 754= 19 Pat L T. 801.**

——Sentence—Murder committed in state of drunkenness. *See* PENAL CODE, S. 302.
A.I.R. 1938 Rang.

CRIMINAL TRIBES ACT (VI OF 1924), S.

Scope and applicability.

S. 23 of the Criminal Tribes Act refers only to convictions for offences specified in Sch. I of the Act and has no application to a conviction for an offence which is not contained in that Schedule. S 23 (1) of the Act has in mind not only the previous convictions of the accused but also the offence for which he is being tried. (*Thomas, C. J.*) EMPEROR *v.* BEHARI.
1938 O.W.N. 1053=1938 O.A. 804= 1938 A.W.R. (C.C.) 88=1938 O.L.R. 464.

DECREE—Construction —Liability for costs—Mortgage suit—Subsequent purchaser—Personal liability for

father's lifetime. Their right to have the decree set aside does not depend upon whether they have become trustees or not on the date of the suit. There is no reason why persons who are themselves parties
and decree should not have the right to sue to
declaration that the decree is void. (*Varadachar*
Abdur Rahman, JJ.) ARAVAMUDHA IYENGAR *v.* RAMANUJA IYENGAR. **48 L.W. 770= 1938 M.W.N. 1153=(1938) 2 M.L.J. 982.**

statement contained in that endorsemen
endorsement recites that consideration
paid, it *prima facie* establishes that th

EVIDENCE ACT (1872), S. 24.

deration has passed. It is then for the party denying consideration to prove that consideration has not passed. (*Wort, A. C. J.*) NATHUNI SAO *v.* LACHHMINIA.
1938 P.W.N. 773.

ESTOPPEL—Conduct—Representation—Insolvency—Declaration of final dividend—Official Receiver regarding insolvency terminated and sending all papers to Court—Acquisition by insolvent more than 12 years
for distribution from
nt. *See* PROVINCIAL
S. 16 (4).
48 L. W. 788.

EVIDENCE—*Burden of proof—Question as to—Relevancy of—When both parties adduce evidence—Duty of Court.*

The doctrine of the onus of proof is merely academic where both parties give evidence. Where there is evidence on both sides, the question of onus does not arise at all, and the Judge has to determine the issue between the parties on the evidence before him. (*Wort, A. C. J.*) NATHUNI SAO *v.* LACHHMINIA.
1938 P. W. N. 773.

will use for cross-examination, and it follows that he is by no means bound to declare the names of the witnesses whose statements to the police he intends to use in cross-examination beforehand, but that on the other hand he exercises an undoubted right when he makes his application in respect of each separate witness as the need arises. (*Roberts, C. J. and Dunkley, J.*) BRAHMAYA *v.* KING. **A.I.R. 1938 Rang. 442.**

——*Cross-examination — Right of — Extent and limits.*

A Judge is and always must be in control of the proceedings in his Court. On the one hand the right of

at length, and per-
same ground again
witness appear dis-
l upon the latitude
repetitions are not
C. J. and Dunkley, J.) BRAHMAYA *v.* KING. **A.I.R. 1938 Rang. 442.**

——*Criminal trial—Disallowance of questions—*

should be done; as the question whether evidence material to one side was improperly excluded may often engage the attention of an appellate Court. Unless the
act question which was
which was refused, it is
to the propriety with
excluded from the con-
first instance. (*Roberts, C. J.*
AHMAYA *v.* KING.

EVIDENCE ACT (1872), S. 24.

Under S. 24 of the Evidence Act which is a rule of exclusion, it is not necessary that there should be a decision in so many words that a confession is not irrelevant. In every case in which a confession is admitted in a criminal case, that fact that evidence of the commission is admitted is sufficient to make the confession evidence. It is open no doubt to the defence to object to the evidence of confession going in, but till such objection is raised, there is no need for the Court to pronounce a formal decision on the question of the relevancy of the confession. The actual fact of admission of the confession is sufficient for the purpose. (*Pandrang Row, J.*) NAVANITHAMMAL *v.* EMPEROR. 1938 M.W.N. 1120=48 L.W. 777.

———S. 24—*Retracted confession—Value of.*

Normally a confession of guilt is the most conclusive evidence which one can have. But if that confession is retracted, then it is certainly desirable, if not absolutely necessary, that there should be some corroboration of what the accused has said about himself in respect of his own actions. But an accused person cannot get rid of a statement merely by saying that he retracts it. (*Costello, Jack and M. C. Ghose, JJ.*) PURNANANDA DAS GUPTA *v.* EMPEROR. 68 C.L.J. 206.

———S. 27—*Statement leading to discovery of facts—What amounts to—Police officer already aware of what accused would say but procuring witness and then taking statement—Propriety—Admissibility of such statement.*

Under S. 27 of the Evidence Act, it is only when the information given by a person in custody leads to the discovery of any fact that such information would be admissible. Where the police officer knows beforehand precisely what the accused is going to say, and procures the presence of witness to witness the making of the statement of the accused and then the accused is brought out of custody and makes a statement and afterwards certain facts are discovered, it cannot be said that anything is discovered in consequence of the statement made by the accused to the police officer in the presence of the witnesses. This is mere farce and this manner of manufacturing evidence ought to be deprecated. S. 27 of the Evidence Act is not designed by the Legislature to encourage proceedings of this sort. (*Burn and Lakshmana Rao, JJ.*) PUBLIC PROSECUTOR *v.* SUBBA REDDI. 1938 M.W.N. 1118= 48 L.W. 780.

———S. 30—*Confession of accused—Conditions of admissibility.*

S. 30 of the Evidence Act requires that the confession of a co-accused should be one affecting its maker, that is, it must incriminate its maker or it is of no value against a co-accused; but the law does not go so far as to require that the confession should claim for its maker the leading part in the crime. (*Noor and Rowland, JJ.*) EMPEROR *v.* SADASIBO MAJHI. 1938 P.W.N. 754=19 Pat. L.T. 801.

———S. 30—*Confession of accused—Sufficiency to base conviction—Corroboration—Nature and extent of.*

The confession of a co-accused uncorroborated by any other evidence is not alone sufficient to support a conviction. But there is no warrant for holding that that wh— a conviction is sought to be based on the confes- —accused together with corroborative evidence from whose Co— evidence cannot be used unless it is should be given an — itself to support a conviction. ernment Advocate on the — ted, at least as one of Any formal explanation which is su— a co-accused a ed in the proceedings is not desirable. —bstantially and Dunkley, J.) BRAHMAYA *v.* KING. A.I.R. 1938 Rang. —.

———S. 526 (8)—*Transfer—Intimation of intention—When to be made.*

EVIDENCE ACT (1872), S. 114.

———S. 63 (3)—*Secondary evidence—Copy of copy not proved to have been compared with original—Admissibility to prove original.*

A copy of a copy, in the absence of proof of comparison with the original is not good secondary evidence of the original, and is not good evidence of the original in the absence of consent. (*Wadsworth, J.*) NARASIMHAM *v.* BABU RAO. 48 L.W. 650= 1938 M.W.N. 1102=(1938) 2 M.L.J. 883.

———S. 70—*Construction—"Admission of a party to an attested document of its execution"—Meaning of.*

The execution contemplated by S. 70 of the Evidence Act is not a mere signing of the document, but a due execution in accordance with what the law requires for the particular document. "Attested" means duly attested, and if a question of attestation is put in issue, it is incumbent on the plaintiff to prove that the document has been duly attested before S. 70 can be relied on. The admission contemplated by the section is an admission made for the purpose of, or having reference to the suit, and made either in the pleadings or during the course of the trial, and not an admission antecedent to the suit made in some other transaction of the party. (*Pandrang Row and Venkataramana Rao, JJ.*) SHEIK DAWOOD ROWTHER *v.* RAMANATHAN CHETTIAR. 1938 M.W.N. 1203.

———S. 91—*Lease—Lease of house for eight months reduced to writing but not registered—Admissibility—T. P. Act, S. 107.*

Where a lease of a house for eight months is reduced to writing it is under S. 107 of the T. P. Act compulsorily registrable and as such, if it is not registered it cannot be admitted in evidence and no other evidence of the terms of the tenancy is admissible. (*Yorke, J.*) MRS. J. H. MATHEWS *v.* MIRZA ISMAIL BEG. 1938 O.A. 785=1938 O.W.N. 1080.

———S. 91—*Partition — Unregistered deed—Other evidence, if inadmissible.*

Where an unregistered partition deed is relied upon by the defence in a partition action, though the deed may be inadmissible in evidence, being unregistered, that does not prevent any other evidence being admissible to prove merely the factum of separation in order to defeat the plaintiff's claim. (*Wort, Ag. C.J. and Manohar Lall, J.*) SULEIMAN TIGG *v.* CYRIL TIGG. 177 I.C. 682=1938 P.W.N. 799=5 B.R. 5= A.I.R. 1938 Pat. 603.

———S. 111—*Applicability*—Bona fides—*Of a transaction not disputed but only its nature.*

S. 111 has no application except as between parties to the transaction itself. It does not apply where the sole dispute on the pleadings is not one, of the *bona fides* of any particular transaction, but is one as to the real nature of the transaction itself. When a question which is entirely outside one of good faith and the transaction is impugned from another angle altogether, merely because a sale takes place between solicitor and client or between persons who have not that special relationship but some other analogous relationship, it does not mean that the method of impugning it should be different or the things to prove should in any way be varied. (*Roberts, C.J. and Braund, J.*) MA PHAW *v.* S.B. DUTT. A.I.R. 1938 Rang. 412.

———S. 114, Ill. (b)—*Approver or accomplice—Need for corroboration.*

Whether a witness is stigmatized as an approver or as an accomplice, he is as regards the matter of corroboration on one and the same footing. (*Costello, Jack and M.C. Ghose, JJ.*) PURNANANDA DAS GUPTA *v.* — 68 C.L.J. 206.

S. 286 —

EXECUTION—*Executing Court—Powers of—Question of territorial or pecuniary jurisdiction of decretal Court—If can be raised.*

S. 11, Suits Valuation Act, and S. 21, C. P. Code, are two legislative exceptions to the general principle of law that where a Court has no jurisdiction, its judgments and orders are mere nullities and can be declared to be void by every Court in which they may be presented. In view of only these exceptions it has been generally held that question of territorial or pecuniary jurisdiction of the decretal Court cannot be raised in execution proceedings before it. (*Middleton, J.C. and Mir Ahmad, J.*) AMIR KHAN *v.* KHAIR MOHAMMAD. **A.I.R. 1938 Pesh. 77.**

EXPLOSIVE SUBSTANCES ACT (VI OF 1908), S. 7—*"Local Government"—Meaning of—Order made by the Governor—Validity of—If can be questioned in Court.*

An order of consent to a prosecution under the Explosive Substances Act which purports to be made by His Excellency the Governor is an order of the Local Government for purpose consent. The executive vested in the Governor, consulted the ministers or not in the matter is not a question that can be canvassed in Courts of law. (*Pandrang Row, J.*) LAKSHMIPATHI NAICK *v.* EMPEROR. **1938 M.W.N. 1171.**

EXTRADITION ACT (XV OF 1903)—Proceedings under—Writ of *habeas corpus*—High Court's jurisdiction to issue. *See* HABEAS CORPUS—WRIT OF. **1938 M.W.N. 1161.**

GENERAL CLAUSES ACT (XIX [illegible]

S. 6-A—Effect of on S. 7, Criminal Law Act. *See* CRIMINAL LAW AMENDMENT [illegible] S. 7. **(1938) 2 M.L.J. 863.**

GOVERNMENT OF INDIA ACT (1915), S. 108—*Scope—If takes away jurisdiction of single Judge of High Court to issue writ of* habeas corpus—*Madras High Court Rules (Appellate Side), R. 2 (a)—If* ultra vires.

The jurisdiction and the duty as regards applications for a writ of *habeas corpus* are *sui generis* and do not fall within the framework of S. 108 of the Government of India Act or any rule framed thereunder. The individual jurisdiction and the individual duty of each Judge in this matter are not affected by any statutory provision or rule. Rule 2 (*a*) of the Madras High Court Appellate Side Rules is therefore *ultra vires*, as its effect is to take away the individual jurisdiction which each Judge has in this matter and to prevent the performance of his legal duty to determine on the merits any application for issue of a writ of *habeas corpus* made to him. (*Pandrang Row, J.*) CROWN PROSECUTOR, MADRAS *v.* MAMMEN MAPPILLAI. **1938 M.W.N. 1161.**

——**S. 67-B (2)**—*Promulgation by Governor-General of ordinance—Reasons if to be stated—Effect of promulgation—Extension of S. 7, Criminal Law Amendment Act, to Madras—Effect of—Fresh notification by Local*

Criminal Law Amendment Act of 1935, wl [illegible] once promulgated becomes a lawful Act. [illegible] extension of S. 7 of the Criminal Law Amen[illegible] of 1932 to the Madras Province has been duly notified, it continues to apply so long as that section is on the statute book, and there is no need for a re-notification by the Madras Government extending it to Madras.

HINDU LAW.

(*Leach, C.J. and Abdur Rahman, J.*) ARUNAGIRINATHAR *v.* EMPEROR. **1938 M.W.N. 1105 (2)= (1938) 2 M.L.J. 863.**

——**S. 107**—Scope and effect—Bihar Money-Lenders' Act, S. 16—If void as repugnant to O. 21, R. 66, C. P. C. (Patna amendment). *See* BIHAR MONEY-LENDERS' ACT, S. 16. **19 Pat L.T. 760.**

GUARDIAN AND WARDS ACT (VIII OF 1890), S. 17—*Welfare of minor—Consideration as to—If can override law to which minor is subject.*

The Guardian and Wards Act does not permit the Court to subordinate the law to which the minor is subject to the considerations of what will be for the minor's welfare. (*Harris and Misra, JJ.*) KUNDAN *v.* AISHA BEGAM. **1938 A.L.J. 982= 1938 A.W.R. (H.C.) 698.**

HABEAS CORPUS—*Writ of—High Court's jurisdiction to issue—Single Judge of High Court—Powers and duties of—Extradition Act—Effect of.*

The Judges of the High Court have the same jurisdic- [illegible] ne Court which was [illegible] ne High Court is a [illegible] *habeas corpus* can be made and must hear them on the merits. The jurisdiction is of a peculiar and exceptional character as every Judge has it and not merely the High Court of which he forms a part. Further, the Judge has no option in the matter and cannot lawfully decline jurisdiction or refuse to entertain and determine applications made to him. It would be contrary to his oath of office to do so. The jurisdiction to issue a writ of *habeas corpus* has [illegible] any provision in the [illegible] therefore be issued [illegible] of the Extradition Act. (*Pandrang Row, J.*) CROWN PROSECUTOR, MADRAS *v.* MAMMEN MAPPILLAI. **1938 M.W.N. 1161.**

HINDU LAW—*Adoption—Widow—Powers of—Prohibition by husband implied from disposition of property and direction as to performance of funeral rites in will—Effect of—Consent of sapindas—Value of.*

If there is a prohibition by her husband against adoption, an adoption by her even with the consent of the sapindas is invalid. The prohibition need not be express, but may be implied. Further the prohibition may be for all time or during a limited period. If, from the disposition of his property made by the husband under a will and the method indicated therein, the inference is fairly deducible that the testator prohibited the adoption and that it was not in his contemplation to permit an adoption which might in any way conflict with his disposition expressed in the will and that the dispositions could not be given effect unless the adoption was prohibited, a prohibition has to be implied. A testator died leaving him surviving his widow *L.* and two daughters by a predeceased wife, *K* and *J. K* had a son *V* and a daughter *Y. J* had a daughter *N* and a son *G.* He left a will which, after reciting that he was 70 years old and had no male issue [illegible] to his widow [illegible] d die without [illegible] ained over and above what she had alienated should be enjoyed by each of the daughters and their descendants in equal shares. His widow was to enjoy his residential house for her life and thereafter his daughters and their descendants

were to enjoy it in equal shares absolutely. In the last portion of the will the testator enjoined that for the expenses of his funeral obsequies, *L* should contribute Rs. 250 and *V*, Rs. 250 and that *V* alone shall perform krityam and other ceremonies.

Held, that the widow had no power to make an adoption to her husband and that if an adoption were adopted it would frustrate the expressed wishes of the testator both as regards the disposition of the properties and as to the performance of his fruneral rites (including therein not only the immediate ceremonies but also the monthly and annual ceremonies which ought to be customarily performed to a deceased).

Held, further, that even if it be held that there was no total prohibition of an adoption for ever, the widow was clearly under a disability to adopt so long as *V* was alive and capable of performing the ceremonies which would confer religious benefit on the testator. (*Venkataramana Rao, J.*) PANCHAPAGESA IYER *v.* GOPALAN. **1938 M.W.N. 1180.**

———*Alienation—Manager—Powers of—Mortgage of family property for acquiring new properties—Validity and binding character of—Transaction approved by all adult members as being beneficial to family—Creditor advancing loan honestly and* bona fide*—Effect.*

The karta of a Hindu joint family is merely a manager and not an absolute owner, and the Hindu Law has, like other systems of law, placed certain restrictions and limitations upon his power to alienate family property. But the law-givers could not have intended to impose any such restrictions on his power as would virtually disqualify him from doing anything to improve the condition of the family. He has authority to alienate "for the sake of the family," or "for purposes of the family," in other words for purpose of "benefit to the family." The only reasonable limitation which can, therefore, be imposed on the karta is that he must act with prudence, and prudence implies caution as well as foresight and excludes hasty, reckless and arbitrary conduct. The manager would thus not be entitled to enter into any transaction which *may* be *speculative or fraught* with [illegible] or which may involve a possibility of loss to the [illegible]y, and the Courts will not encourage him either to part with the joint family or to encumber it merely in order to increase the immediate income of the family by purchasing new properties, because a prudent person would not sacrifice a certain and stable income in favour of the prospect of a better income. But there are cases in which in certain peculiar and exceptional circumstances the alienation of a part of the joint family property by a karta for the acquisition of a new property would be upheld. Where the adult members of the family approve of the new purchase, regarding it as highly beneficial to the family, with the knowledge available to them and possessing all the necessary information about the means and requirements of the family, and the creditor taking a mortgage advances the loan honestly and after being satisfied that the karta is acting for the benefit of the estate, a mortgage by the karta for the purpose of purchasing new properties for the family must be upheld. (*Courtney-Terrell, C.J. and Fazl Ali, J.*) BAIJNATH PRASAD *v.* BINDA PRASAD SINGH. **17 Pat. 549.**

———*Alienation—"Necessity" and "benefit to the estate"—If identical in meaning.*

The terms "necessity" and "benefit to the estate," as applied to alienations by the manager of a Hindu joint family are two separate tests and not merely two different expressions conveying necessarily the same meaning. It is no doubt true that when there is a pressure on the estate or it is threatened with danger, and the pressure or the danger, as the case may be, is removed the estate is necessarily benefited thereby; but it does not follow that every case of benefit must also be a case of necessity or protection of the estate from danger. (*Courtney Terrell, C.J. and Fazl Ali, J.*) BAIJNATH PRASAD *v.* BINDA PRASAD SINGH. **17 Pat. 549.**

———*Alienation—Necessity—Burden of proof—Suit by minor members—Plaint making vague allegations of fraud.*

Prima facie it is for the lender either to prove legal necessity or that he made reasonable enquiry as to the necessity and that the facts represented to him were such as, if proved, would have justified the loan, and where there are minors, the fact that all the adult members consented to an alienation is not, by itself, proof of legal necessity. Where however some minor members of a family brought a suit for a declaration that a certain mortgage of family property effected by adult members was without legal necessity and hence void and not binding on them, but the plaint contained only vague and general allegations of fraud, collusion and negligence on the part of the adult members and their transferee and gave no particulars whatsoever.

Held, that the onus of proving lack of necessity was on the minor plaintiffs. (*Lort Williams, J.*) PROFULLA CHANDRA *v.* BISSESSWAR SINHA. **A.I.R. 1938 Cal. 778.**

———*Dancing girls—Adoption—Ceremonies — Adoption of two daughters—Validity—Custom.*

No particular ceremony is necessary for an adoption by a devadasi and there is no legal objection to the adoption of two daughters by a dancing girl provided that such a practice is sanctioned by the custom of the community. (*Wadsworth, J.*) GANGAMMA *v.* KUPPAMMAL. **I.L.R. 1938 Mad. 789 = (1938) 2 M.L.J 923.**

———*Dancing girl—Adoption of girl—Legal consequences of—Adoptee's right of inheritance—Coparcenary, if constituted—Right of adopted daughter to claim partition.*

The practice of adoption among devadasis in Madras has nothing to do with religious benefit but is purely a custom arising out of the natural desire of the women of that class to have a daughter. In such cases the adopted daughter inherits to her adoptive mother but it cannot be said that a coparcenary such as that recognised by the Hindu Law exists between the mother and the daughter, and the daughter cannot claim a share by partition of the property possessed by the adoptive mother on the ground that it is joint family property. (*Wadsworth, J.*) GANGAMMA *v.* KUPPAMMAL. **I.L.R. 1938 Mad. 789 = (1938) 2 M.L.J. 923**

———*Dancing girls—Adoption of minor girl for purposes of prostitution—Validity and effect of.*

The adoption of a minor by a dancing girl for purposes of prostitution is not really an adoption at all, it is a mere use of certain forms and will confer no status on the person adopted. (*Wadsworth, J.*) GANGAMMA *v.* KUPPAMMAL. **I.L.R. 1938 Mad. 789 = (1938) 2 M.L.J. 923.**

———*Debts—Father—Mortgage by—Suit on—Father sued in representative capacity—Decree—Subsequent suit by sons impeaching mortgage, if barred.*

Where on a mortgage executed by a Hindu father, he is sued in his representative capacity and a decree obtained thereon, that cannot operate as *res judicata* as against the sons in a suit brought by them to question the mortgage on the ground that the consideration was given for immoral purposes. (*Misra, J.*) RAJESHWAR

HINDU LAW.

DUBE *v.* RAM SUNMUKH MISIR.
1938 A.W.R. (H.C.) 709=1938 A.L.J. 1053.

——*Debts—Manager—Promissory note or hundi executed by—Suit on—Liability of other members of the family to be sued—Test.*

tracted otherwise. Under the
to make all the members of th
debt should have been contrac
for the benefit of the family
Negotiable Instruments Act
from applying the principles
based on a negotiable instrument.
a joint family are therefore liable to be sued on a promissory note or hundi executed by the manager alone provided it is established that the money
under the instrument for joint family purpos
...ey-Terrell, C.J. and Fazl Ali, J.)
PRASAD *v.* BINDA PRASAD SINGH. 1.

——*Joint family—Alienation—Duty of lender—Proof of necessity—Coparceners not contesting suit—*

family borrows
wants to make
inclusive of the
shares of the other members, he has to prove before he can get a decree, the existence of the necessity and that he made enquiries. Though the c
appear and contest the suit, that
lender to a decree without the proof
tioned above. The Court has to be satisfied about these before a decree is passed. (*Misra, J.*) RAM KRISHNA DAS *v.* NIMAI BHAR. 1938 A.L.J. 1049.

——*Joint family — Business—Debts inc manager—Junior member participating in Personal liability of.*

It is unreasonable to insist that the adult members of a joint Hindu family should take no interest whatever in the family business on paying of becoming personally liable for all the transactions entered into by the managing member under the Hindu Law, their share in the family property is undoubtedly liable for the liabilities incurred by the manager. It is not uncommon for junior members in a family to take an active part in the supervision of the family property. But it does not follow that the participation by an adult me
family in the business of collection of outst
to the family involves him in personal
family debts borrowed by the manager.

the junior members cannot be made pers

——*Joint family—Business—Business carried on by heirs of original owner along with other dependent members of family—If joint family business.*

A Hindu joint family, even one coming under the Bengal school, consists of a wider group than the coparceners, *i.e.*, sharers. The wives of the coparceners, the unmarried daughters, the sons and grandsons of a Dayabhaga family when the father or grandfather is living, and the other members who have a claim on the family funds for maintenance would, accordingly, be
The common
non residence,
ctions into the

therefore, be said that a business is not to be regarded as a joint family business simply because it is not con-
on who started it, but
continuing member of
who by marriage was
ould satisfy every legiti-

bers and relations who are *de facto* members of the family, and if the proceeds, like the proceeds of all *joint family property, are utilised and made available for* the maintenance and other legitimate expenses of the family. (*Mitter and Biswas, JJ.*) NIBARAN ... *v.* LALIT MOHAN BRINDABAN
I.L.R. (1938) 2 Cal. 368.

——*Coparcener—Death of—Others, if his representatives—Nature of rights of members.*

A member of a joint Hindu family is in no sense a representative of a deceased member. When one

SINGH BAHADUR *v.* BISHESHWAR SINGH.
177 I.C. 610=4 B.R. 840 (1).

——*Maintenance — Daughter-in-law — Right of as against father-in-law's self-acquired property—Suit against father-in-law—Absence of ancestral property —Death of father-in-law pending suit—Effect—Decree against father-in-law's estate as against legal representative—If can be passed.*

M.W N. 1135=
48 L.W. 706.

——*Maintenance—Widow—Charge—Extent of properties to be charged.*

It is unreasonable to give a Hindu widow a charge over the whole of the joint family properties for her maintenance. The charge should be limited to the pro-

perties necessary to secure the payment of the maintenance. (*Wadsworth, J.*) VEERAYYA *v.* CHELLAMMA.
1938 M.W.N. 1072=48 L.W. 618=(1938) 2 M.L.J. 822.

——*Maintenance—Widow—Claim for enhancement—Arrears at enhanced rate—Date from which enhanced rate to be awarded.*

In a suit by a Hindu widow for enhancement of the rate of maintenance, where no formal demand has been made for enhancement prior to the filing of the suit, the arrears at the enhanced rate should be calculated from the date of the institution of the suit for enhancement and not from the date from which former payment under the prior decree fixing the original rate ceased or the date of decree in the present suit. (*Wadsworth, J.*) VEERAYYA *v.* CHELLAMMA. 1938 M.W.N. 1072=48 L.W. 618=(1938) 2 M.L.J. 822.

——*Maintenance—Widow—Rate awardable—Claim for enhancement of rate—Considerations for Court in deciding.*

The maximum amount of maintenance of a Hindu widow would be the amount of the income of the share to which her deceased husband would have been entitled had been alive and a coparcener at the date of the suit. In a suit for enhancement of maintenance by a widow who already holds a decree in her favour for maintenance at a certain rate, the Court cannot proceed to fix the maximum without any regard to the judicial decision already passed and binding on both parties. The only grounds upon which that decision can be said to lose its force are such changes in the circumstances governing the widow and the family as were not foreseen and allowed for at the time when the prior decree was passed. The Court is entitled to look into the changes not only in the needs of the widow but also any changes of those other circumstances to which the Court had regard in fixing the original rate of maintenance. The Court must have regard to the rise of prices; it must have regard to the additional expenses necessitated by the deterioration of the health of the widow. It must also have regard to any reasonable changes in the standard of comfort and in the conventional necessities of the widow due to the improvement in the circumstances of the family to which she belongs. The Court must also have regard to the growth of the income of the family in order to ascertain the maximum which must govern the maintenance allowance. (*Wadsworth, J.*) VEERAYYA *v.* CHELLAMMA. 1938 M.W.N. 1072=48 L.W. 618=(1938) 2 M.L.J. 822.

——*Maintenance—Widow—Suit for enhancement of rate allowed in prior suit—Claim for pilgrimage expenses and for expenses to replace worn out utensils—Sustainability.*

In a suit by a Hindu widow for enhancement of the rate of maintenance awarded to her in a prior suit, there is no justification for granting to the widow a lump sum of money to pay a pilgrimage for the benefit of the soul of her deceased husband, when it is not apparent that any such expenditure was refused at the time of the prior suit on grounds of lack of funds. Nor is there any justification for allowing her a lump sum for the replacement of utensils which have worn out in the interval between the prior suit and the later suit for enhancement. (*Wadsworth, J.*) VEERAYYA *v.* CHELLAMMA.
1938 M.W.N. 1072=48 L.W. 618=(1938) 2 M.L.J. 822.

——*Religious endowment—Trust—Endowment for religious charities—Essentials of validity—Arrangement at partition to set apart moneys for specified religious charities—Funds deposited with banker for same—Sufficiency to constitute trust.*

Under Hindu Law all that is required to constitute a religious or charitable endowment is the intention to endow and the creation of a fund in fulfilment of that intention. A trust can be validly constituted under the terms of a partition deed, and when moneys are set apart and deposited with a banker for that purpose, that is sufficient to make the moneys trust moneys. (*Leach, C. J. and Krishnaswami Ayyangar, J.*) NAGAPPA CHETTIAR *v.* O. R. M. O. M. S. P. FIRM.
1938 M.W.N. 1017=48 L.W. 577=A.I.R. 1938 Mad. 999.

——*Restitution of conjugal rights—Suit by wife—Defences open—Gross failure on part of wife to perform obligation imposed by sacrament of marriage—Effect of.*

A claim for restitution of conjugal right is of the nature of an equitable right. Although, under Hindu Law, the husband may be bound to maintain his wife, it does not follow that she is entitled, as a matter of course, for an order from the Court for the restitution of conjugal rights. That depends upon the facts of each case. Even something less than what might be called a matrimonial offence for the purpose of a divorce or judicial separation may be sufficient to prevent a plaintiff from obtaining an order for restitution of conjugal rights. Where a Hindu wife is the plaintiff in such a suit, gross failure on her part to perform the obligation of the sacrament of marriage imposed on her for the benefit of the husband might, if properly proved, afford good grounds for refusing to her the assistance of the Court. Where, therefore, although the wife suing her husband for restitution of conjugal rights is guilty of no matrimonial offence, in the sense that she has not been guilty of any adultery, nevertheless if it is clear that she had deserted her husband's house, rejected all attempts at reconciliation and had insulted and outraged his family house and that she has been moved to seek an order for restitution of conjugal rights, not because in truth she wants to live with her husband, but merely to restrain a second marriage which the husband is contemplating, there being desertion on the part of the wife and a gross failure to perform the duties imposed upon her as a Hindu wife, the Court is justified in refusing to pass an order for restitution of conjugal rights in her favour. The mere fact that she has borne her husband a child is not, in itself, sufficient to outweigh her failure in other duties. The Court is even justified in refusing to pass an order in such a case on account of the unwifely conduct of the wife extending for a long period, even though the application may be made in good faith. (*Davis, J. C. and Weston, J.*) RUKIBAI *v.* PARTABRAI.
A.I.R. 1938 Sind 233.

——*Widow—Alienation—Powers of—Portion of purchase-money not applied for necessity—Conditional decree setting aside sale—Validity.*

In case of transfer by a Hindu widow, the transferee gets the property at least for the lifetime of the widow, even if there is no legal necessity justifying the transfer. If after the widow's death, the reversioner wants to avoid a sale made by her and the purchaser succeeds in proving legal necessity or benefit to the estate, the transfer is completely protected. There cannot be a case, where there is legal necessity or benefit to the estate and at the same time the alienation is set aside. When a particular transaction is justified by legal necessity, the mere fact that a portion of the purchase-money was not applied for purposes of legal necessity would not entitle the Court to pass a decree setting aside the sale on condition that the reversioner pays to the purchaser the portion of the purchase-money actually spent for legal necessity. (*Mukherjea, J.*) MEGHMALA *v.* SITAL PROSAD. 43 C.W.N. 48.

HINDU LAW.

——*Widow—Alienation—Setting aside of—Alienation set aside for want of necessity—Refund of purchase-money—Purchaser's right to claim, on ground of benefit to estate.*

in her hands, the purchaser cannot demand a refund of any portion of the purchase-money as against the reversioner on the ground of benefit to the estate, although the money secured by the purchase was actually paid in liquidation of debts due by her husband. (*Mukherjea, J.*) MEGHMALA *v.* SITAL PROSAD. **43 C.W.N. 48.**

A widow in possession of her husband's estate is in no sense a trustee for the ultimate reversioner. She is the owner for the time being, fully capable of representing the estate so long as she acts *bona fide* and in the interests of that estate, but it is an ownership qualified by limitations which are of the very essence of the estate. For obligatory or necessary observances essential for the salvation of her husband's soul, she can go to the length of disposing of the entirety of the estate, where it is not considerable and where the requirements of the particular occasion demand it. For other but less peremptory purposes though in themselves meritorious ye her authority is necessarily circun for such objects, only dispose of than a reasonable portion of the estate, the quantum to be measured by the custom and sentiment prevalent in the community to which she belongs. Marriage of girls born in the family and the maintenance of female ... must ... her ... con- ... the prescriptions of Hindu Law. In respect of pious and charitable acts ... widow is co ... directions of ... for her acting ... community, in possession of her husband's estate consisting of 32 acres of land, conveyed as a gift 8 acres of land to a widow of the deceased coparcener of the ... one year of her husband's death, and the gift deeds were attested by the ... the gifts were n ... other relations, ... the gifts stood unchallenged for nearly 40 years.

Held, in a suit by the daughter's son 40 years later impugning the gifts as not binding on him, (1) that the gift in favour of the widow of the deceased coparcener was reasonable in extent, and fully supported by legal and moral considerations, and was therefore a proper gift, valid and binding on the estate; (2) that the gifts in favour of the four Brahmins, which comprised very small pieces of land, were valid, being for good and proper objects and having the sanction of the religious law, though not made in the occasion of any particular ceremony; (3) that the recitals in the deeds of gift, that they were executed in pursuance of the order or authority given to the donor by her husband, acquired great force after such a long lapse of time and after the death of almost all the witnesses who were aware of the circumstances, and could be relied upon by the Court as ... ropriety of the transactions. (*King and Ayyangar, JJ.*) VIRARAJU *v.* ... NAM. **1938 M.W.N. 1189 = 48 L.W. 692.**

——*Widow—Representation of estate—Decree for costs against widow—Death of widow—Executability against property in the hands of the legal representative.*

Where a suit was directed against the estate of a person and it was represented by his widow and a decree ...'s passed against her, it could be executed ... property forming part of the assets of the ... erson's estate in his widow's hands. When ... ty gets into the hand of the next legal re- ... after the death of the widow, it still ... be liable. (*Mulla, J.*) MST. CHAMPA DEVI *v.* PT. SANSAR CHAND.

1938 A.W.R. (H C.) 695 = 1938 A.L.J. 1070.

——*Widow—Residence—Right to—Past living with her husband in the particular house, if necessary—Family dwelling-house—What is.*

It is not necessary for a widow of a coparcener to show that she lived with her husband in the house, to entitle her to claim her right of residence. Where the family has more than one house and one after the other is sold the last house which survives to the family, would be the dwelling-house of the family, if they live in it. Unless a mortgage of the house is justified by ... he females could not be deprived of ... idence. (*Niyogi, J.*) UMASHANKAR

1938 N.L.J. 373.

INCOME-TAX ACT (XI OF 1922), Ss. 4 (1) and 13—*Accruing or arising or received in British India—Head office in British India—Profits of branches outside British India credited to head office account—Liability to tax—Similar amounts treated as profits in prior years by assessee—Effect.*

Where an assessee having his head office in British India with branchas in British India and Native States contended that the sums credited to the capital account ... him liable to tax in respect of such sums and where the assessee had kept his accounts according to the mercantile system, and had in the prior years treated similar sums ... was held that the profits in question ... not actually arise or accrue in ... not physically transferred to, or ... ia, such profits, however, must be deemed by reason of S. 13 of the Act to have arisen or ... always been accepted by the taxing authorities, by reason of S. 13 of the Act the assessees could not now seek suddenly to change their method of accounting. (*Harries and Mulla, JJ.*) KANWALNEN HAMIR SINGH *v.* COMMISSIONER OF INCOME-TAX.

1938 A.L.J. 1015.

——**Ss. 4 (3) (vii) and 10**—*Banking concern—Profits from sale of securities—Assessability—Test.*

The question of the assessability to income-tax of profits realised by a banking concern from the sale of securities and shares, must be determined on the facts of each case whether the banking concer... in securities and shares as part of

INCOME-TAX ACT (1922), S. 10.

matter the finding of fact arrived at by the Income-tax authorities is conclusive unless it is found that that finding was based on no material. It does not necessarily follow from the circumstance that such profits have not been utilised in the revenue account and that they have been carried to the reserve capital *en bloc* that they were not trading profits. (*Addison and Din Mohammad, JJ.*) PUNJAB CO-OPERATIVE BANK, LTD., AMRITSAR *v.* THE COMMISSIONER OF INCOME-TAX. **I.L.R. 1938 Lah. 526.**

——**S. 10 (2)**—*Bad debt—Debt—When becomes bad debt.*

In 1930, the assessee with a number of other co-creditors seized the property of the debtor and paid themselves to the extent of 8 annas in the rupee. This transaction released the debtor from all further liability. The assessee prepared his account on the mercantile system. In the year of assessment the assessee claimed to deduct Rs. 1,600 which remained unpaid, from the total assessable income as a bad debt. It was found however that subsequent to the year 1930, the assessee did not make return of interest on this debt.

Held, that the debt ceased to be a liability in the year 1930 and became a bad debt from the point of view of the assessee in that year and hence the assessee subsequently in the year of assessment was not entitled to treat the sum of Rs. 1,600 as a bad debt and claim deduction thereof. (*Wort, Ag. C. J. and Dhavle, J.*) SHEOSAHAYAMAL *v.* COMMISSIONER OF INCOME-TAX. **A.I.R. 1938 Pat. 577.**

——**Ss. 10 (9) and 12 (2)**—*Applicability—Assignment of mortgage decree in favour of assessee—Assessee in part consideration giving zarpeshgi thika lease to assignor for limited period—Interest in respect of zarpeshgi lease—Deductibility.*

A mortgage decree was assigned to the assessee for certain consideration. The payment of the consideration was by way of a hand note executed by the assessee for part of consideration, the balance being liquidated by the execution of a thika or zarpeshgi lease by the assessee in favour of the assignor for a period of seventeen years. At the time of entering into the transaction the parties agreed upon an account. The account took the form of a statement of the principal, a calculation of interest (quarterly) an addition of this interest to the principal and the deduction therefrom of the quarterly realizations of rents and profits from the zarpeshgi property. Each quarter the net arrears so called were entered and that amount, under the form of accounting adopted, necessarily diminished as time went on until completely wiped out at the end of the third kist of the seventeenth year. It was this quarterly interest which the assessee claimed to have deducted from his income for the purpose of calculating his assessable income under the Income-tax Act.

Held, that it was impossible in the circumstances to say that interest in respect of lease was a liability of the assessee. It was not a payment which he was to make. The interest was nothing more than a method of calculation of the period for which the assignor held the property. The interest was not an expenditure within the meaning of S. 10 or S. 12. Hence the assessee was not entitled to set it off against the interest realizable on the decree. (*Wort, Ag. C. J. and Dhavle, J.*) COMMISSIONER OF INCOME-TAX *v.* DHAKESHWAR PRASAD. **A.I.R. 1938 Pat. 567.**

——**S. 13**—Method of accounting followed for many years—Effect—If could be changed suddenly. *See* INCOME-TAX ACT, SS. 4 (1) AND 13. **1938 A.L.J. 1015.**

INSURANCE.

——**S. 26-A**—*Registration under—Alleged unregistered gift by Mahomedan assessee and reinvestment in business—Unregistered partnership produced—If can be registered as firm.*

An assessee, a Mahomedan in Burma, had certain business the capital of which mainly consisted of immovable property. The assessee alleged that he had made gifts to each of his two sons and had given a bonus to each of his two employees out of the capital of his business and that these sums had been reinvested by these four persons in the business, which had thereby become a partnership of five persons. The gifts were however not registered in accordance with S. 123, T. P. Act. The assessee made an application under S. 26-A of the Income-tax Act for the registration of this business as the business of a firm. The application was accompanied by a deed of partnership which was not registered under the Registration Act but which purported to specify the individual shares of the partner.

Held, that as the gifts were not made in accordance with the provisions of S. 123, T. P. Act, there were no valid gifts by assessee to his sons and employees and hence there were no contributions by them to the capital of the alleged partnership. Moreover, the capital of the business consisted mainly of immovable property and as it had not been registered under the Registration Act, it was clearly ineffectual. Hence four of the alleged partners had not acquired any share in the capital of the business and therefore the firm could not be registered under S. 26-A. (*Roberts, C. J. and Dunkley, J.*) ABBA DADA & CO. *v.* COMMISSIONER OF INCOME-TAX, BURMA. **A.I.R. 1938 Rang. 435.**

——**S. 66 (3)**—*Jurisdiction of High Court—Extent.*

The High Court has no jurisdiction under S. 66 (3) to order the Commissioner of Income-tax to state a case and to refer a question of law to the High Court which the assessee has not duly required the Commissioner to refer under S. 66 (2). (*Roberts, C. J. and Dunkley, J.*) ABBA DADA & CO. *v.* COMMISSIONER OF INCOME-TAX, BURMA. **A.I.R. 1938 Rang. 435.**

INSOLVENCY—*Jurisdiction—Inclusion of doubtful debt—If affects jurisdiction.*

Where the debts exceed 5,000 rupees, the insolvency proceedings should go on before the District Judge. It is immaterial, for the purpose of jurisdiction, that an item of the debts, represented a doubtful debt, because that debt is one of the debts which would nevertheless have to be taken into consideration in administering the insolvency. (*Wort, Ag. C. J. and Manohar Lall, J.*) RUP CHAND PANNA LAL *v.* M. A. HAQ. **177 I.C. 890=5 B.R. 36.**

INSURANCE—*Fire insurance—Policy—Construction—'Opening' in godown—Meaning of—Breach of warranty—Waiver.*

A policy of fire insurance in respect of premises and stock contained in a jute godown was issued subject to certain warranties. One of the clauses of the warranties defined a "Godown" as (*i*) any separate self-contained building situated at a distance of 14 feet or more from any other building, or any separate self-contained building situated less than 14 feet from another building provided that every wall thereof facing any such other building was built without openings of any kind or if containing openings such openings were protected by iron doors or shutters, or (*ii*) any compartment or part of any such building, provided it was separated from the whole of the rest of the building of which it formed part by perfect party walls without openings of any kind or if containing openings such openings were protected by fire-proof doors or shutters. The insured building

was divided by brick partition walls into four separate godowns in line or range, and each godown had separate doors giving access from the outside, and there were no openings in the partition walls. In order to minimise the risk of fire, the insured installed a sprinkler system with six-inch pipe passing through the partition walls of the different godowns through temporary holes. The officers of the Insurance Company inspected the installation work and even asked the same to be expedited. A fire broke out in the godowns, while they were in this condition. In a suit by the insured for damages, it was contended by the Insurance Company that upon the making of the holes in the walls, there was a breach of warranty and that the policy of insurance was not subsisting or effective at the time when the fire occurred owing to such breach. Overruling that contention,

Held, that the policy must be construed largely for the benefit of trade and for the insured, and that the holes made temporarily through the wall were not an "opening" within the meaning of the terms of the warranty, as such terms were meant to refer only to "openings" permanent in character and of substantial size.

Held further, that even if there was breach of term [illegible]

[illegible] ALLI. **I.L.R. (1938) 2 Cal. 400.**

——*Life insurance policy—Days of grace for payment of premium—Computation of—Due date—If to be excluded.*

Where a policy of life assurance gives the assured a [illegible] 3rd July would be paid in time if paid on 2nd August. (*Venkataramana Rao, J.*) RAJAN *v.* A. G. S. LIFE ASSURANCE CO., LTD. **1938 M.W.N. 1148 = 48 L.W. 746 = (1938) 2 M.L.J. 1020.**

INTERPRETATION OF STATUTES—*Clear language—Duty of Court—Reference to preamble—If justified.*

When the terms of an enactment are clear, precise and unambiguous, it must be app[illegible] according to its plain meaning, and it [illegible] of the Court to speculate as to intenti[illegible] lature, as it may appear to the Court [illegible] or otherwise. (*Collister and Bajpai, JJ.*) BADRI PRASAD *v.* RAM NARAIN SINGH.

1938 A.L.J. 1074.

——*Codification—Transfer from one code to another—Departure, if can be presumed.*

It is a recognized canon of construction that when a law is merely being codified and especially when it is being transferred almost bodily from one code to another, departure is not to be presumed unless it is made in express terms. (*Eve, J.*) JAINARAYAN *v.* BALWANT. **1938 N.L.J. 379.**

——*Duty of Court—Intention of Legislature—Construction leading to irrational or unjust result—Avoidance of.*

Per *Beaumont, C. J.*—It is beyond question that Judges have to [illegible] must give effect [illegible] The fact that a [illegible] is irrational or unfair is irrelevant provided the enactment is in such clear terms as to admit of no doubt as to its meaning. But a Judge construing an Act of Parliament is not a mere automaton whose only duty is to give out what he considers to be the primary meaning

of the language used. A Judge must always consider the effect of any construction which he is asked to put on an Act of Parliament, and if he comes to the conclusion that a particular construction leads to a result which he considers irrational or unfair, he is entitled, and indeed bound, to assume that the Legislature did not intend such a construction to be adopted, and to try to find some more rational meaning to which the words are sensible. (*Beaumont, C.J., Broomfield and Nerman, JJ.*) EMPEROR *v.* SOMABHAI GOVINDBHAI.

40 Bom.L.R. 1082 = A.I.R. 1938 Bom. 484 (F.B.).

——*Judicial pronouncements—Words construed by Courts—Re enactment in substantial terms—Effect of—Inference.*

According to a well-known rule for the interpretation of statutes, when a provision of law has been given a particular meaning by the Courts, and it is re enacted or left substantially unaltered after amendment, it may be assumed that the Legislature has accepted the view taken by the Courts. (*Beaumont, C.J., Broomfield and Nerman, JJ*) EMPEROR *v.* SOMABHAI GOVINDBHAI.

40 Bom.L.R. 1082 = A.I.R. 1938 Bom. 484 (F.B.).

——*Repugnancy between two provisions of law—What amounts to.*

[illegible]

not." (*Mahomed Noor and Chatterji, JJ.*) VISWANATH NARAYAN SINGH *v.* HARIHAR GIR.

19 Pat.L.T. 760 = 1938 P.W.N. 765.

JURISDICTION—*Objection relating to—When can be raised.*

[illegible] that there is no proper [illegible] that it could not enable [illegible] relates to a question [illegible] such it raises a point which can be raised and considered at any stage. (*Malik, J.*) ABDUL WAHEED KHAN *v.* RAM BUX.

1938 A.W.R. (H.C.) 691 = 1938 A.L.J. 1044.

LAND ACQUISITION ACT (I OF 1894), S. 23—*Methods of valuation—Claimant challenging valuation—Burden of proof.*

The methods of valuation of land, under the Land Acquisition Act, may be classified under three heads [illegible] number of years purchase of the [illegible] prospective profit from the land [illegible] a fairly correct valuation, it is necessary to [illegible] all of these methods. An exact valuation [illegible] impossible. It is the approximate market value [illegible] most can be sought to be determined. Where a claimant challenges the valuation [illegible] market value under the Land [illegible] great weight should be attached [illegible] value, to admissions in [illegible] No doubt evidence [illegible] to a litigation [illegible] considered [illegible] everyone has. They can [illegible] loss or inconvenience [illegible] the opinion of experts is [illegible] is not great and it would [illegible] on this kind of evidence

LANDLORD AND TENANT.

coincided with other evidence; and where such evidence is *not only not supported by or coincident with the best* evidence in the case, but there is such divergence or disagreement on material points between the evidence of the so-called experts, no reliance can be placed over it. Moreover, even experienced architects and municipal land surveyors cannot be regarded as valuators or experts merely because in course of their business or duty they have had an occasion to value some property here and there. (*Lobo, J.*) SPECIAL LAND ACQUISITION OFFICER *v.* ASSUDOMAL. **A.I.R. 1938 Sind 225.**

LANDLORD AND TENANT—*Abadi—Zamindar and ryot—Rights of, with reference to their houses.*

The position of a person who has either been a zamindar or who in his capacity as such owns houses is different from that of a person who is a mere ryot with a licence from the zamindar to make a residence. The latter has no right to transfer the house he makes but a house either built or bought by the former is transferable and such rights of transfer do not come to an end on an auction sale of the undivided share of the zamindar in the village. (*Zia-ul-Hasan, J.*) BANKEY LAL *v.* VIDYR SAGAR ABKAR. **177 I.C. 969= 1938 O.A. 793=1938 O.L.R. 461= 1938 O.W.N. 1039.**

———*Occupancy tenancy—Test—Permanent lease in favour of pardanashin lady relatives living in the city—Issue of receipts and filing of suits in their name—Evidence of conduct, inference.*

Where a permanent lease in favour of the wife and mother of the zamindars, who are pardanashin ladies living in the city is executed at a nominal rent, and *though a show is maintained as to the existence of* an occupancy tenancy, by the issue of receipts and filing of rent suits in the names of the occupancy tenants, the transaction is really one in the nature of thekanama in favour of the women of the family for their pin money. They are mere assignees of rent and are not genuine occupancy tenants. The genuine tenants in chief are the so-called sub-tenants. (*Darling, S.M. and Mehta, J.M.*) SWARATH SINGH *v.* MAKUND DAS. **1938 R.D. 827.**

———*Rent—Suit for shop rent—Interest prior to suit—Right to.*

A suit for recovery of shop rent is a mere claim for money and the plaintiff is not entitled to damages or interest for the period before suit, as such a suit is not governed by the Bihar Tenancy Act. (*James, J.*) GOBIND PRASAD *v.* MD. ABDUL RASHID. **A.I.R. 1938 Pat. 578.**

———Sir *land—Alienation by a co-sharer—Position of tenants—Determining factor.*

Ordinarily when *sir* is joint *sir* of several co-sharers and one of them alienates his share and is entitled to claim ex-proprietary rights, then until and unless he applies for the demarcation of his share and assessment of rent on it, the *sir* continues to be the joint *sir* of the proprietary body. If a demarcation is made then that portion becomes khalsa land in which the actual tillers of the soil, instead of being mere non-occupancy tenants in *sir* land, become full tenants in chief capable of acquiring either occupancy rights therein after holding for 12 years under the Act of 1901, a statutory right under the Tenancy Act of 1926. In such a case they are not liable to ejectment from the land demarcated. (*Darling, S.M. and Mehta, J.M.*) LACHMAN HAJJAM *v.* DHARAM DEO SINGH. **1938 R.D. 822.**

———*Under-proprietary rights — Creation of—Construction of settlement decree.*

Where the *wajib-ul-arz* contained a reference to the decree of a Settlement Court that 'decree be given without rent in perpetuity in favour of the decree-holder and his heirs,' the decree by itself is not one for under-proprietary rights. In subsequent settlement it was recorded as under-proprietary with reference to the decree. The mere failure to correct the settlement records, in view of the reference in the *wajib-ul-arz* to the decree unaccompanied by any assertion of under-proprietary rights by the other side, cannot confer on them any under-proprietary title. (*Hamilton, J.*) MAHOMED AMIR AHMED *v.* MST. MAHDEI. **1938 O.A. 814= 1938 O.W.N. 1091.**

———*Urban area—* Riyayas—*Position of—Right of transfer.*

In the case of *riyayas* occupying house sites in cities and towns, it is to be presumed that they have a right of transfer, unlike those who inhabit agricultural areas. Hence where a licensor sues to eject a transferee of *riyaya,* he has not only to prove his ownership but also the custom or terms of the grant which prohibit the transfer. (*Zia-ul-Hasan, J.*) BANKEY LAL *v.* VIDYA SAGAR ABKAR. **177 I.C. 969=1938 O.A. 793= 1938 O.L.R. 461=1938 O.W.N. 1039.**

LEGAL PRACTITIONER—*Unprofessional conduct—Advocate filing appeal on last day of limitation without sufficient stamp under agreement with client—Desirability of—Duty of advocate to refuse engament in such cases.*

The filing of a memorandum of appeal on the last day of limitation without sufficient court-fee, knowing full well that it is under-stamped and hoping that the Court would be persuaded to accept the deficiency later is certainly not in consonance with the high traditions of the profession to which the advocate belongs. An advocate who is approached by a client to so file an appeal should refuse to file it unless the full amount of the court-fee was first paid. The High Court will not tolerate practice of this nature.

Per *Mocket, J.*—It is undesirable for practitioners to lend themselves to the practice of deliberately filing appeals under-stamped. (*Leach, C. J., Mockett and Abdur Rahman, JJ.*) *In the matter of* SRI C. PADMANABHA AYYANGAR. **1938 M.W.N. 1169= 48 L.W. 702 (F.B.).**

LETTERS PATENT (Rangoon), Cl. 13—*Certificate under, on a point of law—Recanvassing findings of fact—If can be allowed.*

Where a certificate under Cl. 13 of the Letters Patent is obtained from a Judge in a case upon a representation that there is a point of law of some importance involved and the case then comes before an appellate Court, the Court ought not to assent to a procedure whereby the appellant's Counsel abandons the point of law and desires the whole matter to be recanvassed upon the facts, it being apparent that there would be no appeal on facts alone and that no certificate would have been granted by the Judge unless the applicability of the supposed point of law had been urged before him. (*Roberts, C.J. and Braund, J.*) MA PHAW *v.* S. B. DUTT. **A.I.R. 1938 Rang. 412.**

LIMITATION—*Cause of action — Temporary injunction by Court—If furnishes cause of action for suit.*

An order of Court cannot give a cause of action to a party to start a judicial proceeding. A cause of action briefly means "right and the infringement of the right". Where a party has an undoubted right and that right is infringed, a cause of action at once accrues to him. When it has so accrued and time has begun to run against him, an act of Court restraining him from interfering with or obstructing the opposite party, passed in a suit by that party, can never amount to an infringement of his right. A right can only be infringed by an

act on the part of the
Wadia, JJ.) NARAYAN

40 Bom. L.R. 1134.

LIMITATION ACT (IX OF 1908), Ss 3 and 9—*Scope and effect of—Exhaustive nature of Limitation Act—Suspension of time—Equitable grounds apart from provisions of Act—If available—Subsequent disability—Effect on running of time.*

provisions. *(Rangnekar and Wadia, JJ.)* NARAYAN v. GURUNATHGOUDA. 40 Bom. L.R. 1134.

——S. 7—*Applicability—Decree in favour of karta, his son and grandson, a minor—Execution application filed more than three years after decree—Inhibition*

his son and
ecution was
a question
whether period of limitation was extended by reason of S. 7, Limitation Act, it was held that it must be presumed that the minor was represented by a next friend and that by reason of the inhibition contained in O. 32, R. 6, C.P. Code, the next friend could not give a valid discharge without the permission of the Court and as such applying the test laid down by S. 7, Limitation Act, the period of limitation was extended. *(Wort, Ag. C.J. and Manohar Lall, J.)* PARAMESHWARI SINGH v. RANJIT SINGH. 177 I.C. 713=5 B.R. 15.

——S. 14—*Applicability—"Defect of a like nature"—Meaning of—Prior suit held to be premature as cause of action had not accrued—Right to exclusion of time.*

What is a "defect of a like nature" within the mean-

jurisdiction. Defects as to wrong plaintiffs or wrong defendants are also provided for in the Act. Because the prior suit was dismissed as premature on the ground that the cause of action had not accrued, it cannot be said that S. 14 will not apply. *(Rangnekar and Wadia, JJ.)* MANEKLAL v. SHIVLAL.

40 Bom. L.R. 1169.

——S. 14—*Applicability—"Prosecuting"—If includes defending a suit.*

One essential condition for the application of S. 14 of the Limitation Act is that the plaintiff in the later suit must have been prosecuting with due diligence another civil proceeding. Where the plaintiff in the later suit was a defendant in the prior suit, he
have been prosecuting a suit or civil
time. Merely defending a suit is
amount to the prosecution of a suit

in another decree—Fresh suit by claimant—of action—If accrues.

If a claim by a person is fully satisfied, either by an agreement or by a decree of a Court, and if that satisfaction is subsequently annulled by another decree of Court, a fresh cause of action would accrue in favour of
on, whether the
the Limitation
or suit and pre-
J.) MANEKLAL
40 Bom. L.R. 1169.

(2)—*Execution application filed in wrong Court—Limitation of time.*

There is no section of the C. P. Code forbidding a Court to return an application for execution if it has been filed in a wrong Court. If such an application is filed before a Court which has no jurisdiction to receive it, such Court would be fully competent to return the application in exercise of its inherent power under S. 151, C. P. Code. Where therefore an application for execution is filed on last day of limitation in good faith in a Court which from defect of jurisdiction is unable to entertain it, and the application is returned by that Court for presentation to the proper Court and the next day on which it is presented by the decree-holder to the proper Court, the application is not barred by limitation. *(Edgley, J.)* [illegible] v. INDRA NARAIN. A.I.R. 1938 Cal. [illegible]

——S. 15—*Applicability—Decree declaring plaintiff in possession of lands as sole owner and ordering defendant not to deprive plaintiff of his possession or to obstruct plaintiff in taking crops and ordering defendant not to receive rents—If stay of suit for possession by defendant—Right to exclusion of time for subsequent suit by defendant for possession.*

An injunction or order which prevents a party from
or express or implied. A
plaintiff is in possession
of the property of the suit as sole owner and orders the defendant never to deprive the plaintiff of his possession or to cause obstruction in any way to plaintiff's taking the crops raised, and which orders the defendant not to accept or recover the rents of the property cannot be held to operate as a stay of a suit for possession by the defendant or as an injunction restraining him from filing a suit for possession of the property, especially when the plaintiff in that suit has never sought an injunction or an order restraining the defendant from going to a Court of law and asserting his rights to possession of the property to which he may have been entitled. Such a decree cannot amount to an order staying the institution of a suit within the meaning of
ct so as to entitle the
deduction of time under
Wadia, JJ.)

———Art. 64—*"Account stated"—Essence of.*

The essence of an account stated is the fact that there are cross items of account and that the parties mutually agree the several amounts of each and by treating the items so agreed on the one side as discharging the items on the other side *pro tanto* go on to agree that the balance only is payable. A document contained items showing realizations yearly made by the defendant during certain years as credit against remittances yearly made as debit. There was a balance struck showing a certain amount on the debit side. Below this there was an entry "I admit and accept as correct" which was signed by the defendant.

Held, that this was not a case of "account stated" as there was neither agreement nor adjustment but merely a statement of account with an acknowledgment by the defendant; nor did the endorsement amount to a promise to pay under S. 25 (3), Contract Act, as there was no express promise by the defendant to pay the balance. (*S. K. Ghose and Patterson, JJ.*) SATIS CHANDRA *v.* RAMPADA CHATTAPADHYA. **A.I.R. 1938 Cal. 861.**

———**Arts. 89 and 90**—*Applicability—Misconduct of agent—Suit based on—Suit by sabha against ex-secretary for money wrongfully retained by defendant—Limitation—Starting point.*

Art. 90 and not Art. 89 of the Limitation Act is the article applicable to a suit in which the claim is based on the misconduct or neglect of an agent. A suit by a sabha against an ex-secretary claiming a sum of money on the ground that he had wrongfully retained moneys to the sabha by not entering them in the accounts and had shown certain sums of money falsely as having been spent on behalf of the sabha when as a matter of fact they were not at all spent, is therefore governed by Art. 90, as there is an allegation of misconduct, and the suit filed within three years of the discovery of the misconduct would be in time. (*Pandrang Row, J.*) SANKARANARAYANA AYYAR *v.* T. D. S. BAJANAI SABHA. **1938 M.W.N. 1133=48 L.W. 775.**

———**Arts. 109 and 120** — *Applicability—Suit for profits of immovable property against co-heir in possession—Article applicable.*

Art. 109 does not apply to an action for claim of profits of immovable property against a person who is in possession of the property as co-heir. As there is no special time prescribed for such a claim by any article, Art. 120 applies. (*Roberts, C. J. and Sharpe, J.*) U AUNG MYINT *v.* DAW MYA. **A.I.R. 1938 Rang. 416.**

———**Art. 120**—Applicability—Suit for profits of immovable property against co-heir in possession. *See* LIMITATION ACT, ARTS. 109 AND 120—APPLICABILITY. **A.I.R. 1938 Rang. 416.**

———**Art. 120**—Applicability—Suit by trustee against banker for recovery of trust funds misapplied by banker in reduction of private debt of co-trustee—Limitation—Starting point—Plaintiff kept in ignorance of breach of trust—Effect of. *See* BANKER AND CUSTOMER—LIABILITY OF BANKER. **48 L.W. 577= A.I.R. 1938 Mad. 999.**

———**Art. 120**—*Declaratory suit—Cause of action—Fresh attack on title—Suit brought within six years of last attack is in time.*

A fresh attack on title or invasion of right gives rise to a new right to sue for declaration. If there be successive attacks at intervals, time would run from each of these attacks and if the last attack which is made the basis of the suit be within six years of the suit, the suit will be in time. Hence when the plaintiff remains in possession, though frequent successive threats and attacks on his title are made by the defendant, his title is not extinguished and so long as his title subsists, he has

right to sue for declaration and his suit would be considered to be within time if he makes a threat or attack made within six years the foundation of his suit. (*R.C. Mitter and Sen, JJ.*) MIDNAPORE ZAMINDARY CO. *v.* SECRETARY OF STATE. **A.I.R. 1938 Cal. 804.**

———**Art. 123**—*Applicability—Claim of profits in movable property of deceased.*

Art. 123 does not apply to the claims of profits in the estate of a deceased in respect of movable property. (*Roberts, C. J. and Sharpe, J.*) U AUNG MYINT *v.* DAW MYA. **A.I.R. 1938 Rang. 416.**

———**Art. 142**—*Applicability—Conditions—Dispossession and discontinuance—Meaning of.*

In a case falling under Art. 142 of the Limitation Act, the plaintiff must not only prove title but also possession within 12 years of suit. But before the article could apply it must be shown either that the plaintiff was dispossessed or that he discontinued possession. This could be proved either by the admission in the pleadings or by the facts found. Unless this is done the case would not come under Art. 142 and the residuary Art. 144 is the one that would apply. The word 'dispossession' imports, ouster, a driving out from possession against the will of the person in actual possession. The word 'discontinuance' implies a voluntary act an abandon ment of possession followed by the actual possession of another. An intention to abandon is necessary and it must be either proved or admitted and cannot be assumed. (*Bose, J.*) MAHERBAN *v.* YUSUFKHAN. **1938 N.L.J. 418.**

———**Art. 144**—*Applicability and scope—Suit for possession of immovable property—Plea of adverse possession.*

It is clear from the position in which Art. 144 occurs, and from the words used in that article, that it is a residuary article in respect of all suits for possession of immovable property to which no other article specifically applies. Where the plaint in terms seeks possession of immovable property and the defence is one of adverse possession, the suit falls under Art. 144. (*Rangnekar and Wadia, JJ.*) NARAYAN *v.* GURUNATHGOUDA. **40 Bom.L.R. 1134.**

———**Art. 144**—*Starting point—Adopted son—Suit for possession of property against persons challenging and ignoring rights—Cause of action—When accrues—Adoption disputed and subsequently declared valid by highest Court of appeal—Decision on appeal—If gives new cause of action.*

The rights of adopted son come into existence on the date of his adoption, and from that date he becomes entitled to possession of all the immovable properties belonging to him as against those who challenge and ignore his rights. Time for a suit for possession runs against him from that date, or, in case he is a minor at the time, from the date on which he attains majority. Merely because his adoption is disputed, and is subsequently declared to be valid by the highest Court of appeal several years later, it cannot be held that the cause of action for a suit for possession of the property accrues to him on the decision of the highest Court of appeal. The cause of action for a suit of the property by him accures in any event on his attaining majority, if not earlier. (*Rangnekar and Wadia, JJ.*) NARAYAN *v.* GURUNATHGOUDA. **40 Bom.L.R. 1134.**

———**Art. 166**—*Applicability—If restricted to applications under O. 21, Rr. 72 and 89 to 91.*

The applicability of Art. 166. Limitation Act. is very wide, and there is no ground for holding that it is restricted to applications under O. 21, Rr. 72 and 89 to 91, C. P. Code. It applies to all applications under

LIMITATION ACT (1908), Art. 182.

S. 47 of the Code. (*Gruer, J.*) MAROTI *v.* KISANLAL.

——**Art. 182 (2)**—*"Where there —Meaning of—Appeal from order*

Art. 182 (2) of the appeal against the executed. It has a

aside a decree passed *ex parte* would the meaning of the clause. (*King and Aiyangar, JJ.*) SRI RAMACHANDRA RAO *v.* VENKATESWARA RAO. 1938 M.W.N. 1155=48 L.W. 751.

——**Art. 183**—*"Revivor"—What constitutes—Order containing qualification as to limitation and without prejudice to judgment debtor's plea of limitation—If operates as revivor.*

To constitute a revivor of the decree under Art. 183 of the Limitation Act there must be expressly or by implication, of executi

holder should be allowed to execute the decree. The Court in such a case does not determine the question whether execution is barred or cannot operate as a revivor. HASAN *v.* ISAP.

LUNACY ACT (IV OF 1912), S. 48—*Construction and scope—Enquiry under—Nature of—Question of title to property—If can be decided—Discretion Court.*

The language of S. 48 is not mandatory but permissive. By the use of the word "may" a discretion is given to the Court to make an order under the section. The tsoever connected

matters concerning lunatics and their estates. The Court should, however, refer the parties to a regular suit in cases which it considers likely to be complex or lengthy or properly matters which sh way of a suit and which cannot c with by the summary procedure (*Gentle, J.*) OFFICIAL TRUSTEE ABDUL HAKIM SAHIB.

——**S. 48**—*Scope—"Petition"— rate original petition—Necessity.*

The use of the word "petition" in S. 48 of the Lunacy

is found that the

SAHIB. 1938 M.W.N. 1143.

MADRAS ESTATES LAND ACT (1908), S. 77.

MADRAS AGRICULTURISTS' RELIEF ACT (IV

down of debt—Mortgage debt le under S. 69, Transfer of ure of creditor to scale down debt—Suit for injunction to prevent sale—Maintainability.

Where the creditor in exercise of his power of sale under S. 69 of the Transfer of Property Act, 1882, was

e Agriculturists' sued for an injunction to prevent the creditor from proceeding with the sale,

Held, that the suit was competent and that as the sale was imminent the Court might properly grant an interim injunction. It is no answer in such a case to say that under S. 69 of the Transfer of Property Act the debtor will be entitled to recover damages if the mortgagee exercised his power of sale in an improper or irregular manner. (*Stodart, J.*) GOVINDASWAMI NAICKER *v.* .I. SOWCAR. (1938) 2 M.L.J. 918.

CO OPERATIVE SOCIETIES ACT

—Rules under—R. 22 (6) (*a*)—Attach- Effect of—If confers special rights on Society—Decree in administration suit debtor—Effect of. *See* ATTACHMENT—EFFECT OF. 1938 M.W.N. 1127.

——**S. 47 (3) (b) and (6)**—*Power of liquidator to mbership—Application to Court isdiction of Court to decide the*

The liquidator of a Co-operative Society passed an order determining what contribution should be made by f the Madras Co- , the Court under espondent that he was not a member of the Society and therefore was not bound by the liquidator's order.

Held, that the liquidator has jurisdiction to decide who There is no bar to the the respondent is or is of the liquidator. 59 HEJMADY CO-OPERA- IKA. (1938) 2 M.L.J. 980.

MADRAS ESTATES LAND ACT (I OF 1908), S. 26 (3)—*Applicability—Rent-free land—Holder of—If ryot.*

of the lands cannot of rent s held it be a *th, J.*) ADILAKSHMI DEVAMMA GARU *v.* APPA RAO GARU. 1938 M.W.N 1134=48 L.W. 701= (1938) 2 M.L.J. 934.

Jurisdiction of Collector—Lands found 1900 *but subsequently built upon and uildings—Non payment of rent for 20 years—No proof of tender of patta—Express consent of proved—Inference—Suit for rent—Juris- ollector.*

was found that the suit lands were cultivable 1900, *i.e.*, some eight years prior to the e Estates Land Act, and that either at that time when the Act came into force or very shortly after-

wards they ceased to be used for agricultural purposes, but were built upon and occupied by houses, and that for at least 20 years no rent was paid for the lands and no patta tendered, there being also no proof of the consent of the landholder to the arrangement.

Held, (1) that the fact that for at least 20 years no rent was paid went a long way to support an inference that the occupation of the lands by houses was with the consent of the then landholder; (2) that the landholder before he could support his claim for rent in the Court of the Collector must establish facts which would justify the conclusion that the occupant of these lands was a ryot holding them for the purpose of agriculture, though he did not actually use them for that purpose; (3) that the Court was not justified in drawing such an inference merely because it had been proved that the lands were cultivable lands in the remote part; and (4) that in the absence of proof by the landholder that the lands were ryoti lands at some period while the Act was in force, a suit for rent was not maintainable in the Court of the Collector. (*Wadsworth, J.*) THIRUMALAI TIRUPATI DEVASTHANAM *v.* KOMARAPPA MUDALI.
48 L.W. 611=1938 M.W.N. 1062= (1938) 2 M.L.J. 829.

MADRAS HIGH COURT (ORIGINAL SIDE) RULES, O. 5-A, R. 5—*Suit on behalf of trust for recovery of trust properties—Defendant claiming under sale deed with express covenant for title and indemnity—Application by defendant for making vendor party to suit—Maintainability—Procedure—Power and duty of Court.*

In a suit for recovery of immovable properties alleged to be trust properties belonging to a deity, the plaintiff sought to ignore certain alienations made in violation of the terms of the original endowment. The 1st defendant, one of the alienees, pleaded that he was a *bona fide* purchaser for value and that he was protect- by express covenants of title and indemnity in the sale deeds which he took from his vendors, and as he had the right of indemnity against his vendors he sought to avail himself of the third party procedure under R. 5 of O. 5-A of the Original Side Rules by which he wanted to have his vendors also made parties to the suit so that the question of their liability to him might be determined in case of his own loss in the action of the plaintiff

trial of that issue subsequent to the trial of the action. (*Venkataramana Rao, J.*) VENKATAKRISHNA NAIDU *v.* NARAYANASWAMI AIYAR. (1938) 2 M.L.J. 886.

MADRAS HIGH COURT (APPELLATE SIDE) RULES, R. 2-A—Scope—If *ultra vires*—Single Judge of High Court—Jurisdiction to issue writ of *habeas corpus*. *See* GOVERNMENT OF INDIA ACT (1915), S. 108. 1938 M.W.N. 1161.

MADRAS HINDU RELIGIOUS ENDOWMENTS ACT (II OF 1927), Ss. 18, 57 and 62—*Excepted temple—Framing of scheme—Board proceeding on the assumption that a person was not hereditary trustee—His hereditary trusteeship established in a suit under S. 57—Case against the trustee not stated clearly—Procedure causing prejudice to trustee.*

The Commissioners of the Endowments Board proceeded under Ss. 18 and 57 of the Hindu Religious Endowments Act on the assumption that *A* was not the hereditary trustee of the temple, examined a few witnesses and then framed a scheme without making clear the case against him. There was no place for him in the Board of management. *A* filed a suit as contemplated by S. 57 for setting aside the scheme and also a petition under S. 84 (2) of the Act. In the petition the Court granted a declaration in his favour that he was the hereditary trustee and the suit temple was an excepted one. In the suit the Court decided that the scheme framed by the Court was not *ultra vires* and no case was made out for disturbing it. The Board filed no revision petition to the High Court, against the order in the original petition. On the other hand *A* filed an appeal against the decision of the lower Court in the suit.

Held, that the procedure adopted by the Commissioners was wrong and the trustee *A* was prejudiced by such procedure. What is contemplated in S. 62 of the Act is that opportunity should be given to the trustee to hear what the case against him is and then the Board may proceed to consider whether a case for the settlement of a scheme has been made out. The inquiry under S. 62 should be more detailed and thorough than what is required under S. 57. 54 Mad. 532 and (1934) 68 M.L.J. 722=58 Mad. 862, Ref. to. (*Madhavan Nair, Offg.C.J.* and *Krishnaswamy Aiyangar, J.*) GARUDACHAR *v.* MADRAS HINDU RELIGIOUS ENDOWMENTS BOARD. (1938) 2 M.L.J. 987.

MAD. SURVEY & BOUN. ACT (1923), S. 14.

in subsequent proceedings that at the time of the survey

period, taking into consideration possessior
and posterior to the survey officer's order,
ing title by adverse possession. Similarly,
officer goes into the facts, finds that the unsuccessful claimant is in possession but that his possession is unlawful, and lays down the bo
his finding as to title, the sur
bar the unsuccessful party fi
that his unlawful and hostile
the survey officer to exist, continued for such a period as to justify the plea of title by adverse po
later suit. The governing factor must
survey officer actually decided. The
claimant cannot go behind that decision, but there is no reason why he should not in subsequent proceedings put forward any claim which is not inconsistent with that decision. (*Wadsworth, J.*) ACHUTHARAMAYYA v. SOORAPPAYYA. 1938 M.W.N. 1066= 48 L.W. 595=(1938) 2 M.L.J. 894.

——S. 14—*Limitation for suit—Starting point—"Notification"—Supplemental notification terminating supplemental survey—If furnishes fresh starting point of limitation.*

The notification from the date of which the three years' period for a suit under S. 14 of the Survey and Boundaries Act commences to run
issued under S. 13 that the survey
cerned is complete, in other words,
terminating the survey. A supplemental notification terminating a supplemental survey of sub-divisions consequent on the re-settlement miscellaneous inspection cannot extend the time for filing a suit to contest the correctness of the boundaries laid down in the main survey, except in so far as it relates to boundaries changed in the course of the
(*Wadsworth, J.*) ACHUTHARA[illegible]
PAYYA. 1938 M.W.N. 10[illegible]

MAHOMEDAN LAW—*Guardianship—Custody of minor—Loss of right of mother—Marriage with one not within the prohibited degree of relationship to the minor.*

The proposition cannot be disputed that a female including the mother of a Mahomedan child who is otherwise entitled to the custody of the child, loses the
on not related to
for example, a
[illegible]NDAN v. AISHA
BEGAM. 1938 A.L.J. 982= 1938 A.W.R. (H.C.) 698.

——*Guardianship*—De facto *guardian—Alienation by—Powers.*

A *de facto* guardian has no power under the Mahomedan Law to transfer any right or interest in the immovable property of the minor. Such a transfer is

brother—Binding nature.

MALICIOUS PROSECUTION.

While a *de facto* guardian may, under the Mahomedan
ibilities, he cannot impose any obliga-
Where at a partition of the estate
omedan the shares were allotted and

the minor's share of the father's debts executed a bond, it is not enforceable as against the estate of the
elder
JJ.)
[illegible] 17.

——*Wakf*—Mutwalli — *Decree against—If binds*

against *mutwallis*" as
d the wakf estate, but
there can be no manner of doubt that in certain circumstances a decree passed in a suit against the *mutwallis* of a wakf estate would affect the wakf property. The question whether the decree affects the property of the wakf will depend upon the facts of the case in which the decree is passed. (*Sen, J.*) FAZAL RAHAMAN v. ABDUL RASHID. 43 C.W.N. 15.

——*Wakf—Right to sue—Protection of wakf estate from waste—Private wakf.*

Persons interested in a private wakf are entitled to bring a suit to protect the wakf estate from waste. Where, therefore, the wakf property is sold in execution

tain a suit for a declaration that such property is not affected by the decree against the *mutwallis* or by the sale in execution thereof. (*Sen, J.*) FAZAL RAHAMAN v. ABDUL RASHID. 43 C W.N. 15.

MALABAR LAW—*Tarwad—Karnavan—Powers of—Debt incurred by karnavan—Liability of tarwad—*
[illegible] *sumption of*

accredited
arwad in all
prima facie
the power to enter into contracts on behalf of the tarwad, but there is no presumption that every contract entered into by him is on behalf of the tarwad. In the case of a loan by the karnavan, a representation believed in by the creditor that the loan was required for a tarwad purpose would be enough. Even though the members of the tarwad are not actual contracting parties to a loan contracted by the karnavan, it is open to them to ratify and adopt it in cases where the contract was entered into by the karnavan in his capacity as karnavan but not for a necessary tarwad purpose. The concurrence of the senior most anandiravan in a transaction of the karnavan raises a *prima facie* presumption of necessity, and it will be for the other members who seek to exempt the tarwad from liability to disprove the case of necessity. (*Venkataramana Rao, J.*) KESAVAN NAMBUDIRI v.
[illegible] W.N. 1136.

proof—
probable

of the incident was wholly

known it to be false. The defendant's story may be true in every single respect and yet the plaintiff may still have been innocent. (*Bose, J.*). BHAGIRATH BIRDICHAND *v.* VISHWASRAO PUNDALIK.

A.I.R. 1938 Nag. 522.

——*Criminal Court judgment—Reasoning of—If relevant.*

In the absence of *res judicata*, the reasons upon which a judgment proceeds are entirely irrelevant in a subsequent litigation except in the special circumstances specifically provided for by the Evidence Act. This law has been applied to suits for malicious prosecution. Hence in a suit for malicious prosecution the reasons upon which the previous judgment of Criminal Court is based are not relevant. (*Bose, J.*) BHAGIRATH BIRDICHAND *v.* VISHWASRAO PUNDALIK.

A.I.R. 1938 Nag. 522.

MINOR—Alienation by—Setting aside at minor's instance—Order for refund of consideration money to alienee—When justified—Specific Relief Act, S. 41. *See* SPECIFIC RELIEF ACT, S. 41. **48 L.W. 604.**

——*Debt by guardian—Binding nature—Powers of a guardian.*

A guardian as manager can in a proper case bind, charge encumber and/or alienate the estate. But if he is not the manager he cannot bind the estate of the minor by any debt contracted. The minor's liability under S. 68 of the Contract Act is different, it being purely a statutory liability arising under certain conditions. (*Stone, C.J. and Clarke, J.*) GARAMLAL *v.* TULARAM. **1938 N.L.J. 375.**

MORTGAGE—*Mortgage suit—Costs—Liability for—Subsequent purchaser of mortgaged property—Personal liability for costs—Decree—Construction.*

Whether or not a particular party in a suit is liable personally for the costs decreed depends upon the construction to be placed upon the decree. In making an order in a mortgage suit, the Court should consider the advisability of making a personal decree against a subsequent purchaser of the mortgaged properties who is made a party defendant. The Court generally makes no difference between the amount of the claim and the costs, and a subsequent purchaser there being no privity between him and the mortgagee is not liable on the action on the personal covenant but it depends entirely on the circumstances of each case. Where the order was in the following terms: "that the suit be decreed with costs on context against defendants 3 to 9 (subsequent purchasers) and *ex parte* against others,"

Held, that the order was capable of construction in one way only and that it was only an ordinary mortgage decree; that it was not a personal decree against defendants 3 to 9. (*Wort, C. J. and Manohar Lall, J.*) BANARSI PRASAD *v.* MAHABIR PRASAD.

177 I.C. 689=5 B.R. 11=1938 P.W.N. 710.

——*Mortgage suit—Preliminary decree—Effect of.*

On the passing of a preliminary decree for foreclosure on the basis of a mortgage the relations between the parties are governed not by the terms of the mortgage-deed which has ceased to exist, but by the terms of the preliminary decree into which the mortgage becomes merged. (*Misra, J.*) TAYYAB HASSAN *v.* SAGHIR HASAN. **1938 A.L.J. 997= 1938 A.W.R. (H.C.) 728.**

——*Rights of mortgagee—Equitable mortgage—Subsequent lease by mortgagor—Position of lessee.*

A mortgage is not affected by a lease granted by a mortgagor after the mortgage and without the concurrence of the mortgagee, unless the lease be in the usual course of management. So far as dealings by mortgagors with third parties are concerned, mortgagees, in

whose favour a mortgage has been created by an indenture stand on the same footing as a mortgagee who has got his mortgage right by the deposit of title deeds. A mortgage created by the deposit of title deeds and a mortgage created by an indenture in India stand on the same footing. A mortgage created by the deposit of title deeds does not create only an equitable estate liable to be defeated or postponed, as in England, by a subsequent purchaser for value without notice. So even when the mortgagee is an equitable mortgagee a lessee from the mortgagor who takes a lease which is not granted in the usual course of management, is bound by the mortgage, even if he had no notice of it. (*R. C. Mitter and Sen, JJ.*) RAM RATTAN DAS *v.* MT. SEW KUMARI.

A.I.R. 1938 Cal. 823.

——*Sub-mortgage—Mortgagor redeeming mortgage—Remedy of sub-mortgagee.*

A sub-mortgagee is not privy to the original contract of mortgage and until and unless he gives notice to the mortgagor, the mortgagor has got every right to redeem the mortgage and get rid of the liabilities thereunder. The money becomes the property of the mortgagee and he may pay it to any one he likes. The sub-mortgagee has a remedy in such circumstances against his transferor only, that is to say, the mortgagee and no one else. (*Almond, J.C. and Mir Ahmad, J.*) BHAG CHAND *v.* SUJAN SINGH. **A.I.R. 1938 Pesh. 73.**

——Sub-mortgage—Right of sub-mortgagee to sue original mortgagor—Parties to and frame of suit. *See* T. P. ACT, S. 55 (6). **48 L.W. 766.**

MOTOR VEHICLES ACT (VIII OF 1914), S. 2—*'Public place'—Test.*

The mere fact that a place would be styled as a public place for the purposes of the Gambling Act and the Penal Code, does not necessarily mean that it is a public place as defined in S. 2, Motor Vehicles Act. To make it a public place under the Motor Vehicles Act, it must be a road, street, way or a place over which the public have a right to pass or to which the public are granted access. On the two sides of the motor stand of the petitioners, there were houses while the city wall ran along the third side. The fourth side, however, was open and looked towards a public street. The land was privately owned and had been leased by the petitioners. Through the portion leased by them ran a deep city drain which could only be crossed by means of a bridge and it was over the bridge that the lorries of the petitioners were parked. Thus to all intents and purposes the petitioners were keeping their lorries in an enclosed place except that apparently there was no gate at the bridge.

Held, that the place was not a public place within the meaning of S. 2, Motor Vehicles Act. (*Addison, J.*) ABDUL HAKIM *v.* EMPEROR. **A.I.R. 1938 Lah. 817.**

——**Ss. 11 and 16**—*Bombay Motor Vehicles Rules, R. 21—If* ultra vires—*Notification under by District Magistrate—Breach of—Offence.*

Rule 21 of the Bombay Motor Vehicles Rules framed by the Local Government under S. 11 of the Motor Vehicles Act is not *ultra vires* of the Local Government. A notification issued by a District Magistrate under R. 21, prohibiting the driving on certain roads of the District of, *inter alia*, any motor vehicle, public or private, the maximum weight of goods in which exceeds one and a half ton is a valid notification and a breach of it amounts to an offence under S. 16 of the Motor Vehicles Act. (*Broomfield and Norman, JJ.*) EMPEROR *v.* VINAYAK MAHADEV HABBU.

40 Bom.L.R. 1099=A.I.R. 1938 Bom. 506.

NEGOTIABLE INSTRUMENT—*Equities—Promissory note—Agreement between payee and maker—Plea*

NEG. INSTR. ACT (1881), S. 70.

of in suit by indorsee—If open—Payment by maker under agreement with payee—If can be set off as against endorsee.

In cases of negotiable instrument, any equities which have to be pleaded should generally arise out of the very transaction itself and must not arise out of the transac-

the chit was closed. *B*
C. Before that time all
paid by *A* and the last ins...
after the endorsement. *C*, the endorsee, who was not a holder in due course brought a suit on the promissory note and in that suit *A* pleaded that he was entitled to a credit for the amount paid by him towards the instalments.

the instalments.

Held also, that as all except the last instalments were paid before the note was endorsed, the contract had not remained merely executory. Moreover the agreement by *A* to pay future instalments towards the chit fund should be taken as an accord and satisfaction to the extent of the amount which he had undertaken to pay and which *B* had agreed to accept towards the partial discharge of the promissory note. (*Abdur Rahman, J.*) ELLAPPA CHETTIAR *v.* SESHA AIYAR.

A I R. 1938 Mad. 897.

No presentment is necessary in the case of a promissory note which is not payable at a specified place, when the suit is against the maker of
(*Bhide, J.*) NANU MAL *v.*
KISHORE.

OUDH RENT ACT (XXII O...
and 127—*Remedy of ejected proprietor—Suit in Civil Court, if lies.*

In view of the fact that S. 108 (10) of the Oudh Rent

ejected under S. 127 of the Act. (*Yorke, J.*) SHEIKH BARSATI *v.* SARJU PRASAD.
1938 O.A. 823=1938 A...

——S. 127—Remedy of ejected
Civil Court, if lies. *See* OUDH RE
(10) AND 127. **1938 O.A. 823=1938 O.W.N. 1074.**

PARDANASHIN LADY—*Deed by—Onus of proof.*

If a person seeks to enforce a deed executed by a pardanashin lady, it is incumbent upon him to prove not only that the deed was executed by her but also that it was explained to her and she perfectly understood its contents and that she executed the document of her own free and independent will. (*Pandrang Row and Ven-*

PENAL CODE (1860), S. 302.

kataramana Row, JJ.) SHEIK DAWOOD ROWTHER *v.* RAMANATHAN CHETTIAR. **1938 M.W.N. 1203.**

PARTNERSHIP ACT (IX OF 1932), S. 4—*Business—Requisites—Single act of lending on joint security—Partners.*

Before there can be a partnership in respect of a single

one, C.J. and Bose, J.) SETH SUGAN-
MRAOBI. **1938 N.L.J. 403**

PENAL CODE (XLV OF 1860), S. 34—*Applicability—'Common intention'—What is—Common intention to cause grievous hurt but murder committed by one—Offence committed by others.*

S. 34, Penal Code, is not confined only to cases where it may be difficult to distinguish between the acts of the

was committed by one of the party, it ...
be a probable consequence of abetment on the part of the others and hence they are only guilty of abetment of an offence under S. 325, I. P. Code. (*Zia-ul-Hasan and Yorke, JJ.*) RAJA RAM *v.* EMPEROR.
1938 O.W.N. 1057=1938 O.A. 808=
1938 A.W.R. (O C.) 92 (2)=1938 O.L.R. 469.

——S. 41—*Special law—Criminal Law Amendment Act, S. 7—Abetment of offence under—Conviction for—Sustainability.*

The Criminal Law Amendment Act of 1932 is a
S. 41 of the Indian
convicted for abetting
...inal Law Amendment
...ahman, J.) ARUNA-
GIRI NATHAR *v.* EMPEROR.
(1938) M.W.N. 1105 (2)=(1938) 2 M.L.J. 863.

under—Proof required.
absconder is found in the house
sufficient to involve the owner
...nce under S. 216, I. P. Code, unless all other elements of the offence are established. Among other things, it is the duty of the prosecution to prove the knowledge of the accused person as

EMPEROR. **40 P.L.R. ...**

leave the scene peacefully he declined to do so, whereupon a fight ensued in which the accused killed the deceased.

Held, he could never plead the right of private defence. (*Roberts, C.J. and Dunkley, J.*) THE KING *v.* NGA PU GYI. **A.I.R. 1938 Rang. 441.**

——S. 302—*Murder or culpable*
blow on the head—Death resulti-

PRACTICE.

—— *Parties—Suit by defeated claimant to set aside decision of certificate officer—Officer who made the award, if a proper party.*

Where a suit is to set aside the summary decision of a certificate officer, in respect of the plaintiffs' claim to the attached property, the Registrar of the Co-operative Societies, who made the award as a result of which the certificate proceedings started, is not a proper party. (*James, J.*) REGISTRAR, CO-OPERATIVE SOCIETIES

Agreement between payee and maker—Payment by

——Subsequent events—Relief on ground of—Right to—Suit by Hindu daughter-in-law against father-in-law—Claim to maintenance from self-acquired property—Death of defendant—Decree
sentatives on ground of enlargement
of father in-law—If can be passed.
MAINTENANCE—DAUGHTER-IN-L

PRE-EMPTION—*Law to be applied in Berar.*

In Berar, all questions of pre-emption must be gover
the M
But ir
may l
(*Bose,*

PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), S. 38—*Scope—Order under O. 21, R. 2, C. P. Code.*

To fall within the scope of S. 38 an order must not only be made in the suit, but it must be the order made in the suit. This means that it must be an order which in some way or other disposes of the suit, for example, an order dismissing a suit for default. Unless it is the order made in a suit in this sense
power to deal with it under S. 38.
order made in execution proceeding
under O. 21, R. 2, C. P. Code cann
in the suit in this sense. A furthe
view is to be found in the opening
It is quite reasonable that where
contested there should be nothing in the nature of an appeal against the order disposing of it. But it would be quite illogical to make the right to appeal against orders made in execution proceedings dependent upon whether the suit had been contested or uncontested An order made under O. 21, R. 2, C. P. Code, therefore
the decision
under S. 38
(*Panckridge,*

1938 Cal. 862.

PROV. INSOLV. ACT (1907), S 16.

PRESS (EMERGENCY) POWERS ACT (XXIII OF 1931), S. 4 (1) (h)—*Applicability—Promotion of enmity or hatred.*

A riot between Indians and Burmans was followed by two articles in a newspaper. The articles pointed out that the facts recited in the articles were already of common knowledge. One of the articles contained a version of the incidents of the riot and the reasons that led up to the riot. The second article pointed out that

in violent or
made to gloss
of the other.
ing of enmity
Majesty's sub-
the scope of
article, it was
not a "class of
His Majesty's subjects", as contemplated by Cl. (*h*) of

the matter of A.I.R. 1938 Rang 417 (S B.).

PRINCIPAL AND AGENT—*Relationship—Test.*

The main test to determine whether a person selling
agent is whether he is
goods when the time for
supposed to be selling the
liability of an agent to render accounts is based on the assumption that he is dealing with money or goods entrusted to him. An
a contract with a
matches. The latter
fore he was allowed
sale apparently went
the agreement was

Held, that the latter was not an agent of the former but only a favoured buyer. (*Beckett, J.*) PHUL CHAND v. AGGARWAL BATTERY MANUFACTURING CO. A.I.R. 1938 Lah. 814.

PROMISSORY NOTE—*Place of payment—Presumption—Pronote not specifying any place.*

If a pronote does not specify any place where payment is to be made, the presumption is that payment

same—Subsequent sale by him to wife—Application by creditor to annul and to make it available for distribution—Competency—Estoppel.

The husband of the appellant was adjudicated insolvent on 30th January, 1915, under the Provincial Insolvency Act of 1907. The Official Receiver thereupon took possession of the estate, realized it and declared a final dividend sometime in 1915. The administration having thereby concluded, the Receiver sent to the District Court all the concerned papers relating to the insolvency, and the papers were duly destroyed under

PROV. INSOLV. ACT (1920), S. 21.

the rules for the destruction of records. The insolvent subsequently began earning monies and with such acquisitions he purchased a property in 1928, and remained in enjoyment of it till 1934, when he sold it to the appellant. In 1936, one of the creditors of the insolvent in the insolvency applied to the Court claiming that the appellant got no title under the sale and that the property should be applied and administered under the Insolvency Act, and the District Judge relying on S. 16 (4) of Act III of 1907, held that the sale by the insolvent was a nullity.

Held, that the conduct of the Receiver must have been within the knowledge of the creditors and the latter must therefore be regarded as having deliberately acquiesced in the position indicated by that conduct, namely that the insolvency had become finally determined; and neither the Receiver nor the creditors having taken any steps, from 1915 till 1928, showing that they or any of them regarded the insolvency as still pending, it was not open to any of them now to get behind what must be regarded as a representation by them, and revive the insolvency for the purpose of challenging a sale *bona fide* made in the belief that there was no insolvency, a belief contributed to by all of them. (*King and Krishnaswami Ayyangar, JJ.*) SUBBAMMA *v.* GODEMSETTI SURAPPA COMPANY. **48 L.W. 788.**

———**(V OF 1920), Ss. 21, 28 and 56**—*Comparison of powers conferred by—Recovery of property alleged to belong to the insolvent—Procedure.*

As the debtor continues to be in possession of property prior to adjudication, the insolvency Court is empowered by S. 21 (2) to get at the property in the possession of the debtor. But after adjudication all property of the insolvent vests by virtue of S. 28 (2), in the Court or Receiver. S. 56 (3) empowers the Court or Receiver to remove persons in possession and obtain actual physical possession. But if the third person in possession sets up a title, a Court has no power under S. 56 to summarily direct him to deliver up possession. In such a case the Court has to try under S. 4 the issue whether the insolvent is entitled to the property or not. The more convenient course is to authorise a creditor to conduct the proceedings on its behalf under S. 28 (2), and present the necessary petition for that purpose. (*Bose, J.*) MST. JASODABAI *v.* FIRM SHRIKISHAN. **1938 N.L.J. 384.**

———**S. 28 (4)**—*Application under—If can be resisted when adjudication stands.*

When a person has been, along with his father, adjudicated and it was not appealed against, an application under S. 28 (4) in respect of a property bequeathed to him by a will could not be resisted on the ground that it is the personal property of the insolvent. As long as the adjudication stands it could not be done. (*Wort, Ag. C. J. and Manohar Lall, J.*) KAMAL LAL GURDA *v.* CHANDRIKA CHARAN RAY. **177 I.C. 829=5 B.R. 20.**

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), S. 17 (as amended by Act IX of 1935)—*Nature of the provision—Powers of Court with reference to—Alternatives open to applicant.*

The provisions of S. 17 of the Provincial Small Cause Courts Act are imperative and it is not within the power of the Court to condone any failure on the part of an applicant to carry out those provisions. He must either deposit the decree amount or obtain by a prior application permission to file adequate security and then file the security bond. (*Mulla, J.*) MURARI LAL *v.* MOHAMMAD YASIN. **1938 A.L.J. 1078.**

———**S. 17 (as amended by Act IX of 1935), and S. 25**—*S. 17, if mandatory—Failure to comply with—High Court, if bound to interfere under S. 25—Discretion.*

S. 17 of the Provincial Small Cause Courts Act as it stands now contains a mandatory provision. An applicant has got to do one of two things, that is either deposit the decree amount in Court or give security as per directions previously given. When this mandatory provision is not complied with, and a suit is restored the power of the High Court to interfere under S. 25 of the Act is purely discretionary. The mere fact that an order passed by the Small Cause Courts is either illegal or without jurisdiction, does not necessarily justify interference. The real test is whether any substantial injustice has been done by the order complained against. (*Mulla, J.*) MOHAN LAL *v.* SOHAN LAL. **1938 A.L.J. 1058.**

———**S. 25**—Powers under—Interference—Discretionary. *See* PROVINCIAL SMALL CAUSE COURTS ACT, SS. 17 AND 25. **1938 A.L.J. 1058.**

———**Art. 28**—*Jurisdiction of Small Cause Court—Position of defendant, if material.*

The question of jurisdiction depends entirely on the allegations made in the plaint and it is immaterial whether the defendant is a rival claimant to the estate or merely a person in wrongful possession. (*Almond, J. C.*) ZAMIN SHAH *v.* MUKAMIL SHAH. **A.I.R. 1938 Pesh. 79.**

PUBLIC DEMANDS RECOVERY ACT, S. 20—*Sale of portion of holding—Title of purchaser.*

Where in execution of a certificate issued under the Public Demands Recovery Act, a portion only of a holding is sold, the purchaser acquires only the right, title and interest of the certificate debtor, and not the entire holding. (*Sen, J.*) RAM SANKAR *v.* JOGENDRA NATH. **43 C.W.N. 20.**

———**Ss. 36 and 37**—*Certificate sale—Declaratory suit that plaintiff's title is not affected—Maintainability.*

Where the plaintiff is neither the certificate debtor nor his representative, a suit by him for a declaration that his title to the holding is not affected by the certificate sale is not barred by any of the provisions of the Public Demands Recovery Act. (*Sen, J.*) RAM SANKAR *v.* JOGENDRA NATH. **43 C.W.N. 20.**

PUNJAB COURTS ACT (VI OF 1918), S. 41 (3)—*Scope—Question of custom.*

Where the appellant raises a point that the Senior Subordinate Judge had omitted to determine one of the points raised by the appellant, namely that the reversioner had no right to succeed to the property of the deceased in the presence of daughter and her son according to Hindu Law, the appellant is not raising any question of the existence or validity of a custom and in the circumstances the appeal does not fall within the purview of S. 41 (3). (*Bhide, J.*) MT. BHOLI *v.* JAI LAL. **A.I.R. 1938 Lah. 824.**

PUNJAB DEBTORS' PROTECTION ACT (II OF 1936), S. 4—*Retrospective operation.*

The intention of the Legislature is not to make S. 4 of the Punjab Debtors' Protection Act retrospective. Its operation is confined only to those cases in which a Civil Court "orders" that land be attached and alienated temporarily, at a time when the Act is in force. Where, therefore, land had been ordered to be attached and alienated temporarily long before the Act came into force and the auction sale of the lease had also been held and all that remained to be done, when the Act came into force, was to consider the objections of the judgment-debtor under O. 21, R. 90, C. P. Code, the section is inapplicable to the case. (*Tek Chand, J.*) DASU RAM *v.* GHAZI MOHAMMAD. **40 P.L.R. 976.**

PUNJAB MUNICIPAL ACT (III OF 1911), S. 195—*Notice by Municipal Committee—Jurisdiction of Civil Court.*

If the notice issued by . . . within the purview of S. . . Act, then the Civil Courts . . . only remedy of the aggri . . . under S. 225. If, howev . . . within the purview of S. . . . wholly *ultra vires*, then the jurisdiction of the Civil Court is not ousted. (*Abdul Rashid, J.*) EAZLU *v.* THE MUNICIPAL COMMITTEE, ROHTAK. 40 P.L.R. 980.

PUNJAB PURE FOOD ACT (VIII OF 1929), S. 13 (1) (a)—*Adulterated ghee lying at shop of commission agent—Sale—Presumption.*

A commission agent who has purchased adulterated ghee from certain persons on behalf of others is not liable to . . .

. . . *Powers under—Exercise of—Discretion.*

Though a decision of a Court of law is not 'according to law' that does not of itself entitle the applicant to an order in revision. The word in S. 25 of the Rangoon Small Cause Courts Act is 'may' and not 'shall'. The High Court has a discretion as to what, if any, order it will pass, when satisfied that a decree or order made by the Court of Small Causes is not 'according to law'. (*Sharpe, J.*) R. N. PANDAY *v.* MOHAMMAD KASIM KHAN. 1938 Rang. L R. 565.

REGISTRATION ACT (XVI OF 1908), S 17 (1) (b)—*Equitable mortgage—Need for registration—Test.*

In deciding the question as to whether . . . evidencing an equitable mortgage requires . . . under S. 17 or not, the question to be . . . whether the document constituted the bargain between the parties or it was merely a record of an already completed transaction. In the former case the document would come within the purview of S. 17 and would require registration; but in the latter case it would not be a document which would create, etc., a right in immovable property and would not require . . . purpose of considering whether . . . taken as embodying a bargain . . . and mortgagee or as merely evi . . . which has already been complete . . . was executed or delivered, not . . . document must be looked into but also . . . circumstances. (*R. C. Mitter and Sen, JJ.*) RAM RATTANDAS *v.* MST. SEW KUMARI.

A.I.R. 1938 Cal. 823.

——**S. 17 (2) (vi)**—*Consent decree—Transfer of property—Registration, if necessary.*

Terms of settlement embodied in a decree of Court come within S. 17 (2) (*vi*) of the Registration Act and do . . .

. . . ing at Sub-Registrar a document . . . place where it could not be registered, as the . . . concerned were not within the jurisdiction of . . . Registrar concerned, the document is inoperative. But in such a case the document can be presented for re-

SPECIFIC RELIEF ACT (1877), S. 38.

registration and the Registering Officer could proceed as . . .

. . . ment by Registrar recording payment of consideration for bond—Effect of—Denial of consideration—Onus. *See* DEED—CONSIDERATION. 1938 P.W.N. 773.

RELIGIOUS ENDOWMENT—*Dedication—Construction of consent decree—Dedication or recognition of previous dedication.*

One X by his will dedicated certain premises in favour of a deity. After his death, a suit was brought against his heir for a declaration regarding the deity's rights and . . .

The third paragraph provided that the other portion of the premises was declared as dedicated to the said deity.

Held, that the dedication of the premises was not by the defendant and that the terms of settlement read as a whole in reality only recognised the previous dedication made by X. (*Costello and Lort Williams, JJ.*) MANIK CHAND AGARWALA *v.* PARESH NATHJEE.

I.L.R. (1938) 2 Cal. 312.

——*Dedication—Construction of will—Dedication to munder or to deity.*

A Digambari Jain resident of Calcutta by his will dedicated certain premises in the following terms:—"To . . .

obtained from the aforesaid house shall be expended for the *Munderjee's poojahrey*, Tailooba, Repairs, Poojapats and Articles for the *Poojahas et cetera*.

Held, that the dedication was not to the *munder* but to the deity located in it and was, therefore, valid. (*Costello and Lort Williams, JJ.*) MANIK CHAND . . .

. . . 805.

——*Restitution of conjugal rights—Suit for—Powers of Court.*

No Court can compel a man or woman to live with one another against their will. (*Davis, J. C. and Weston, J.*) RUKIBAI *v.* PARTABRAI.

A.I.R. 1938 Sind 233.

SPECIFIC RELIEF ACT (I OF 1877), S. 31— . . .

. . . O.A. 823— . . . W.N. 1074.

——**S. 38**—*Rescission of contract—Condition as to repayment of benefit—Scope and effect of.*

SPECIFIC RELIEF ACT (1877), S. 41.

Where a contract is voidable on account of its having been induced to be entered into by fraud or misrepresentation and the person at whose option it is voidable has received benefit under the contract, it is not avoided by return of the benefit so received but by the exercise of the option of the aggrieved party to rescind the contract. He has to make the payment because the contract is voided; the contract is not voided on condition of his making such payment. The Court in passing a decree in a suit by the aggrieved party for rescission of the contract cannot limit the right of the aggrieved party to rescind the contract. But it could enable the other party to recover his money by execution of the very decree rather than by being compelled to bring a suit for its recovery; and in making such a direction for the repayment of the benefit obtained under the contract, the Court could specify a time before the expiration of which the other party could not proceed to execute the decree. Where in such a suit by the aggrieved party the Court passes a decree declaring the contract to be void and ordering it to be set aside subject to the aggrieved party paying to the other party the amount (benefit) received under the contract within a certain time, this does not indicate that it is the intention of the Court that the suit should stand dismissed if he fails to make the required payment within the specified time. But it can only mean that by virtue of the aggrieved person's success in his suit he is bound to pay to the other party the sum of money within the period of grace allowed, with the consequence that on his failure to make this payment, not that his suit shall fail altogether but that the other party can proceed to execute the decree against him for recovering the amount. (*Mya Bu and Mackney, JJ.*) REV. PATRICK *v.* MAUNG E. **A.I.R. 1938 Rang. 408.**

———**S. 41**—*Applicability—Alienation by minor—Setting aside at minor's instance—Refund of Consideration minor to alienee—Power of Court to order.*

S. 41 of the Specific Relief Act is not limited in its operation to void instruments, but applies to both void and voidable instruments. A Court setting aside an alienation made by a minor at his instance has power under S. 41 to order a refund of the consideration received by him as a condition to his recovering possession of the alienated property. Where the alienee has chosen to advance the money to the minor with knowledge of the minority, it would not be proper to order a refund. But where an innocent purchaser or alienee has advanced money to the minor without any knowledge of the minority, an order for refund can properly be made against the minor, even though there has been no misrepresentation on the part of the minor as to his age. (*Madhavan Nair, O.C. J. and Krishnaswami Ayyangar, J.*) HANUMANTHARAO *v.* SITHARAMAYYA.

1938 M.W.N. 1076 = 48 L.W. 604.

———**S. 54**—*Injunction—Relief discretionary—Interference in appeal.*

The grant of an injunction is a discretionary matter and where both the lower Courts have held that the case is a fit one for an injunction, the decision will not be interfered with. (*Roberts, C. J. and Sharpe, J.*) MUNICIPAL COMMITTEE, MYAUNGMIYA *v.* PAW HAING.

A.I.R. 1938 Rang. 404.

STAMP ACT (II OF 1899), S. 36—*Document admitted in evidence—If can be challenged later on—Admission in evidence—What constitutes.*

Though an insufficiently stamped instrument has been wrongly admitted in evidence, it cannot be called in question at any subsequent stage of the same suit or proceeding. Where a Judge has in his own handwriting endorsed on the back of a document 'genuineness admitted by defendant's pleader and admitted in evidence' and initalled it, the document is properly admitted and by no stretch of imagination can it be said that the Judge did not apply his mind to the admission of the document. (*Thomas, C. J. and Zia-ul-Hasan, J.*) AVADH SINGH *v.* TAHKUR RANDHIR SINGH.

1938 O.A. 838 = 1938 A.W.R. (C.C.) 114 = 1938 O.W.N. 1085.

SUCCESSION ACT, (XXXIX OF 1925), S. 306—*Executors or administrators—Construction—Heirs, if included.*

The words 'executors or administrators' in S. 306 of the Succession Act mean persons who are appointed by the Court to administer the estate of a deceased person in the absence of a will or persons nominated by the testator in his will to administer his estate. Those words are not sufficiently wide to include or embrace heirs representing the estate. (*Harries, J.*) OFFICIAL LIQUIDATORS *v.* JUGAL KISHORE.

1938 A.L.J. 1002 = 1938 A.W.R. (H.C.) 741.

———**S. 306**—*'Special proceeding'—Construction—If covers summary proceeding under S. 235 of the Companies Act.*

The phrase 'special proceeding' in S. 306 of the Succession Act is an extremely wide one and there is nothing in the section to suggest that it must be a proceeding analogous to a suit, but even if such a construction has to be given, misfeasance proceedings under S. 235 of the Companies Act can be held to be proceedings in the nature of a suit. In any way 'special proceeding' is wide enough to cover summary proceeding under S. 235 of the Companies Act. (*Harries, J.*) OFFICIAL LIQUIDATORS *v.* JUGAL KISHORE. **1938 A.L.J. 1002 = 1938 A.W.R. (H.C.) 741.**

SURETY BOND—*Construction—Rule—Bond making surety liable in case plaintiff succeeds in particular appeal specifically named—Appeal decided adversely to plaintiff—Plaintiff succeeding in further appeal—Liability of surety—If extends to further appeal.*

Each security bond has to be interpreted according to its own terms. Where bond definitely say that if a particular appeal (the number of which is specifically given in the bond) is decided in favour of the plaintiff (opposite party) the executant of the bond shall pay a certain amount into Court, the surety would be liable only in the particular event of the appeal ending in favour of the plaintiff. His liability cannot be extended to the contingency of their being a second appealorLetters Patent appeal against the decision of the appeal specifically referred to, in the absence of language in the bond referring to such a contingency. So that if the appeal specifically referred to ends adversely to the plaintiff, the surety ceases to be liable, and the fact that ultimately the plaintiff succeeds in a Letters Patent appeal cannot entitle him to proceed against the surety under the bond. (*King and Krishnaswamy Ayyangar, JJ.*) PARAMASIVAN PILLAI *v.* RAMASWAMI CHETTIAR.

48 L.W. 760 = 1938 M.W.N. 1158.

TEMPORARY POSTPONEMENT OF EXECUTION OF DECREES ACT (X OF 1937), S. 5—*Scope and effect of.*

Where a suit on a promissory note is filed against an agriculturist, at a time when it is barred by the Limitation Act, but the claim was within time allowed by law when the Temporary Postponement of Execution of Decrees Act came into force, such a suit is within time by reason of S. 5 of the said Act, the language of which is perfectly clear and does not admit of two interpretations. (*Collister and Bajpai, JJ.*) BADRI PRASAD *v.* RAM NARAIN SINGH. **1938 A.L.J. 1074.**

TRADE-MARK—*Passing-off—Action for—Colourable imitation—Test—Right to relief.*

T. P. ACT (1882), S 53.

The plaintiffs who were manufacturers of black mull had on their goods a device or a trade-mark of their own. The trade-mark consisted of the name of the firm in English at the top followed by a pictorial label containing the picture of a motor-bus with several passengers enjoying a ride therein and a tram car in the back ground. Underneath the pictorial label it was given in Devanagri script that the goods were manufactured in India. Below that appeared the numerals "4424" and underneath these numerals were the letters "H R". The last line of the device gave the length of the piece as 24 yards and towards the right there was a seal of the firm. The defendants also started manufacturing black mulls, with a device closely resembling that of the plaintiffs; that device also consisted of the name of the firm in English followed by a pictorial label wherein the distinctive feature consisted of motor-car, palm and an iron fencing with green foliage in the back ground. Their pictorial label also was followed by some words in Devnagri script conveying a similar as those on the plaintiffs' device and the nume the letters of the figures showing the measuren piece were exactly the same. There was also a seal in the corner. The plaintiffs alleged that the device adopted by the defendants was a colourable imitation of their device and prayed for an issue of permanent injunction against the defendants restraining them from using

teristic feature of the goods of the two firms was the pictorial label.

Held, that there was no colourable imitation and no deceptive resemblance between the goods of the plaintiffs and those of the defendants entitling the plaintiffs to the relief prayed for. The distinctive mark of the plaintiffs had not been copied by the defendants and there was no possibility of illiterate persons confusing the distinctive marks. That having regard to the fact that the plaintiffs came into the market only a few

raders, no relief relating to law *Mohammad, J.)*

Section 53-A is not retrospective. Hence, where an o in 1920 has pro- e reduced rent is fterwards, S. 53-A s not admissible as therefore not ad- t, nor can it be ad: he introduction of

TRUST.

S. 53-A. As this compromise is itself not admissible the rent receipts in which the amount of the original rent is stated, would also be not admissible to show reduction of rent. (*Jack, J.*) MOHENDRA NARAYAN ROY *v.* PROFULLA KUMAR. **43 C.W.N. 34 = A.I.R. 1938 Cal. 795.**

——**S. 55 (6)**—*Holder of charge under—Rights of—Mortgagee — Insolvency—Sale of assets including mortgage right by Official Receiver—Purchaser of all assets paying sale price but not getting formal sale deed—Rights of—Suit on mortgage impleading original mortgagor only—Non-joinder of Official Receiver—Effect—Sub-mortgagee—Right to sue original mortgagor—T. P. Act, S. 134—"Transferee."*

A person who purchases the assets including a mortgage right, belonging to an insolvent at a sale by the Official Receiver, but who does not get a formal registered deed of sale in his favour from the Official Receiver is not entitled to maintain a suit on the mort- gor merely on the of the sale price. lien in his favour under S. 55 (6) of the T. P. Act for the amount paid by him to the Official Receiver, the charge would attach to all the items purchased by him and as charge holder he would not be entitled to throw the whole burden on one of the items covered by the charge. Though he gets reason of S. 55 (6), gagee he can sue the Receiver who repre- impleaded as a party, the suit, because the ettle the amount due absence of the sub- iff holding a charge same footing as a 4, T.P. Act. (*Varadachariar and Pandrang Row, JJ.*) VIJAYARAGAVALU NAIDU *v.* ARUNACHALAM CHETTIAR.

1938 M.W.N. 1186 = 48 L.W. 766.

——**S. 100**—*Charge—Liability to arise in future—Validity.*

A valid charge on immovable property could be created to secure a contingent liability or to take effect on a future contingency. (*Spargo, J.*) U LAT *v.* U PON GAUNG. **177 I.C. 601 = 11 R.R. 148 = A.I.R. 1938 Rang. 145.**

——**S. 107**—Lease of house for 8 months in writing—Registration—Necessity. *See* EVIDENCE ACT, S. 91—LEASE. **1938 O.A. 785 = 1938 O.W.N. 1080.**

——**Ss. 122 and 123**—*Gift of immovable property—Deed executed and registered—Right of donor to revoke prior to acceptance by donee.*

A gift of immovable property which has not been accepted by the donee is incomplete, though the deed of gift has been executed and registered by the donor; the registered deed to its acceptance. L *v.* DORAISWAMY **48 L.W. 764.**

on holding charge . P. ACT, S. 55 (6). **48 L.W. 766.**

TRUST—*Suit on behalf of—Right to maintain—Public charitable or religious trust created by Hindu under will—Appointment of son as trustee for life and after him his sons—Son guilty of misconduct and breach of trust and leaving British India—Suit by grandsons for possession and mesne profits of trust properties illegally alienated by their father—Maintainability—Proper remedy.*

TRUSTS ACT (1882), S. 88.

Persons who are not the present trustees are not entitled to maintain in that capacity a suit on behalf of the trust for possession of immovable properties of the trust or for mesne profits. Where under a will executed by a Hindu a trust is created in respect of certain charities, and the testator appoints his son as trustee for life and after the latter's death his sons (*i.e.*, the testator's grandsons) as trustees, the grandsons cannot during their father's lifetime maintain a suit for possession of trust properties. The fact that their father has been guilty of misconduct and breach of trust and has alienated the trust properties or that he has totally failed to perform the trust and has left British India would not be sufficient for holding that the father *ipso facto* ceased to be a trustee and that the plaintiffs directly became trustees entitling them to maintain the suit. The father's misconduct or breach of trust might justify his removal from office, but for such reliefs there must be the necessary allegations and the prayer; further if the trusts are public charitable trusts, a suit for removal will have to be in compliance with S. 92, C. P. Code, or if they are religious trusts, S. 53 or S. 73 of the Madras Hindu Religious Endowments Act will govern the case. (*Varadachariar and Abdur Rahman, JJ.*) ARAVAMUDHU IYENGAR *v.* RAMANUJA IYENGAR.

1938 M.W.N. 1153=48 L.W. 770= (1938) 2 M.L.J. 982

TRUSTS ACT, Ss. (II OF 1882), 88 and 90—*Applicability—Mahomedan co heirs—Major heirs continuing business of deceased and making profits—Liability to account to minor heir for profits made during management.*

A trustee is not permitted to make a profit out of his trust and a guardian of a minor is in the position of a trustee when in possession of the minor's property. Where a person, whether a father or a stranger, enters upon the estate of an infant and continues in possession, the Court would consider such a person as a guardian of the infant. On the death of a Mahomedan who had a very successful business and considerable fortune, his brothers took charge of the business, and having got possession, set up a false claim to be partners in the business in order to get a greater share in the estate than the law allowed and utilised moneys of the estate for themselves. A minor daughter of the deceased who was entitled to a half-share in the estate and who was a child in the care and control of the brothers eventually escaped from their control and sued them for recovery of her half-share in the properties and in all the accretions to the estate, arising from the business. The brothers were, on their own showing, guardians of the plaintiff.

Held, that the three brothers were in the position of trustees and were liable to account to the plaintiff for her half share in the profits arising out of the business and not merely to a half-share in the properties and in the profits as on the date of her father's death; the fact that they were co-owners of the estate of the deceased would not their liability as guardians. (*Leach, C.J. and Abdur Rahman, J.*) KATHOOM BI *v.* ABDUL WAHAB SAHIB. **1938 M.W.N. 1173=48 L.W. 783.**

UNITED PROVINCES AGRICULTURISTS' RELIEF ACT (XXVII OF 1934), Ss. 2 (10)(a) and 5—*'Any decree for money' in S. 5—Construction—If includes decree for recovery of price paid and damages.*

Where a person obtained a decree for the money paid for supply of goods and damages for the breach of contract to supply them, the judgment-debtors are not entitled to apply under S. 5 of the U. P. Agriculturists' Relief Act, for converting such a decree into one for instalments. The amount paid by the plaintiff is not a 'loan' within the meaning of S. 2 (10) (*a*) of the Act and the damages decreed could not be deemed to be a decree based upon a loan or upon a transaction which is in substance a loan. (*Mulla, J.*) NARAIN DAS *v.* RADHA KUAR. **1938 A.L.J. 1063.**

———S. 3 (4)—*Order directing payment of decree in ten instalments — Default—If and when the whole amount becomes realizable.*

Where a judgment-debtor is directed to pay the amount due in 10 instalments, since it is more than six, according to S. 3 (4) of the Agriculturists' Relief Act, the decree-holders will not be at liberty to take out execution unless and until there has been default in three instalments—the section does not say whether they should be consecutive or otherwise—and that then the whole amount remaining due would become realizable. (*Collister and Bajpai, JJ.*) GURCHARAN PRASAD *v.* ALI SAJJAD. **1938 A.L.J. 991= 1938 A.W.R. (H.C.) 700=1938 R.D 844.**

———S. 4—*If applies to decrees passed prior to the Act.*

The expression 'or in any order for grant of instalments passed against an agriculturist' occurring in S. 4 of the Agriculturists' Relief Act, is wide enough to cover all such orders, whether passed in respect to a decree anterior to or posterior to the Act. When S. 3 is made applicable by S. 5, it is the intention of the Legislature that the provisions of S. 4 should automatically come into operation where a decree, whether passed before or after the Act is converted into a decree or order for instalments. (*Collister and Bajpai, JJ.*) GURCHARAN PRASAD *v.* ALI SAJJAD. **1938 A L J. 991= 1938 A.W.R. (H.C.) 700=1938 R.D. 844.**

———S. 5—'Any decree for money'—Construction. *See* U. P. AGRICULTURISTS' RELIEF ACT, SS. 2 (10) (*a*) AND 5. **1938 A.L.J. 1063.**

———S. 30 (1)—*Scope and effect of—Order for instalments—Rate of interest to be allowed—Court, if can allow a lower rate than that prescribed by the Act.*

Under S. 30 (1) of the Agriculturists' Relief Act, the rates fixed in Sch. III will be applicable only till such date as may be fixed by the Local Government in the gazette in this behalf. Under Sch III certain maximum rates are prescribed with effect from 1st January, 1930, and these were thereafter subject to modifications in accordance with rates which might be notified by government under S. 4, subject to the provisions of note (*b*); but when once an order for instalments is passed, it appears to be the intention of the Legislature that the maximum rates should be those given in the various notifications under S. 4 of the Act, being no longer subject to note (*b*) to Sch. III. The fact that S. 30 (1) of the Act provides that the rate of interest shall not be higher than that specified in Sch. III does not imply that the Court is not at liberty to allow a lower rate than that prescribed. (*Collister and Bajpai, JJ.*) GURCHARAN PRASAD *v.* ALI SAJJAD. **1938 A.L.J. 991= 1938 A.W.R. (H.C.) 700=1938 R.D. 844.**

———S. 33—*Reopening of fully satisfied debts—Permissibility.*

The use of the expression 'debtor' in S. 33 of the Agriculturists' Relief Act indicates that the relationship of debtor and creditor is a subsisting one between the parties. There does not appear to be any provision in the Act which specifically provides that debts that had been fully satisfied to the knowledge of the parties may be reopened. As such a suit for the reopening of a closed transaction in respect of a bond is not permissible under S. 33 of the Act. (*Ismail, J.*) SUNDER LAL *v.* KAUSHI RAM. **1938 A.L.J. 976= 1938 A.W.R. (H.C.) 680=1938 R.D. 833.**

U.P. AGRICULTURISTS' REL. ACT (1934), S 33.

——**S. 33**—*Right to sue for accounts under—Plaintiff agriculturist only on the date of suit—If entitled.*

[illegible]

LAL *v.* KAU[illegible] 1938 A.L.J. 976 [illegible]

[illegible]

UNITED P[illegible] TES ACT ([illegible])

R. 6—Scope

The scheme [illegible] language of R. 6 of the rules framed under the Act unmistakably lead to the conclusion that subject to certain limitations, the Civil Procedure Code has been made applicable to the proceedings in the Court of the special Judge. (*Ismail, J.*) RAM SWARUP *v.* DEVI DAS.
1938 A.W.R. (H.C.) 707=1938 A.L.J. 10[illegible]

——**S. 2 (g)**—*Landlord—Holder of Muafi la[illegible] Lucknow city, not assessed to local rate—If can [illegible] under the Act.*

Where in respect of a miscellaneous Muafi plot, situated in the city of Lucknow, no khewat was prepared, and which was not assessed to any local rate, the holder of such a plot is not a landlord within the meaning of S. 2 (*g*) of the U. P. Encumbered Estates Act, and as such cannot apply under the Act. (*Darling, S.M. and Mehta, J.M.*) MOHAMMAD QASIM ALI *v.* DURGA PRASAD. **1938 R.D. 861=1938 O.W.N. 1119.**

——**Ss 4 and 6**—*Application transferred to special Judge—Failure of applicant to appear on date fixed—*[illegible]

[illegible]

RAM SWARUP *v.* DEVI DAS
1938 A.W.R. (H.C.) 707=1938 A.L.J. 1039.

——**S. 4**—*Failure to join sons and grandsons—Applicant blowing hot and cold—Application, if duly ma[de]*

Where an applicant attempts to make it appear, [illegible] he is separate from his sons and grandsons and at the same time leaves a loophole by which he could assert [illegible]

[illegible]

NARAIN MARWARI *v.* TIRLOK CHAUDHRI.
1938 A.W.R. (B.R.) 357=1938 R.D. 854 (1)=1938 O.W.N. 1113.

——**S. 4**—*Misdescription in application under—Sarbarakar of idol, bona fide applying in personal capacity—Disclosure within limitation—Application, if can be amended.*

Where in his application under S. 4 of the U. P. Encumbered Estates Act, a Sarbarakar of an idol, applied in his personal capacity, but the misdescription was brought to light by the applicant himself well [illegible]

[illegible]

U.P. LAND REVENUE ACT (1901), S. 39.

It is much too late to find fault with an original application under S. 4 of the U. P. Encumbered Estates Act, [illegible]

[illegible]

——**Ss. 6 and 7**—*Sale after order under S. 6—Setting aside of—Board subsequently setting aside order under S. 6—Effect.*

Where a sale in execution was held, but prior to which an application under S. 4 of the Encumbered Estates Act and an order under S. 6 of the Act had been [illegible]

[illegible] question as to validity of the order setting aside the sale. (*Mulla, J.*) BULAQI DASS *v.* GHULAB CHAND.
1938 A.W.R. (H.C.) 705=1938 A.L.J. 1061.

——**S. 7**—*'Execution process'—If includes sale in execution of a decree.*

An order passed by a Court executing a decree, for sale, which is carried out by a ministerial officer, amounts to an execution process. (*Mulla, J.*) BULAQI DASS *v.* GHULAB CHAND **1938 A.W.R. (H.C.) 705=1938 A.L.J. 1061.**

——**S. 46**—*Boards, when will interfere in revision.*

[illegible]

order passed under S. 6 of the Act. (*Darling, S.M. and Mehta, J. M.*) SUKHNANDAN *v.* NURUL HASAN KHAN. **1938 O.W.N. 1071=1938 R.D. 820.**

[illegible] *prior settlement—Villages falling in different assess-*[illegible]

[illegible] villages fell in different assessment circles with varying rates and with varying other conditions and the villages had been assessed separately according to S. 63 of Land Revenue Act, and that it was only for convenience that a single covering engagement was taken at the prior settl[ement] [illegible] to [illegible] sep[illegible] whi[illegible] S. 4 [illegible] Land Revenue Act. (*Darling, S.M.*) BIRENDRA BIKRAM SINGH *v.* EMPEROR.
[19]38 O.W.N. 1115=1938 R.D. 842.

——[illegible]—*Decision if under S. 39 or S. 42*

[illegible] officer nor the contending parties [illegible] into one under S. 42 of the U. P. La[nd] [illegible] It is the pleading alone that will

WILL.

in order to prevent an intestacy. Finally, the Court has no power to insert in the will a disposition which is

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mar-

ried daughters by another wife, (defendants 1 and 2). He left a will, an unprofessional document written in

ed the properties and debts, then followed a legacy to the testator's sister and a small legacy to each of his

the plaintiff, and to her married step-daughters defendants 1 and 2.

Held, by the High Court, reversing that even if the preamble and the last clause which were not juxtaposed

plaintiff could not claim to be solely entitled to the residue which was divisible among the three daughters, plaintiff and defendants 1 and 2, in equal shares. (*Wadsworth, J.*) KISTAMMAL *v.* SARASWATHI BAI AMMAL. 1938 M.W.N. 1152=48 L.W. 728= (1938) 2 M L J 1010.

——Construction—Prohibition against adoption by widow of testator—When implied. *See* HINDU LAW—ADOPTION. 1938 M.W.N 1180.

——*Construction—Rules of—Clear language.*

It is a cardinal principle of construction that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. (*R. C. Mitter and A.N Sen, JJ.*) GOLAK BEHARI MONDAL *v.* SURADHANI DASSI. 68 C.L J. 216.

WORKMEN'S COMPENSATION ACT (VIII OF 1923)—*Commissioner appointed under—Power to award arrears of pay as compensation.*

The Workmen's Compensation Act prescribes compensation to be paid in certain circumstances. It is not open

WORKMEN'S COMPENSATION ACT (1923). S 30.

to the Commissioner to award any damages or any other compensation except that provided by the Act. Hence arrears of pay cannot be granted by him as compensation. (*Ismail, J.*) JAGANNATH BRIJ RAJ *v.* SOEMBAR. 1938 A.W.R. (H.C.) 684=1938 A.L.J. 1007.

——S. 3—*Accident arising out of and in the course of employment—Accident to engine driver of a launch during a halt in the voyage.*

An engine driver was employed on a steam launch during the whole round voyage. In the course of the voyage a temporary halt was made. During that halt ie engine driver met with an accident while doing ertain repairs to the engine and the boiler as a result of hich he died.

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Dunkley, J.) K.

1 L .R. 1938 Rang. 439.

——S 3—*Accident arising out of and in course of employment—Facts that go to show*

The deceased was employed in an Electric Supply Company to put up and change the posts and to connect

Held, that the accident arose out of and in the course of his employment. (*Baguley and Mosely, JJ.*) DAW GUN *v.* MA OHU KIN. A.I.R. 1938 Rang. 414.

——Ss 4 and 30—*Principle governing award of compensation—Question of law—When arises.*

The principle on which compensation under the Workmen's Compensation Act is to be awarded has to be determined in accordance with the provisions of the Act and cannot be departed from on grounds of sentiment. Where in the case of a loss of the index and middle fingers of a labourer, compensation is awarded as for loss of the arm below the elbow, an appeal against such a decision involves a substantial question of law. (*Ismail, J.*) JAGANNATH BRIJ RAJ *v.* SOEMBAR. 1938 A.W.R. (H C.) 684=1938 A.L J. 1007.

——S. 30—Appeal—Question of law—When arises. *See* WORKMEN'S COMPENSATION ACT, SS. 4 AND 30. 1938 A.W.R. (H.C.) 684=1938 A.L.J 1007.

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